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Re-Punishing the Innocent: False Confession as an Unjust Obstacle to Compensation for the Wrongfully Convicted

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— Note —

RE-PUNISHING THE INNOCENT: FALSE CONFESSION AS AN UNJUST OBSTACLE TO COMPENSATION FOR THE WRONGFULLY CONVICTED

"Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream."

—Learned Hand, 1923*

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INTRODUCTION

In 2006, Douglas Warney was released from prison after serving nine years and two months for a murder he did not commit.[1] The resident of Rochester, New York, was convicted of stabbing a neighborhood acquaintance to death in 1997 and sentenced to twenty-five years to life, but he was exonerated after a DNA test of crime scene evidence implicated another man, who subsequently confessed.[2] By the time of his release, Warney had spent 3,380 days in prison for the crime.[3] New York State's Unjust Conviction and Imprisonment Act,[4] in force since 1984, is designed to compensate exonerees for the time they spent wrongfully incarcerated. But when Warney filed a claim, he was denied.[5]

* United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923).

1. Warney v. State, 947 N.E.2d 639, 640 (N.Y. 2011).

2. *Id.* at 641–42.

3. *Id.* at 642. Warney was convicted on February 12, 1997, and his conviction was vacated and sentence set aside on May 16, 2006.

4. N.Y. CT. CL. ACT § 8-b (McKinney 2013).

5. *Warney*, 947 N.E.2d at 642.

The statute makes an exoneree eligible for compensation only if he "did not by his own conduct cause or bring about his conviction."[6] Warney, who was mentally disabled with an IQ of sixty-eight and suffering from AIDS-related dementia, had signed a written confession that served as the centerpiece of the prosecution's case.[7] He later recanted and claimed he had been coerced by interrogators—a claim bolstered by the DNA results—and his attorneys discovered factual anomalies suggesting police misconduct during his interrogation.[8] But a New York judge decided that his case met the statutory standard: Warney had caused or brought about his own conviction by confessing, and so in recompense for those 3,380 days, New York State owed him nothing.[9]

The oft-quoted principle that it is better to let guilty men go free than to punish an innocent man is axiomatic in Anglo-American criminal law and has deep roots.[10] Besides reflecting the fundamental value our legal system places on personal liberty and the high burden required to deprive someone of that liberty, the principle also embodies a basic admission—that the single most egregious error a justice system can commit is to punish the innocent.

The natural corollary to this principle is that society has a special responsibility to make efforts toward righting the wrong when it occurs. A majority of U.S. states, along with the District of Columbia and the federal government, have recognized that responsibility by passing statutes that provide compensation for exonerees after their release. Like New York's, however, many of these statutes include conditions that deny compensation to certain categories of exonerees. Such conditions are based largely on the rationale that some exonerees, despite the reversal of their convictions, in one way or another contributed to their own plight. The statute drafters deemed such contributions worthy of punishment, deciding that society does not owe the same responsibility to these exonerees that it owes to others.

Reasonable minds may differ on the propriety of ever denying compensation to someone who was incarcerated for a crime he did not commit. But all should agree that denials of compensation, if they are to occur, should be limited to exonerees whose contributory conduct was truly blameworthy—that is, outside the range of conduct society reasonably expects of defendants in the criminal justice system.

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6. N.Y. CT. CL. ACT § 8–b(5)(d).

7. *Warney*, 947 N.E.2d at 641–42.

8. INNOCENCE PROJECT, CASE SUMMARY: DOUGLAS WARNEY.

9. This decision was later overturned on appeal. See *infra* Part V.

10. *See, e.g.*, 4 WILLIAM BLACKSTONE, COMMENTARIES *352 ("[T]he law holds, that it is better that ten guilty persons escape, than that one innocent suffer."); *In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) ("[A] fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.").

This Note argues that one type of preconviction conduct, the false confession, which has contributed to scores of demonstrably wrongful convictions in America, should never be allowed to serve as an automatic basis for the denial of exoneree compensation. In recent years, criminological and psychological research have provided a greater understanding than ever of the causes of false confessions. They have revealed that a popular common-sense assumption—that no one would confess to a crime he did not commit unless he had some ulterior motive, was recklessly dishonest, or was coerced via torture—simply does not reflect reality. Powerfully refined modern interrogation tactics can manipulate innocent people into confessing, and sometimes even into believing their own confessions, through no genuine fault of their own. There is potential for great injustice when state compensation systems fail to adapt to this modern understanding, imposing restrictions broad enough to deny compensation to exonerees whose "contribution" was not blameworthy by any reasonable standard.

I. COMPENSATION FOR THE WRONGFULLY CONVICTED

Throughout most of the American justice system's history, there was "little reason to take much stock in [postconviction] claims of innocence."[11] Once a defendant had been found guilty, the odds of producing new evidence sufficient to upset a jury verdict were astronomically low. Then, as now, "many claims of innocence [were] made, but few [were] sustained."[12] But in the late 1980s, the first applications of forensic DNA identification introduced a "revolution in the criminal justice system."[13] Suddenly, it was possible in certain cases to produce conclusive scientific evidence of a wrongful conviction years or even decades after the crime. With the rise of The Innocence Project and other prisoner advocacy groups, the number of annual DNA exonerations nationwide increased steadily throughout the 1990s and now hovers at around twenty per year.[14] In short, DNA "has taught us . . . that there are more innocent people in jail than we ever thought."[15]

11. Janet C. Hoeffel, *The Roberts Court's Failed Innocence Project*, 85 CHI.-KENT L. REV. 43, 45 (2010).

12. *Id.*

13. ANDREI SEMIKHODSKII, DEALING WITH DNA EVIDENCE 1 (2007).

14. Innocence Project Case Profiles, INNOCENCE PROJECT, http://www.innocenceproject.org/know/Search-Profiles.php (last visited Apr. 14, 2013). Figures for the last seven years are as follows: eighteen DNA exonerations in 2006; nineteen in 2007; fifteen in 2008; twenty-three in 2009; eighteen in 2010; fifteen in 2011; and seventeen in 2012.

15. Interview by Frontline, PBS, with Barry Scheck, Co-Founder, The Innocence Project, *available at* www.pbs.org/wgbh/pages/frontline/shows/case/interviews/scheck.html (last visited Mar. 8, 2013).

As the number of overturned convictions grew, more and more states confronted the need to compensate exonerees for the justice system's failure and for the losses they suffered due to their incarceration. Whereas compensation statutes were once a rarity, found only in a few states where public attention to a high-profile exoneration had stirred the legislature to action,[16] the 2000s saw a boom in state legislative progress. Thirteen states passed new statutes, nearly doubling the number of states offering some form of statutory compensation to twenty-seven (plus the District of Columbia and the federal government).[17] Others updated their statutes to raise the amount of exoneree awards.[18] In 2004, Massachusetts became the first state to supplement its monetary compensation with "services . . . reasonable and necessary to address any deficiencies in the individual's physical and emotional condition."[19] More states quickly followed suit, and ten now offer some form of addition support, including job training and placement, health insurance, counseling, housing assistance, and legal services.[20] Such efforts reflect a growing recognition of the many hardships exonerees face upon release.[21]

Statutes are not the only avenue for compensation available to the wrongfully convicted after exoneration. Exonerees may also turn to civil lawsuits, though this alternative is costly and time consuming, and typically requires a showing that the conviction was due to intentional misconduct by an identifiable party.[22] Private bills, by which a state legislature acts to compensate one specific individual, have also been used in a handful of cases, though they are "dangerously prone to becoming 'popularity contests' based as much on the celebrity of the exoneree

16. In a 1941 article, Yale University Professor Edwin Borchard lamented that only three states (Wisconsin, North Dakota, and California) had as of then enacted exoneree compensation statutes. He also noted that the United States lagged far behind Europe and Latin America in adopting uniform statutory remedies for the wrongfully convicted. Edwin Borchard, *State Indemnity for Errors of Criminal Justice*, 21 B.U. L. REV. 201, 202 (1941).

17. INNOCENCE PROJECT, MAKING UP FOR LOST TIME: WHAT THE WRONGFULLY CONVICTED ENDURE AND HOW TO PROVIDE FAIR COMPENSATION 4 (2009) [hereinafter LOST TIME].

18. *Id.*

19. MASS. GEN. LAWS ch. 258D, § 5(A) (2012) (enacted Dec. 30, 2004); Mary C. Delaney et al., *Exonorees' Hardships After Freedom*, WIS. LAW., Feb. 2010, at 18, 53.

20. LOST TIME, *supra* note 17, at 16.

21. *See generally* Jennifer L. Chunias & Yael D. Aufgang, *Beyond Monetary Compensation: The Need for Comprehensive Services for the Wrongfully Convicted*, 28 B.C. THIRD WORLD L.J. 105 (2008); *Frontline: Burden of Innocence* (PBS television broadcast May 1, 2003).

22. LOST TIME, *supra* note 17, at 12–13.

and the legislator introducing the bill as on the merits of the case."[23]

For those reasons, scholars and exoneree advocates generally agree that statutory compensation is the "only reliable and fair response to the inevitable mistakes that occur as a byproduct of the operation of a criminal justice system as large as ours."[24] The powerful social-justice rationale for a uniform compensation regime funded with public money was eloquently stated by Yale University Professor Edwin Borchard in 1941: "Where the common interest is joined for a common end—maintaining the public peace by the prosecution of crime—each individual member being subject to the same danger (erroneous conviction), the loss when it occurs should be borne by the community as a whole and not by the injured individual alone."[25]

II. STATUTORY RESTRICTIONS ON COMPENSATION

Two justifications are typically advanced to support restrictive conditions in exoneree compensation statutes: cost and a desire to avoid compensating the undeserving.[26] The cost concern is facially unconvincing, as the small number of exonerations, even after the rise of DNA identification, practically guarantees that compensating exonerees will never amount to more than a tiny fraction of a state's criminal justice budget. Even the four states with the most exonerations—Illinois, New York, Texas, and California—averaged between just two and three per state per year from 1989 to 2003, "a number that cannot reasonably be claimed will break the bank."[27] In addition, the rate of DNA-based exonerations will inevitably decline as the technology is more frequently employed during criminal investigations and trials, so that a defendant whose DNA proves his innocence is increasingly unlikely to be convicted in the first place.[28]

23. *Id.* at 13. The inadequacy of the private bill system has long been recognized. *See* Borchard, *supra* note 16, at 202 ("[T]hese special statutes are enacted only spasmodically, and not all persons have the necessary influence to bring about legislation in their own behalf.").

24. Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, 6 U. CHI. L. SCH. ROUNDTABLE 73, 74 (1999).

25. Borchard, *supra* note 16, at 208.

26. Adele Bernhard, *Justice Still Fails: A Review of Recent Efforts to Compensate Individuals Who Have Been Unjustly Convicted and Later Exonerated*, 52 DRAKE L. REV. 703, 713 (2004).

27. Deborah Mostaghel, *Wrongfully Incarcerated, Randomly Compensated—How to Fund Wrongful-Conviction Compensation Statutes*, 44 IND. L. REV. 503, 529 (2011). The figures Mostaghel cites come from a landmark study of exonerations nationwide, Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 541 (2005).

28. *See* Bernhard, *supra* note 26, at 715 ("Overall . . . the rate of DNA exonerations will inevitably slow.").

The worry over compensating the undeserving, however, is more complex, and it is certainly not new. A hundred years ago, writing a report on European compensation statutes for the U.S. Congress while serving as its Law Librarian, Borchard approvingly referenced "the equitable maxim that no one shall profit by his own wrong or come into court with unclean hands."[29] He noted that the European statutes generally incorporated some form of bar to limit compensation "to those only who are clearly shown to deserve it,"[30] and included as one example of the undeserving a defendant who "by willful misconduct or negligence, contributed to bring about his arrest or conviction."[31]

If the animating principle behind exoneree compensation statutes is that each member of society is "subject to the same danger," as Borchard suggested, the desire to deny compensation to defendants who contribute to their conviction is understandable. Certain conduct may put an individual in *extraordinary* danger of erroneous conviction, beyond that which everyone must accept as a byproduct of the criminal justice system. Such an individual could reasonably be viewed as less deserving of remedial measures than someone who did everything we would expect of an innocent defendant but still was convicted for reasons entirely beyond his control.

But a critical challenge is identifying the kinds of conduct that make an individual truly less deserving—which "contributions" to a conviction legitimately deserve to be punished with noncompensation. Among the state statutes, fourteen out of twenty-seven include some form of restriction that denies compensation based on the defendant's preconviction conduct.[32] The two most common types of conduct that may disqualify a claimant are confessions and guilty pleas.[33] Some statutes are quite specific in their prohibitions—Nebraska's, for instance, denies compensation to defendants who "commit or suborn perjury, fabricate evidence, or otherwise make a false statement."[34] Others are less explicit, such as New Jersey's statute, which allows for

29. EDWIN M. BORCHARD, STATE INDEMNITY FOR ERRORS OF CRIMINAL JUSTICE 32 (1912). This report, which includes an editorial preface by John H. Wigmore, is not to be confused with Borchard's 1941 law review article of the same title, *supra* note 16.

30. *Id.* at 14.

31. *Id.* at 32.

32. LOST TIME, *supra* note 17, at 27–31.

33. Bernhard, *supra* note 26, at 717. Bernhard based this generalization on a comparison of state statutes compiled in 2000, before roughly half of the present compensation statutes had been enacted, but a review of all the statutes in force today indicates her conclusion is still correct.

34. NEB. REV. STAT. § 29-4603(4) (2012).

compensation only if an exoneree "did not by his own conduct cause or bring about his conviction."[35]

Among the statutes with restrictions, at least eight contain language that may deny compensation to an exoneree who falsely confessed. According to The Innocence Project's state-by-state analysis, the statutes of California, Mississippi, Nebraska, New Jersey, New York, Vermont, West Virginia, and Wisconsin each have a provision with such potential.[36] The practical result of these provisions is the possibility of punishing (or, more accurately, re-punishing) an exoneree whose false confession was used against him during an investigation or trial that led to a wrongful conviction.

By punishing false confessions through noncompensation, the statutes treat the confessor's act as blameworthy. In the past, that treatment may have seemed entirely reasonable as a reflection of common-sense fiscal restraint and just deserts. But modern scholarship suggests such an interpretation is badly outdated: a false confession, without more, is best interpreted not as a lie worthy of punishment, but as the consequence of an imperfect investigative process that can overwhelm and ultimately victimize an innocent confessor.

III. AN EVOLVING UNDERSTANDING OF FALSE CONFESSIONS

As discussed above, conventional wisdom once favored viewing postconviction claims of innocence with practically insurmountable skepticism, until DNA science exposed the unsettlingly prevalent potential for wrongful conviction. In a similar manner, our understanding of confessions—their reliability and vulnerabilities—has undergone a profound transformation due to scholarly and scientific inquiry. As a result, "it no longer seems rational to consider all false confessions as misconduct, because multiple exonerations prove that innocent people falsely implicate themselves, despite gaining nothing for themselves in the process."[37]

False confessions are inherently difficult to understand, and many people therefore believe they must be exceedingly rare. Psychology Professor Elizabeth F. Loftus has observed that "[p]eople intuitively feel that they would never confess to something they did not do."[38] Eddie Lowery has made a similar observation, but based on different expertise. Lowery confessed to rape and spent ten years in a Kansas state prison before DNA proved his innocence, and he has described the typical reaction from those who learn of his ordeal: "You run in to

35. N.J. STAT. ANN. § 52:4C–3(c) (West 2009).

36. LOST TIME, *supra* note 17, at 27–31.

37. Bernhard, *supra* note 26, at 718 (footnote omitted).

38. Elizabeth F. Loftus, *Editorial: The Devil in Confessions*, 5 PSYCHOL. SCI. IN THE PUB. INT. i (2004).

so many people who say, 'I would never confess to a crime [that I didn't commit].'"[39] Professor Saul Kassin, who lectures nationwide on the psychology of false confessions, has also observed the prevalence of public skepticism. The "most common reaction" he hears from audiences is the same familiar refrain: "Well, I would never do that. I would never confess to something I didn't do."[40]

Indeed, it is illogical that any rational person would do so, given the grave consequences of a criminal conviction. It is tempting to dismiss false confessors as reckless or mischievous liars, and a certain number undoubtedly are—in possibly the most famous example in American memory, over 200 people responded to the media circus surrounding Charles Lindberg Jr.'s kidnapping in 1932 by confessing to the crime.[41] But in the context of modern criminal investigations, false confession is a much more complex phenomenon than previously thought or conventional wisdom would suggest.

Psychologists first turned serious attention to false confessions in the early twentieth century, led by Harvard University professor Hugo Münsterberg.[42] In works like his 1908 book *On the Witness Stand: Essays on Psychology and Crime*, he traced the history of false confessions in America as far back as the Salem witchcraft trials of 1692.[43] Münsterberg placed much of the blame for the false confessions of his era on police brutality and coercion, observing that "[u]nder pain and fear a man may make any admission which will relieve his suffering, and, still more misleading, his mind may lose the power to discriminate between illusion and real memory."[44] Münsterberg also noted that some wrongfully accused persons, facing an "unfortunate combination of damaging evidence" likely to produce a conviction, falsely confessed simply in a bid for leniency.[45]

The first significant contribution of legal scholarship to the modern understanding of false confession was Borchard's landmark book *Convicting the Innocent: Sixty Five Actual Errors of Criminal*

39. John Schwartz, *Confessing to Crime, but Innocent*, N.Y. TIMES, Sept. 14, 2010, at A14.

40. Ian Herbert, *The Psychology and Power of False Confessions*, ASS'N FOR PSYCHOL. SCI. OBSERVER, Dec. 2009, at 10, 11.

41. Richard P. Conti, *The Psychology of False Confessions*, 2 J. CREDIBILITY ASSESSMENT & WITNESS PSYCHOL. 14, 20 (1999).

42. *Id.*

43. HUGO MÜNSTERBERG, ON THE WITNESS STAND: ESSAYS ON PSYCHOLOGY AND CRIME 145–48 (Clark Boardman Co. 1941) (1908).

44. Hugo Münsterberg, *The Third Degree*, MCCLURE'S MAG., Oct. 1907, at 614.

45. MÜNSTERBERG, *supra* note 43, at 145.

Justice, published in 1932.[46] Challenging the "conventional wisdom that innocent people [were] never convicted in the American criminal justice system,"[47] Borchard profiled several cases involving false confessions.[48] The book was anecdotal, offering no broader analysis of the specific factors that led the innocent to confess, nor any statistics on how prevalent the problem was.[49] Nonetheless, it raised awareness in the legal community and eventually helped to spur subsequent studies in the field of wrongful conviction and false confession research.[50]

The first large-scale, systematic social science study of wrongful convictions came fifty-five years later, when Hugo Bedau and Michael Radelet published *Miscarriages of Justice in Potentially Capital Cases* in 1987.[51] The professors' research shed new light on both the prevalence and causes of false confessions. Quantitatively, it showed that a false confession had been offered in 49 out of a sample of 350 erroneous convictions (14 percent).[52] Qualitatively, the study showed a great diversity of reasons behind the false confessions, from the easily understandable to the plainly absurd:

> The false confession was, in some cases, the result of mental illness. In other cases, the defendant appears to have falsely confessed or pleaded guilty to avoid the risk of a death sentence. In two instances the defendant was too intoxicated to remember what he did and readily confessed under the inquiries of the police. In a few cases, the explanations are almost too bizarre to believe: One defendant falsely confessed to the police as a joke; another falsely confessed to murder because she did not want to be known as a fornicator; and another falsely confessed to impress his girlfriend and then, after being convicted for that murder, falsely confessed to another murder just to prove that a person's false confession could get him convicted—which it did, for the *second* time![53]

46. EDWIN M. BORCHARD, CONVICTING THE INNOCENT: SIXTY FIVE ACTUAL ERRORS OF CRIMINAL JUSTICE (1932). The seminal status of this book is discussed in Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 901 (2004).

47. Drizin & Leo, *supra* note 46, at 901.

48. *E.g.*, BORCHARD, *supra* note 46, at 110–19 (1932).

49. Drizin & Leo, *supra* note 46, at 902.

50. *Id.* at 903.

51. Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987).

52. *Id.* at 57–58.

53. *Id.* at 63 (footnotes omitted).

With such a broad spectrum of conduct, a picture began to emerge suggesting that some false confessions were much less blameworthy than others.

The Bedau and Radelet study was widely cited, and other research on the role of false confessions in producing wrongful convictions soon followed. As for prevalence, other authors using different case samples found that a false confession was offered between 18 and 25 percent of the time.[54] With awareness of the scope of the phenomenon growing, researchers also began to analyze the modern interrogation process in greater detail, seeking to understand why so many people would act in such opposition to their self-interest. The results of this research provide crucial support for the position that denying compensation because of a confession creates a serious risk of injustice.

One fairly intuitive conclusion researchers have reached is that certain populations are more susceptible to the pressures of interrogation than others. The mentally retarded, for instance, are "beyond legitimate dispute" more likely to falsely confess, for reasons ranging from an inability to appreciate the consequences of a confession to an innate desire to please others by behaving in accordance with "the perceived wishes of authority figures."[55] Special vulnerability has also been observed among juveniles, and this is similarly unsurprising—courts have recognized that "the greatest care must be taken to assure that [a minor's] admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair."[56] Following this principle, some jurisdictions automatically discount the confessions of minors in the absence of corroborating evidence, specifically because of their recognized unreliability.[57]

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54. The 18 percent figure derives from a study focused on interrogation tactics. Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 18 (2010). The 25 percent figure was calculated by The Innocence Project based on a survey conducted in 2003 looking at 140 wrongful convictions. *False Confessions*, INNOCENCE PROJECT, www.innocenceproject.org/understand/False-Confessions.php (last visited Mar. 14, 2013).

55. Morgan Cloud et al., *Words without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495, 503, 511 (2002).

56. *In re* Gault, 387 U.S. 1, 55 (1967).

57. *E.g.*, N.Y. FAM. CT. ACT § 744(b) (McKinney 2010) ("[A]n uncorroborated confession made out of court by a respondent is not sufficient" to meet the burden of proof in hearings concerning whether a person is in need of supervision).

More surprising, however, is the extent to which ordinary, innocent adults, who presumably have the full capacity to act in their own best interest, are nonetheless susceptible to the pressures of the interrogation process. The risk of false self-incrimination among these defendants is especially important for this Note, both because it challenges commonly held assumptions and because "the vast majority of reported false confessions are from cognitively and intellectually normal individuals."[58]

What causes an innocent person to confess? Some false confessions, of course, are extracted through police misconduct, but these have long been recognized as invalid[59] and inadmissible,[60] and they raise issues beyond the scope of this Note. Of greater interest to psychological and criminological researchers, and of greater concern here, is the question of how innocent suspects can be coaxed into confessing even when police stay within the bounds of the law. The answer lies in the overwhelming power of modern interrogation techniques.

IV. "WE DON'T INTERROGATE INNOCENT PEOPLE"

Formal modern police interrogation is a "guilt-presumptive process . . . led by an authority figure who holds a strong a priori belief about

58. Drizin & Leo, *supra* note 46, at 920. Notably, there is not universal agreement on this point: Drizin and Leo point out at least one author who has argued that "for the most part, false confessions are caused not by police questioning techniques in general but rather by the application of those techniques to certain narrow, mentally limited populations." Paul G. Cassell, *The Guilty and the "Innocent": An Examination of Alleged Cases of Wrongful Conviction from False Confessions*, 22 HARV. J.L. & PUB. POL'Y 523, 584 (1999). Drizin and Leo conclude, however, that this position is unsupported by the available data and only serves to perpetuate the myth that intellectually "normal" individuals will not falsely confess during interrogation unless subjected to extreme duress, such as physical brutality. Drizin & Leo, *supra* note 46, at 920 n.156.

59. *See, e.g.*, Lego v. Twomey, 404 U.S. 477, 485 (1972) ("The use of coerced confessions, whether true or false, is forbidden because the method used to extract them offends constitutional principles."); Brown v. Mississippi, 297 U.S. 278, 286 (1936) (noting that a conviction "is a mere pretense" when "resting solely upon confessions obtained by violence," and that such a practice is "revolting to the sense of justice" and a "clear denial of due process").

60. Blackburn v. Alabama, 361 U.S. 199, 205 (1960) ("[C]ases by now too well known and too numerous to bear citation . . . [have] established the principle that the Fourteenth Amendment is grievously breached when an involuntary confession is obtained by state officers and introduced into evidence in a criminal prosecution which culminates in a conviction.").

the target."[61] This distinguishes it in a critical way from a "diagnostic" interview, the primary purpose of which is fact finding—to determine whether a suspect is guilty.[62] By the time an investigator decides to conduct a formal interrogation, during which he may apply a powerful arsenal of manipulative and carefully honed psychological tools, he has already made a threshold determination that the truth-seeking process of investigation is over, at least temporarily, and he "measures success by the ability to extract an admission from [the] target."[63]

A. Innocence and the Likelihood of Being Interrogated

Because of modern interrogation's guilt-presumptive focus, it is in the interest of justice to minimize the risk that innocent people be subjected to it in the first place. But in an unfortunate and well-documented irony, innocent suspects—who did not commit the crime being investigated but have nonetheless aroused police interest—are in some ways more likely than guilty ones to become targets of a formal interrogation. As common sense suggests and research strongly confirms, innocent people are more likely to submit to voluntary questioning. The reasons include "strategic self-presentation"[64] (not wanting to create a false impression of guilt through lack of cooperation), a "naive faith in the power of their own innocence to set them free,"[65] and the "illusion of transparency,"[66] a psychological "tendency to overestimate the extent to which others can read one's internal states" such as honesty and guiltlessness.[67] Furthermore, if arrested and taken into custody during an investigation, innocent suspects are often more likely than guilty ones to waive *Miranda* rights and answer questions in an interrogation room.[68]

61. Saul M. Kassin & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 PSYCHOL. SCI. PUB. INT. 33, 41 (2004).

62. *See id.* at 44 (describing a "diagnostic" encounter as one intended to elicit "confessions from suspects who are guilty, but not from those who are innocent").

63. *Id.* at 41.

64. *Id.* at 40.

65. *Id.*

66. *Id.*

67. Thomas Gilovich et al., *The Illusion of Transparency: Biased Assessments of Others' Ability to Read One's Emotional States*, 75 J. PERSONALITY & SOC. PSYCHOL. 332 (1998). This study notes that "the illusion of transparency is a robust phenomenon that applies to a host of different internal states." *Id.* at 343.

68. *See* Kassin & Gudjonsson, *supra* note 61, at 40 (discussing observational and controlled laboratory research indicating that "innocent people in particular are at risk to waive their rights").

Innocent people thus voluntarily and blamelessly expose themselves to police scrutiny that many guilty people avoid. And upon doing so, the potential for victimization multiplies. Any investigative attention, even in the "diagnostic" context of preinterrogation truth seeking, can create an intimidating environment that invites misinterpretation of a suspect's behavior. As David Simon, a seasoned observer of homicide detectives in Baltimore, has observed,

> [n]ervousness, fear, confusion, hostility, a story that changes or contradicts itself—all are signs that the man in an interrogation room is lying, particularly in the eyes of someone as naturally suspicious as a detective. Unfortunately, these are also signs of a human being in a state of high stress, which is pretty much where people find themselves after being accused of a capital crime.[69]

Once suspicion is aroused, a situation can quickly escalate. In one Florida case, widely cited as an example of misplaced suspicion, a murder victim's neighbor voluntarily submitted to questioning on multiple occasions because "he thought the police needed his help."[70] He quickly became the prime suspect after "his face flushed and he became embarrassed during the initial questioning."[71] Those symptoms had an innocent explanation—the suspect was a recovering alcoholic who suffered from an acute anxiety disorder and obsessive compulsive personality disorder, which "caused him to sweat profusely and become red in the face when he felt people were critically observing him."[72] But once investigators saw what they viewed as telltale signs of guilt, they subjected the suspect to a sixteen-hour formal interrogation that culminated in a coerced (and ultimately inadmissible) confession.[73]

Innocent suspects' preinterrogation vulnerability can be compounded by another psychological phenomenon called the "investigator bias effect."[74] Several studies indicate that training and

69. DAVID SIMON, HOMICIDE: A YEAR ON THE KILLING STREETS 206 (1991).

70. State v. Sawyer, 561 So. 2d 278, 283 (Fla. Dist. Ct. App. 1990).

71. *Id.*

72. *Id.*

73. *Id.* at 290–91. After the confession was suppressed, since "no evidence of [Sawyer's] guilt existed," the state dismissed all charges against him. Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 458 (1998).

74. Christian A. Meissner & Saul M. Kassin, *"He's Guilty!": Investigator Bias in Judgments of Truth and Deception*, 26 LAW & HUM. BEHAV.

experience do not produce reliable improvements in investigators' ability to gauge an individual's truthfulness or deceptiveness.[75] But such training and experience, typical in law enforcement, has been shown to increase investigators' tendency to see evidence of guilt—whether or not it exists—thus "increasing the likelihood that they would judge targets as deceitful."[76] Such training has also been shown to boost investigators' self-reported confidence, untethered to reality though it may be, in their skills of detection.[77]

It is important to note that none of the effects described above requires or even assumes police misconduct, carelessness, or bad faith—they simply reflect the realities of a process that, like any other, is susceptible to human fallibility. But the potential cumulative effect of these phenomena on innocent suspects is profound. And once investigators confidently cross the threshold of believing they have a guilty party before them, formal interrogation is the portentous next step. Kassin and Gisli Gudjonsson, two leaders in the field of false confession research, have observed firsthand the mindset that an innocent suspect may unwittingly encounter as a result:

> At a conference on police interviewing that the two of us recently attended, Joseph Buckley (2004)—president of John E. Reid and Associates (a Chicago-based organization that has trained tens of thousands of law-enforcement professionals) and coauthor of the widely cited manual *Criminal Interrogation and Confessions*—presented the influential Reid technique of interviewing and interrogation. . . . Afterward, an audience member asked if his persuasive methods did not at times cause innocent people to confess. His reply was, "No, because we don't interrogate innocent people."[78]

B. The Interrogation Process

The popular assumption discussed in Part III, found in various iterations of the insistence that "I would never confess to something I didn't do,"[79] supports a theory that one author has called "'the myth

469, 473 (2002) (describing findings "suggesting that training and prior experience lead to a perceptual bias toward judgments of deceit").

75. *Id.* at 477 ("[R]esearch has generally failed to demonstrate performance increments as a function of special training or prior law enforcement experience.").

76. *Id.* at 478.

77. *See id.* (observing that in a comparison across studies, trained detectives were "significantly more confident in their judgments" than trained and untrained student research subjects, and noting that this result was "consistent with our reanalysis of the literature").

78. Kassin & Gudjonsson, *supra* note 61, at 36 (citation omitted).

79. *Supra* note 40 and accompanying text.

of psychological interrogation': that an innocent person will not falsely confess to a serious crime unless he is physically tortured or mentally ill."[80] To understand how such a common-sense belief can be so demonstrably inaccurate, researchers have focused on the dynamics of modern interrogation and its capacity to produce false confessions.

Criminal interrogators may employ a broad array of techniques, but researchers studying why false confessions occur have observed a unified theme: the desire to "manipulate the perceptions, reasoning, and decision-making of a custodial suspect and thus lead to the decision to confess."[81] One of the most widely utilized methods, and an appropriate illustrative example, is the Reid technique referenced above. This method, first made public in 1974, is promoted as having been "successfully utilized . . . to solve literally hundreds of thousands of crimes."[82] It has been taught to "more than 200,000 investigators in private industry, law enforcement and the Federal government,"[83] and is endorsed in *Criminal Interrogation and Confessions*,[84] "the most widely read and best known police interrogation manual in American history."[85] The interrogation stage of the Reid technique breaks down into nine steps:

> Step One. The Positive Confrontation. By accusing the suspect at the outset, the interrogator immediately establishes an atmosphere of confidence, and is also able to observe and evaluate the suspect's reaction to being accused. . . .
>
> Step Two. Theme Development. . . . [A] successful interrogator develops "themes" or reasons that allow the suspect to salvage self-respect while confessing.
>
> Step Three. Handling Denials. Before a suspect can become attentive to theme development and confess guilt, they must be stopped from continuing to deny involvement. . . .
>
> Step Four. Overcoming Objections. . . . Techniques for overcoming a guilty suspect's objections and moving toward a confession . . . .

80. Drizin & Leo, *supra* note 46, at 910.

81. *Id.*

82. Brian C. Jayne & Joseph P. Buckley, *The Reid Technique of Interrogation*, JOHN E. REID & ASSOCS., INC., http://www.reid.com/educational_info/canada.html (last visited May 7, 2013).

83. *Id.*

84. FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS (5th ed. 2013).

85. YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE 546 (13th ed. 2012).

> Step Five. Procuring and Retaining the Suspect's Attention. . . . [P]hysical closeness and verbal techniques used by the interviewer are methods for acquiring and maintaining a suspect's attention.
>
> Step Six. Handling the Suspect's Passive Mood. . . . [R]ecognizing that the suspect has "given up" and is ready to confess . . . [and] focusing . . . the general theme onto one or two essential elements that will stimulate the confession.
>
> Step Seven. Presenting an Alternative Question. To obtain the first admission of guilt from the suspect, a question with only two possible answers (either of which is incriminating) is asked. . . .
>
> Step Eight. Detailing the Offense. Corroboration of an admission of guilt is obtained through details of the offense supplied by the suspect. . . .
>
> Step Nine. Elements of Oral and Written Statements. Proper handling of the suspect's oral statements and the reductions of such statements to a written, typed or recorded confession . . . .[86]

Kassin and Gudjonsson have observed that the "nine steps are essentially reducible to an interplay of three processes" commonly utilized in modern criminal interrogation: *isolation*, *confrontation*, and *minimization*.[87]

Investigators and scholars have recognized the impact of *isolation* in unfamiliar surroundings for decades. Research in the 1960s observed that "such isolation heightens the anxiety associated with custodial interrogation and, over extended periods of time, increases a suspect's incentive to escape."[88] This makes intuitive sense, as the "needs for belonging, affiliation, and social support, especially in times of stress, are a fundamental human motive," deprivation of which can provoke a strong reaction.[89] "False confession is an escape hatch. It

86. JOHN E. REID & ASSOCS., INC., THE REID TECHNIQUE OF INTERVIEWING AND INTERROGATION® AND THE ADVANCED COURSE ON THE REID TECHNIQUE OF INTERVIEWING AND INTERROGATION® (2013).

87. Kassin & Gudjonsson, *supra* note 61, at 43.

88. *Id.* at 53 (citing P.G. Zimbardo, *The Psychology of Police Confessions*, 1 PSYCHOL. TODAY 17–20, 25–27 (1967)).

89. Kassin et al., *supra* note 54, at 16 (citing Roy F. Baumeister & Mark R. Leary, *The Need to Belong: Desire for Interpersonal Attachments as a Fundamental Human Motivation*, 117 PSCYHOL. BULL. 497 (1995)).

becomes rational under the circumstances,"[90] Kassin has noted, adding that the most common explanation given after a false confession is that the suspect "just wanted to go home."[91] The impact of isolation is also reflected in anecdotal evidence from wrongfully convicted individuals. A Long Island murder defendant profiled by *The New York Times* in 1998 after his confession was proven false provides a typical example—the man was "tired, lonely and scared" after a long interrogation and "wanted to go home," so he eventually told police what he knew they wanted to hear.[92]

Confrontation in the interrogation context may involve several different tactics. An interrogator may begin with "strong assertions of . . . guilt designed to communicate that resistance is futile."[93] Such accusations serve to "exploit the psychology of inevitability to drive suspects into a state of despair."[94] Police are trained to challenge any resistance that the suspect offers, using methods such as "repeatedly accusing the suspect of committing the crime and lying about it; cutting off and interrupting denials; attacking alibis or assertions of innocence as illogical, implausible, or untrue; [and] insisting that no one will believe the suspect's protestations of innocence."[95] The interrogator emphasizes that the suspect's guilt is already beyond doubt, and that the only remaining questions concern *how*, not *whether*, the suspect committed the crime.[96]

One especially effective—and controversial—confrontation tool to help establish that "resistance is futile" involves presenting the suspect with fabricated evidence indicating his guilt. Created to help convince a suspect not to persist with denials, such evidence can take many forms, including "a fingerprint, blood or hair sample, eyewitness identification, or [a] failed polygraph."[97] Because of its highly manipulative potential, this tactic is forbidden in most European

90. Alexandra Perina, *"I Confess": Why Would an Innocent Person Profess Guilt?*, PSYCHOL. TODAY, Mar./Apr. 2003, at 11, 11 (2003) (quoting Saul Kassin).

91. *Id.*

92. Jan Hoffman, *Police Refine Methods So Potent, Even the Innocent Have Confessed*, N.Y. TIMES, Mar. 30, 1998, at A1.

93. Kassin & Gudjonsson, *supra* note 61, at 54.

94. *Id.*

95. Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 516 (2006).

96. *See* Jayne & Buckley, *supra* note 82 (providing one example of such a statement used in interrogation: "While there is no doubt that you did this, what I need to establish are the circumstances that led up to this happening").

97. Kassin & Gudjonsson, *supra* note 61, at 54.

countries.[98] In the United States, however, the Supreme Court stated in *Frazier v. Cupp*[99] that lying to a suspect about evidence during interrogation, without more, is "insufficient . . . to make [an] otherwise voluntary confession inadmissible,"[100] and subsequent decisions have interpreted *Frazier* as allowing police deception during an interrogation.[101]

Credible evidence indicates that the risk of obtaining false confessions from innocent suspects increases dramatically when police employ such manipulation. Professor Welsh White is among many scholars who have concluded that "[b]ased on the empirical data, . . . [w]hen an interrogator deceives a suspect as to the nature of the evidence against him, falsely leading him to believe that the police have overwhelming evidence of his guilt, the suspect is likely to give an untrustworthy confession."[102] The effect has been observed in scholarly reviews of actual false confession cases,[103] and has been

98. *Id.*

99. Frazier v. Cupp, 394 U.S. 731 (1969).

100. *Id.* at 739. In *Frazier*, an interrogator lied to the defendant about an accomplice's confession, and the defendant subsequently made incriminating statements that he later sought, unsuccessfully, to have suppressed.

101. The *Frazier* opinion did not specify whether any limits exist on the extent of police authority to use deception, and the Court has since passed up several opportunities to impose such limits. *See* Laurie Magid, *Deceptive Police Interrogation Practices: How Far Is Too Far?*, 99 MICH. L. REV. 1168, 1176 & n.41 (2001) (listing subsequent decisions and noting that "in several cases that the Court heard on other issues, deception had been used during interrogation, and the Court made no unfavorable comment about the deception"). Notably, however, some courts have imposed limits in certain circumstances. *See, e.g.*, State v. Cayward, 552 So. 2d 971, 974 (Fla. Dist. Ct. App. 1989) (suppressing a confession after police fabricated "tangible documentation" in the form of a written lab report indicating, falsely, that a defendant's semen was found on a victim's underwear—a transgression that the court said "offends . . . traditional notions of due process").

102. Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 146 (1997). For a more detailed discussion of the arguments against allowing police deception during interrogations, including the increased risk of false confession, see Irina Khasin, Note, *Honesty Is the Best Policy: A Case for the Limitation of Deceptive Police Interrogation Practices in the United States*, 42 VAND. J. TRANSNAT'L L. 1029 (2009).

103. *See, e.g.*, Kassin et al., *supra* note 54, at 17 (noting that "studies of actual cases reveal that the false evidence ploy . . . is found in numerous wrongful convictions in the U.S., including DNA exonerations, in which there were confessions in evidence," and listing several references).

reproduced in controlled laboratory settings using psychological and behavioral research methods.[104]

Being confronted with false evidence can create a strong impression that conviction is a foregone conclusion. This, in turn, can provoke a key mental shift in a suspect, as "research shows that once people see an outcome as inevitable, cognitive and motivational forces conspire to promote their acceptance, compliance with, and even approval of the outcome."[105] When Jerry Lee Louis was suspected of a Florida murder in 1992, interrogators told him that eyewitnesses had identified him (none had), that his hair and fingerprints were found at the crime scene (they weren't), and that he had failed a polygraph test (he hadn't).[106] Faced with such seemingly insurmountable evidence, Louis finally acquiesced and told police "what they wanted to hear" because, as he later told his lawyer, he "had given up hope that telling the truth would earn him back his freedom."[107]

The third common aspect of modern criminal interrogation, *minimization*, aims to convince a suspect that the consequences of confessing are so low, relative to the potential consequences of not confessing, that confession is in his best interest. Effective minimization is "designed to lull a suspect into believing that the magnitude of the charges and the seriousness of the offense will be downplayed or lessened if he confesses."[108] As with confrontation, an interrogator employing minimization may mislead the suspect to manipulate his reasoning. In homicide cases, for instance, "interrogators often suggest that if the suspect admits to the crime it will be framed as an unintentional accident or as an act of justifiable self-defense, but that if he continues to deny guilt, his actions will be portrayed in their worst possible light—as premeditated, cold-blooded murder."[109]

Minimization conveys to a suspect, implicitly or explicitly, that confession provides a way out of what seems like a hopeless predicament. It entails "providing moral justification or face-saving excuses," such as that the suspect's actions were "spontaneous, accidental, provoked, peer pressured, drug induced, or otherwise

104. *See, e.g.*, Kassin & Gudjonsson, *supra* note 61, at 54–55 (discussing multiple such studies and interpreting their results in the context of false confession analysis).

105. *Id.* at 54.

106. Hoffman, *supra* note 92 .

107. *Id.* Louis was eventually released after it became clear that his two separate confessions were "both wildly at odds with the crime scene and witness reports" and a judge suppressed them. *Id.* By that time, however, he had spent over four years in a county jail awaiting trial. *Id.*

108. Drizin & Leo, *supra* note 46, at 912.

109. *Id.* at 917 (footnotes omitted).

justifiable by external factors."[110] It may even involve shifting blame to the victim, with an interrogator suggesting that anyone in the suspect's position would have committed the same crime.[111]

The police must take care, of course, to avoid making an overt promise of leniency in exchange for a confession, as courts have long recognized that this practice jeopardizes the subsequent confession's voluntariness.[112] But even in the absence of a concrete promise, psychological research has found that interrogation targets are susceptible to veiled suggestions of lenient treatment in exchange for a confession.[113] Kassin and Gudjonsson thus conclude that minimization may serve as "the implicit but functional equivalent to a promise of leniency," such that the "net result is to put innocents at risk to make false confessions."[114]

With such potent tools as isolation, confrontation, and minimization at police disposal, modern interrogation can leave innocent suspects vulnerable. This is strongly suggested by the research showing that 18 to 25 percent of wrongful convictions involved a false confession.[115] But arguably the most convincing evidence of modern interrogation's overwhelming psychological power is a byproduct documented in several interrogation-induced false confessions: internalization. "[I]nnocent but vulnerable suspects, under the influence of highly suggestive interrogation tactics, come not only

110. Kassin & Gudjonsson, *supra* note 61, at 55.

111. *Criminal Interrogation and Confessions* provides several sample monologues to illustrate such blame-shifting. For instance, if an employee is suspected of stealing from his employer, the authors recommend this empathetic approach: "Anyone else confronted with a similar situation probably would have done the same thing, Joe. Your company is at fault. . . . [I]f you received a decent salary in the first place, you wouldn't be here and I wouldn't be talking to you." INBAU ET AL., *supra* note 84, at 223.

112. *See, e.g.*, Bram v. United States, 168 U.S. 532, 543 (1897) ("A confession can never be received in evidence where the prisoner has been influenced by any threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner . . . ."). This rule has been somewhat relaxed over time. "[T]he modern view" is that promises offered during interrogation "are rarely determinative on their own . . . . [T]he key question is whether the inducement is 'so attractive as to render a confession involuntary.' " Paul Marcus, *It's Not Just About* Miranda*: Determining the Voluntariness of Confession in Criminal Prosecutions*, 40 VAL. U. L. REV. 601, 606–07 (2006).

113. *See* Kassin & Gudjonsson, *supra* note 61, at 55 (discussing research analyzing the interplay between minimization, perceived promises of leniency, and confessions).

114. *Id.*

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

to capitulate in their behavior, but also to believe that they committed the crime in question, sometimes confabulating false memories in the process."[116] No figures exist on the prevalence of internalization among false confessors, but the prospect of an interrogation resulting in actual memories of fictional guilty acts is an acute reminder of how thoroughly innocent suspects can be manipulated.

"'I remember slashing once at my mother's throat with a straight razor,'" confessed eighteen-year-old Peter Reilly in a 1973 Connecticut murder case that "entered the legal annals as perhaps the classic instance of a suspect under interrogation becoming convinced that he committed a crime he did not do."[117] Reilly was convicted of manslaughter based almost entirely on his confession, which he provided after eight hours of interrogation and which included several graphic details about the crime.[118] He was exonerated three years later, when a subsequent investigation proved he was five miles away at the time of the killing.[119]

V. A MORE JUST CONCEPTION OF "CONTRIBUTION"

> *"It no longer seems rational to consider all false confessions as misconduct, because multiple exonerations prove that innocent people falsely implicate themselves, despite gaining nothing for themselves in the process."*[120]

A generation's worth of new research into modern interrogation practices and their effects has shown convincingly that innocent people can be psychologically manipulated into confessing—that they can be blameless victims of a well-intentioned but imperfect investigative process. These findings help explain the otherwise seemingly inconceivable fact that so many exonerees have confessed to crimes they did not commit. The findings should also force a reevaluation of how a false confession fits into the analysis of whether an exoneree made a truly blameworthy contribution to his erroneous conviction.

As discussed in Part II, no state statute contains language explicitly denying compensation to all exonerees who falsely confessed. But several states' provisions aimed at exonerees whose conduct caused or brought about their conviction "may prevent people who falsely

116. Kassin & Gudjonsson, *supra* note 61, at 50.

117. Donald S. Connery, *Peter Reilly*, *in* TRUE STORIES OF FALSE CONFESSIONS 47, 69–70 (Rob Warden & Steven A. Drizin eds., 2009) (internal quotation marks omitted).

118. *Id.* at 69.

119. *Id.* at 70.

120. Bernhard, *supra* note 26, at 718 (footnote omitted).

confessed . . . from receiving compensation."[121] The case of Douglas Warney, introduced at the start of this Note, illustrates that such statutory ambiguity creates a very real risk that falsely confessing exonerees could be left empty handed.

Warney's original claim for compensation under New York's Unjust Conviction and Imprisonment Act, filed after his release in May 2006, was dismissed by the New York Court of Claims upon a motion by the state.[122] In upholding that decision on appeal, the Supreme Court's Appellate Division pointed to an earlier state case, *O'Donnell v. State*, which had concluded as part of its interpretation of the Act that "an innocent criminal defendant may cause or bring about his or her own conviction by making an uncoerced false confession of guilt that is presented to the jury at trial."[123] While that analysis in *O'Donnell* was dicta, as the case did not involve a false confession,[124] it had a legitimate foundation. In the legislative history of the Act, contained in New York's Report of the Law Revision Commission for 1984, the commission had placed "giving an uncoerced confession of guilt" first on its list of examples of claimant "misconduct" that could "cause or bring about his prosecution."[125]

In Warney's case, after establishing that a false confession could trigger the statutory denial of compensation, the Appellate Division decided with very little analysis that he had failed to state a viable claim under the Act. Warney had emphasized that the circumstances of his interrogation suggested coercion, but to no avail—the court dismissively observed that "he merely surmises that his confession must have been coerced because it was later shown to be false when someone else confessed to the crime."[126]

Absent from the opinion was any recognition of potential fault in the interrogation process, or of the possibility that, even if Warney's confession had not been obtained through police behavior meeting the legal standard of coercion (in which case it would clearly not bar

121. LOST TIME, *supra* note 17, at 27–31.

122. Warney v. State, 894 N.Y.S.2d 574 (App. Div. 2010).

123. *Id.* at 275 (citing O'Donnell v. State, 808 N.Y.S.2d 266, 269 (App. Div. 2005)).

124. The exoneree's alleged contributory conduct in *O'Donnell* involved offering an alibi that "ha[d] inconsistencies and contradictions . . . [and] certainly may well have led to his conviction" at trial. *O'Donnell*, 808 N.Y.S.2d at 269 (alterations in original).

125. STATE OF N.Y., REPORT OF THE LAW REVISION COMMISSION, Doc. No. 65, at 75–76 (1984).

126. *Warney*, 894 N.Y.S.2d. at 275.

recovery),[127] it might still not have constituted true "misconduct" by Warney.[128] This is unsurprising in context, since Warney's central argument on appeal was that his confession had been coerced, so he evidently did not attempt to raise the broader issue of innocent suspects' vulnerability to manipulation in the interrogation room.[129] But the court's formalistic approach, concluding with scant analysis that an uncoerced false confession met the literal statutory requirement and the legislature's conception of conduct contributing to a conviction, exemplifies the risk any exoneree may face in a state with a similar restriction.

New York's highest court reversed the dismissal of Warney's claim in March 2011, but it relied on procedural grounds—the lower courts had made "factual determinations" concerning his allegations of coercion "that were inappropriate at [that] stage of the litigation."[130] The closest that the court came to addressing broader substantive issues, such as when a false confession should meet the statutory requirement to preclude compensation, concerned the definition of coercion. A concurring opinion stated 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 confessor, or threaten to do so."[131] The manipulation "present here," however, exceeded the ordinary bounds of even modern interrogation trickery, as police allegedly fed Warney nonpublic details of the crime, then pointed to his accurate recounting of those details in the confession as proof of

127. *Warney*, 947 N.E.2d at 644 ("[A] coerced false confession does not bar recovery under section 8-b because it is not the claimant's 'own conduct' within the meaning of the statute.").

128. It is noteworthy that the Report of the Law Revision Commission for 1984 uses the word "misconduct" (which implies some degree of inherent blameworthiness or wrongdoing) to describe the examples of conduct contributing to a conviction, while the Act itself uses the more neutral word "conduct." Warney highlighted this distinction on appeal to the Court of Appeals, but the court found it unnecessary to rule on the implications of the language discrepancy because Warney had alleged that his confession was coerced, and hence not properly viewed as his own "conduct" *or* "misconduct." *Id.* at 644 n.3.

129. *See id.* at 644 ("Warney alleges in detail that his confession was coerced . . . .").

130. *Id.* at 644. After this victory, which allowed Warney's compensation claim to proceed to discovery, the state finally settled with him, paying $3.75 million for his 108-month incarceration. Emily Lurie, *Douglas Warney Awarded $3.75 Million*, FALSE CONFESSIONS BLOG (Dec. 7, 2011), http://www.falseconfessions.org/blog/2011/12/douglas-warney.

131. *Warney*, 947 N.E.2d at 646 (Smith, J., concurring).

its credibility.[132] The court had no occasion to decide what types or degrees of manipulation rise to the level of legally cognizable coercion, or, more broadly, to consider the policy question of whether widely used modern interrogation practices might be so inherently manipulative as to justify an inference of coercion after a confession is proven false.

But it is precisely those questions that must be addressed by future courts, legislators, and policy makers to prevent unjust outcomes for exonerees who falsely confessed prior to conviction. We now have an unprecedented scientific understanding of how innocent people can be pressured into confessing under circumstances that cannot reasonably be deemed blameworthy. Until we apply that knowledge to the statutory frameworks that govern exoneree compensation, our legal system risks re-punishing wrongly convicted false confessors who cannot show police misconduct that fits into the existing legal conception of coercion.

Fortunately, a workable remedy to this problem is straightforward and employs a device already very familiar to American jurisprudence. A properly crafted rebuttable presumption can respect legislators' concerns about "rewarding" undeserving individuals with public money, while more narrowly tailoring the statutory restriction so that it affects only the truly undeserving. As suggested by Professor Adele Bernhard, "courts should presume all false confessions to be the product of coercion [and hence not a claimant contribution to the conviction] unless they can be shown otherwise by clear and convincing evidence."[133]

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132. This alleged misconduct was Warney's primary basis for establishing coercion. The strength of his position was on display at oral argument before the Court of Appeals, when Warney's attorneys turned the tables on the prosecutors' reasoning: now that Warney had been proven innocent, his "knowledge" of so many details about the crime could *only* have come from police interrogators improperly feeding him information. The following exchange demonstrated the merit of his claim:

> "Is there any other possible theory [of how the confession contained such detail]?" Judge Smith asked.
>
> "There are other possible theories," Ms. Nathan [representing the state] said.
>
> "How about one, just for the sake of argument," Judge Smith said.
>
> "He had knowledge of the victim's home," Ms. Nathan said.
>
> "No," Judge Smith said. "The 12-inch serrated knife, stabbed into him 15 times. How did he know that?"
>
> "He may have been asked a leading question," Ms. Nathan said.

Jim Dwyer, *Confessions, Manipulation and Injustice*, N.Y. TIMES, April 2, 2011, at A14.

133. Bernhard, *supra* note 26, at 720.

Such a scheme would reflect the research-supported reality that many false confessions are not the product of actual defendant misconduct. At the same time, it would continue to shield the public coffers from confessors who "specifically intended to distort the truth-seeking function of the police investigation."[134] The clear and convincing evidentiary standard seems appropriate, as that same standard is commonly employed for other elements of state compensation statutes.[135] And more importantly, the standard in this context errs on the side of the exoneree, which is sound public policy, since the harm of compensating a potentially undeserving claimant in a "close call" seems far outweighed by the harm of denying compensation to a deserving claimant whose life has been so drastically upset by wrongful incarceration.[136]

Precisely what conduct must be shown to rebut the presumption of coercion should be the subject of separate scholarship and legislative deliberation, and decisions in this regard could be informed by past instances of clear misconduct. Examples might include confessing to protect a coconspirator or other known perpetrator, to secure benefits for family members from organized crime, to avoid revealing other personal misconduct, or for self-aggrandizement.[137] As a critical caveat, Bernhard notes that a court's inquiry into coercion for compensation purposes should be entirely independent from any prior ruling on the confession's admissibility at trial. The admissibility standard is tied to voluntariness, and "[i]n determining voluntariness, coercive techniques are not necessarily determinative. As a result, although police interrogation techniques may create false confessions, they do not always render confessions 'involuntary' as a matter of law . . . ."[138] Accordingly, "a pretrial ruling on admissibility should play no role in deciding whether to award compensation."[139]

134. *Id.*

135. *See* Adam I. Kaplan, Comment, *The Case for Comparative Fault in Compensating the Wrongfully Convicted*, 56 UCLA L. REV. 227, 250 n.154 (2008) (observing that many state compensation statutes "require that the claimant prove by clear and convincing evidence" that he did not commit the crime for which he was imprisoned, "although some utilize a different standard (generally, a preponderance of the evidence)").

136. This value judgment is also a fitting counterpart to the "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring); *see supra* note 10.

137. *See, e.g.*, Boaz Sangero & Mordechai Halpert, *Proposal to Reverse the View of a Confession: From Key Evidence Requiring Corroboration to Corroboration for Key Evidence*, 44 U. MICH. J.L. REFORM 511, 523 (2011) (listing a wide spectrum of documented reasons why defendants have falsely confessed, ranging from "fear of the death penalty" to "as a joke").

138. Bernhard, *supra* note 26, at 721 (footnote omitted).

139. *Id.*

CONCLUSION

The issue discussed in this Note does not directly impact a great many people, and it thankfully never will. Only a tiny sliver of the population will ever experience the nightmare of a wrongful conviction leading to incarceration. Of those, only a small (but growing) number will have the opportunity, resources, and good fortune to prove their innocence and reverse their convictions. Of those, only a fraction will live in a state that provides for uniform compensation via statute; a still smaller fraction will live in a state with a statutory restriction based on the exoneree's preconviction conduct. And of those, only a minority will have falsely confessed to the crime for which they were incarcerated. In terms of raw numbers, this is not the most pressing social justice issue of our time.

But as Dr. Martin Luther King Jr. famously recognized in one of the wisest maxims humanity has ever produced, "injustice anywhere is a threat to justice everywhere."[140] If the American criminal justice system aspires to follow that basic principle, it must take extraordinary care to protect those who are most victimized by its imperfections. This is especially so when new information reveals that our traditional conceptions of culpability, and the laws we have built around those conceptions, no longer account for all we know about the complexities of real life. "[L]et us be realists,"[141] wrote Dean John H. Wigmore in support of the first federal exoneree compensation statute in 1912, in words equally applicable a century later to the issue discussed herein. "Let us confess that of course [our justice] may and does err occasionally. And when the occasion is plainly seen, let us complete our justice by awarding compensation. . . . To ignore such a claim is to make shameful an error which before was pardonable."[142]

Gregory P. Scholand[†]

140. Martin Luther King Jr., Letter from a Birmingham Jail (Apr. 16, 1963).

141. John H. Wigmore, *Editorial Preface* to EDWIN M. BORCHARD, STATE INDEMNITY FOR ERRORS OF CRIMINAL JUSTICE 3 (1912).

142. *Id.*

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