

THE DILEMMA AND DEBATE OVER CONFESSION EVIDENCE STRATEGIES

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Abstract:

This paper discusses the current problems identified by current DNA exonerations history. It addresses the need for policy changes that emphasizes greater reliance on DNA evidence collection and analysis, and less faith in confession evidence. Moreover, it discusses the fact that of the 300 DNA exonerations to date, 20-25% of those exonerations included confession evidence despite the innocence of those inmates. This article makes recommendations for Congressional legislation promoting change in three aspects: (1) recognition and restoration of the *Escobedo* Assertion as the guiding principle for law enforcement; (2) consistent with other jurisdictions, when interrogating, the process should be recorded; and (3) when an appellate court determines a confession was coerced, the matter should be remanded for a new trial, since that confession evidence is too prejudicial for the harmless error doctrine to work. These recommendations and the intent of this article are to prevent or reduce the number of false confessions in the future.

The subject is then compared to the report by Durant Frantzen, Frantzen suggests additional studies were necessary. However, the report actually supports a finding that even law enforcement officers lack faith in the effective use of the various interrogation strategies being promoted around the United States to American police.

Table of contents

	Page
Reliability of confession evidence	4
In the news	4
High profile case of Amanda Knox	6
Issue/problem/policy – Falsely convicting the innocent with false confessions	7
Problem/policy – Harmless error doctrine does not work in confession cases	8
The <i>Escobedo</i> assertion	9
The dilemma of confession evidence	10
Other influences which lead to false confessions	11
The psychology of false confessions.	13
Police interrogation techniques	14
Typology of confessions	16
Canada’s findings	17
Harmless error doctrine	17
Mock trial experimental study	19
DNA’s benefit to the criminal justice system	19
Use of DNA to prove guilt and innocence	22
Need for reliable arrest and conviction rates.	24
DNA collection update and the future	27
Opposing view to empirical findings	28
Frantzen’s 2010 law enforcement participatory study	28
Interrogation strategies not supported by practitioners	30

History of interrogation use and methods	30
Various categories of interrogation evidence	31
<i>Miranda</i> avoidance practice	32
Training	34
Summary and conclusion	34

Lessons Learned from DNA Exonerations Concerning False Confessions

Reliability of confession evidence

This paper discusses the problems and policies associated with confession evidence in light of DNA evidence analysis, in the context of which evidence is a more effective tool for investigating crime. In the end, this article will make statutory recommendations for the overturning of *Arizona v. Fulminante* (1991) and for the restoration of the Escobedo Assertion announced in *Escobedo v. Illinois* (1964) (the case which set the stage for *Miranda v. Arizona* (1966)). Clearly, the trend in law enforcement over the past 20-30 years has favored confession evidence. However, the Innocence Project has shown that as many as 20-25% of the Project cases successfully litigated included false confessions. 20 - 25% false confessions is an alarming rate that all Americans should be concerned about.

In the news

Eventually, all criminal justice policy is impacted by public perception. Frequently, these perceptions are influenced by the media and television. During the past decade, stories concerning false confessions have been making headlines. For example, on October 1, 2012, a headline of the Los Angeles Times read “DNA Evidence Exonerates 300th Prisoner Nationwide.” The 300th exoneration was Damon Thibodeaux, 38, of Louisiana who was released from death row, becoming the 300th prisoner nationwide to be freed after DNA evidence showed he was innocent (Hennessy-Fiske, 2012). A Jefferson Parish judge overturned Thibodeaux’s rape and murder conviction releasing him from prison after serving 16 years, 15 awaiting his execution on death row for a crime he did not commit (Hennessy-Fiske, 2012). Of the first 300 exonerations, 18 were on death row awaiting their executions (Hennessy-Fiske, 2012).

Thibodeaux was convicted in 1997 and sentenced to death after allegedly confessing to the July 19, 1996, tragic rape and murder of his 14-year-old step-cousin, Crystal Champagne, in Westwego, a community southwest of New Orleans (Hennessy-Fiske, 2012). The girl had disappeared the last night she was seen by her family as she left the apartment to walk to a nearby grocery store (Hennessy-Fiske, 2012). Failing to return, her parents called for police and a search followed (Hennessy-Fiske, 2012). Crystal's body was located under a bridge the following evening, her pants were pulled down and a wire ligature was around her neck; giving the appearance she had been strangled and sexually assaulted. Later that night, detectives began interrogating potential witnesses, which included Thibodeaux (Hennessy-Fiske, 2012).

Unfortunately, after a lengthy 9-hour interrogation, Thibodeaux falsely confessed to raping and murdering the girl. The confession evidence became the primary basis for Thibodeaux's conviction in October 1997 (Hennessy-Fiske, 2012). Thibodeaux appealed the conviction, to no avail. On appeal, his arguments included that he was coerced into giving a false, unrecorded confession after being interrogated by sheriff's investigators endlessly for nine hours (Hennessy-Fiske, 2012). He also asserted there being insufficient evidence to convict him and that using his false confession resulted in an unfair trial (Hennessy-Fiske, 2012). One of Thibodeaux's attorneys, Steve Kaplan, said "This is a tragic illustration of why law enforcement [needs to] record the entire interrogation of any witness or potential suspect in any investigation involving a serious crime" (Hennessy-Fiske, 2012).

Lucky for Thibodeaux, his legal team persuaded the district attorney of Jefferson Parish, Paul Connick, to reinvestigate the case in 2007 costing hundreds of thousands of dollars (Hennessy-Fiske, 2012). DNA testing showed that Thibodeaux was not the killer and that Crystal had not been raped (Hennessy-Fiske, 2012).

Another one of Thibodeaux's attorneys, Barry Scheck, co-director of the Innocence Project, acknowledged that "District attorneys now recognize that the system doesn't always get it right and many, like District Attorney Connick and his team, are committed to getting to the truth" (Hennessy-Fiske, 2012). The LA Times author mentioned in closing, Thibodeaux's case emphasizes the importance of California's Proposition 34, seeking to repeal the death penalty in the upcoming election.

High profile case of Amanda Knox

Another recent case, a high profile case involving a coerced conviction is worth mentioning. The Amanda Knox case was another false confession case, which illustrates just how seriously a confession trumps factual innocence (Kassin, 2012, p. 431). In November 2, 2007, Meredith Kercher was found dead and raped (Kassin, 2012, p. 431). Her roommate, Amanda Knox, 21, was immediately blamed despite having no criminal history or history of violence; and there being no tenable motive (Kassin, 2012, p. 431). Unfortunately, police were drawn to her blaming her apparent demeanor – they contributed she lacked affect, her outbursts of sobbing, and her displayed girlish and immature behavior at times as the rationale being suspecting her. As crazy as it seemed, these assertions led police to suspect Knox was involved and that she had lied about being with her new boyfriend, Raffaele Sollecito, that evening (Kassin, 2012, p. 431).

Armed with their ill-conceived notion of guilt, several police officials interrogated Knox on and off for four days (Kassin, 2012, p. 431). Her final interrogation started in the evening of November 5th and lasted until the next day at 6 am during which time she was alone, without an attorney, tag-teamed by a dozen police, with no break for food or sleep (Kassin, 2012, p. 431). In many ways Knox was vulnerable for confessing – she was young, far-a-way from home, with no family, and forced to speak in a language in which she was not fluent (Kassin, 2012, p. 431).

Knox reported being badgered, repeatedly called a liar and threatened. Among other claims, officers falsely told her that forensic evidence placed her at the scene and that her boyfriend denied her alibi (Kassin, 2012, p. 431). The pressure proved to be too much to bear, ultimately she confessed to crimes she had not committed. Subsequently she was convicted and then Knox appealed.

On October 3, 2011, after having been granted a new trial, she was acquitted. Because police had failed to provide Knox with an attorney and failed to record the interrogation, the Court ruled her confessions inadmissible in court (Kassin, 2012, p. 431). Ten weeks later, the Italian court of appeals released a strongly worded 143-page opinion in which it criticized the prosecution and concluded that there was no credible evidence, motive or plausible theory of guilt (Kassin, 2012, p. 432).

Because of these occurrences, it is necessary for the criminal justice system to review the phenomenon to explore the causes of these false confessions and overhaul strategies needed to curtail more from occurring.

Issue/Problem/Policy – Falsely convicting the innocent with confessions

In light of the rising number of exonerations proven by DNA as well as the surprise fact that 20-25% of them included false confessions of innocent people, this article is dedicated at identifying the problem source, and make policy recommendations. As will be discussed below, the problem can be identified in two parts: Law enforcement's and the criminal justice system's departure from the *Escobedo* assertion, and the Court's application of the harmless error doctrine concerning coerced confession evidence in *Arizona v. Fulminante* (1991). It's high time the pendulum swung the other way on the confession-forensic evidence continuum. The rise in reliance upon confession evidence is inconsistent with the assertion declared in *Escobedo v.*

Illinois (1964), which formerly instituted the policy that a criminal justice system which relied on confession evidence was less reliable than a system that relied on evidence obtained through skillful investigation.

Problem/Policy – Harmless error doctrine does not work in confession cases

Contrary to the notion that innocent people don't confess to crimes they did not commit, Saul Kassin has been recognized for his research of the false confession phenomenon for a couple decades in the United States (Kassin, 2012, p. 432). In his career, he has published several articles including "False Confessions: Causes, Consequences, and Implications for reform" which was inspired, in part, by the findings of the Innocence Project, that a startling 25% of their wrongful conviction cases contained false confession evidence (Kassin, 2012, p. 432). In one of his earlier articles (Kassin, 1997), Kassin overviewed the emerging study of confessions, described and critically evaluated the influential Reid technique of interrogation, and reiterated three classic types of false confessions previously identified (Kassin, 2012, p. 432). The purpose was to describe the phenomenon of false confessions and to note relevant psychological theories and research of the suspect characteristics and police interrogation techniques that can lead innocent people to confess (Kassin, 2012, p. 432).

The *Escobedo* assertion

In June of 1964, the U.S. Supreme Court issued its decision *Escobedo v. Illinois* (Dowling, 1965, p. 143). That case involved the wrongly obtained confession from Danny Escobedo. The Court referred to the issue as an "oblique, many-faceted constitutional problem of modern criminal procedure" referring to incommunicado police interrogation of suspected criminals versus the right of persons suspected of crime to assistance of counsel at the police investigation level of a criminal case (Dowling, 1965, p. 143). *Escobedo* was the fore-runner to *Miranda v.*

Arizona (1966). Implicit within the problem were two lesser issues: the requirement that confessions be voluntary and the privilege against self-incrimination (Dowling, 1965, p. 143).

The most profound statement made in *Escobedo* is known as the *Escobedo* assertion:

“We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the ‘confession,’ will in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently sourced through skillful investigation.”

(Robinson, 1965, p. 414).

Escobedo provoked national attention in its day (Dowling, 1965, p. 143). Newspapers and other media sources widely reported the case, condemning it as an example of the Court’s “turn ‘em loose” philosophy, claiming the ruling proscribed crippling new restrictions on government concerning the taking and use of criminal confessions (Dowling, 1965, p. 143). Many accused the Court of hamstringing law enforcement by bringing defense lawyers into an important police workshop – the interrogation room (Dowling, 1965, p. 143). The *Escobedo* Court stated that the defendant who does not ask for counsel is the very defendant who most needs attorney assistance (Dowling, 1965, p. 154). Ever since the *Escobedo* decision, the philosophy against the utilization of confession evidence has gradually eroded. Momentum has increased favoring its use to aid the congested legal system.

The dilemma of confession evidence

The classic rationale for the exclusion of confessions rests upon the principle that that some confessions are believed to be untrustworthy (Robinson, 1965, p. 413). The orthodox principle excludes confessions when the circumstances under which they were obtained are such as to indicate a substantial danger of inducement to make a false statement (Robinson, 1965, p. 413).

Conversely, it is traditionally assumed that confessions made in the absence of such inducement have probative value (Robinson, 1965, p. 413). The inference supports the common sense notion that an innocent person will not ordinarily wish to imperil his freedom by making a false admission of criminal guilt (Robinson, 1965, p. 413). In fact is a confession – if freely and voluntarily given – is viewed as evidence of the most satisfactory character (Robinson, 1965, p. 413). Confession evidence benefits the truth-seeking process best when the confession evidence is added to such other evidence as may be available than when it is excluded (Robinson, 1965, p. 414).

Other influences which lead to false confessions

While factors which cause persons to confess are undoubtedly extremely complex, it is an easy inference that persons guilty of such tactical blunder must be disadvantaged intellectually, emotionally, or culturally (Robinson, 1965, p. 420). In a famous early confession case involving protracted interrogation, Justice Black wrote for the Court:

The determination to preserve an accused's right to procedural due process sprang in large part from knowledge of the historical truth that the rights and liberties of people accused of crime could not be safely entrusted to secret inquisitorial processes. The testimony of centuries, in governments of varying kinds over populations of different races and beliefs, stood as proof that physical and mental torture and coercion had brought about the tragically unjust sacrifices of some who were the noblest and most useful of their generations. The rack, the thumbscrew, the wheel, solitary confinement, protracted questioning and cross questioning, and other ingenious forms of entrapment of the helpless or unpopular had left their wake of mutilated bodies and shattered minds along the way to

the cross, the guillotine, the stake and the hangman's noose. And they who have suffered most from secret and dictatorial proceedings have almost always been the poor, the ignorant, the numerically weak, the friendless, and the powerless.

(Robinson, 1965, p. 420). Adding to Justice Black's opinion, Professor Beisel of U.C. Berkley, included:

Seldom indeed do we hear of professionally trained men or experienced business men making confessions as to crimes of which they might be accused. Instead, under the present constitutional law of 'coerced' confessions, it is the frightened, the insecure, the weak, the untrained, the bewildered, the stupid, the naïve, and the credulous that are caught in the web. These are the ones who will talk to an experienced, well-trained police interrogator. Once they start talking, they talk themselves into jail.

(Robinson, 1965, p. 420). No matter how fine scholars may think the present constitutional law of confessions to be, it does permit many of the discriminatory features of characteristics dividing and separating men into various social classes to play an important, perhaps decisive, yet unarticulated role in determining who shall or shall not be punished by the use of confessions. All the inequalities of naive intelligence, environment, schooling, economic opportunity, racial origin, to name only a few, bear upon and are allowed to play an important part in securing confessions of guilt at the police station under the present constitutional law of 'coerced' confessions (Robinson, 1965, p. 420).

Chapman (2013) who recently added to the topic, emphasized that false confessions are very much alive and well in the legal system in North America today, and there is a very long history of these types of wrongful declarations (Chapman, 2013, p. 160). One of the first references to a false confession was recorded in 1660 (Chapman, 2013, p. 160). The suspect was a servant

named John Perry, who was sent for his master, William Harrison (Chapman, 2013, p. 160). When Perry failed to return home for a prolonged period of time, he came under suspicion of robbing and murdering his master for rent money (Chapman, 2013, p. 160). When officials confronted Perry upon his return home, he initially asserted his innocence, but then speculated Harrison may have been killed, but he denied being responsible for murdering him (Chapman, 2013, p. 160). The local magistrate encouraged Perry to confess to being the murderer (Chapman, 2013, p. 160). Instead, Perry accused his brother Richard and his mother of the crimes and professed merely assisting them of disposing the body (Chapman, 2013, p. 160). All three members of the Perry family were convicted of murder solely on the basis of John's detailed confession (Chapman, 2013, p. 160). Perry later tried to retract his confession, but all were executed any way (Chapman, 2013, p. 160). Two years passed after the execution when William Harrison returned home from Turkey, very much alive and well (Chapman, 2013, 160-161).

The psychology of false confessions

From a psychological perspective, there has been decades of research on the use of persuasion, advertising, false memories, false confessions, and eye witness accounts (Chapman, 2013, p. 161). The psychological accounts are impactful as they involve mistaken identities, inaccurate memories, and faulty eyewitness testimony resulting in the conviction of the innocent (Chapman, 2013, p. 161). When this psychological research is applied to interrogation, the result can be that the officer already believes that the suspect committed the crime and is "not likely to take 'no' as an answer (Chapman, 2013, pp. 161-162). The interrogators will typically use "any means necessary" to elicit a confession, and not only will suspects confess, but they will form false memories of the crime(s) they did not commit (Chapman, 2013, p. 162). Various psychological

theories have developed including the “source monitoring framework” which posits that individuals usually can differentiate memories from imagination, but those without this ability may falsely confess when fantasy and reality become convoluted (Chapman, 2013, p. 162). The “encoding, retrieval, and evaluation discussed by the source monitoring framework can give rise to false beliefs and memories” and interrogation can “expose innocent suspects to information with which they had no previous knowledge” (Chapman, 2013, p. 160).

Police interrogation techniques

In attempt to prevent false confessions in their nation, the British model for conducting interrogations was created and named PEACE. Crucial aspects of interviewing under the PEACE policy include overarching aims that “the role of interviewers is to obtain reliable and accurate information; interviewers should be open-minded; interviewers must act fairly; interviewers ask questions to establish the truth” (Chapman, 2013, p. 163). However, one study conducted by Bull and Soukara found that although the PEACE tactics were policy, police still relied on techniques such as revealing crucial evidence about the crime, leading questions, repetitive questioning, emphasizing contradictions, directly accusing the suspect, and challenging the suspect’s account in more than 50% of the cases they studied (Chapman, 2013, p. 163). Techniques such as “gentle prods” or asking the suspect to speak through encouragement, recognizing changes in mood and changing questioning techniques, concern, and silence were used in less than 50% of the cases (Chapman, 2013, p. 163).

In the past, courts have thus recognized the potential for false confessions even if the inducements or threats seem inconsequential to those looking at the situation from the outside (Chapman, 2013, p. 163). Richard Leo and Steven Drizin have identified what they call “psychological coercion” by the police which are “coercive police methods that sequentially

manipulate a suspect's perception of the situation, expectations for the future, and motivation to shift from denial to admission," and one of these methods is to "overbear a suspect's will . . . and are thus regarded as inherently coercive in psychology and law" (Chapman, 2013, pp. 163-164)

It is also true that interrogations are inherently stressful (Chapman, 2013, p. 164). In another British study, the researchers examined the reactions of first-time offenders interrogated about sex crimes (Chapman, 2013, p. 164). They found that the suspects had reactions including "trembling, shivering, sweating, hyperventilation, frequent urination, and verbal incoherence" (Chapman, 2013, p. 164). Added to these inherent stresses, the researchers found that those who make false confessions do so because of a combination of mental elements, personality, intelligence, and the environment of the interrogation (Chapman, 2013, p. 164).

The techniques used by police in the course of interrogations should be the focal point for an analysis of false confessions (Chapman, 2013, p. 164). Police officers try to persuade a suspect to confess because denial of the crime is considered an undesirable outcome (Chapman, 2013, p. 164). Moreover, the number of confessions an officer obtains is linked to his or her interviewing competence (Chapman, 2013, p. 164). Moreover, valid confessions are viewed as an integral part of the legal system for facilitating plea negotiations and alleviating the pressures of the clogged legal system (Chapman, 2013, p. 164). Research shows that 40-76% of those interrogated confess (Chapman, 2013, p. 164). However, the pressure put on officers to obtain confessions from suspects leads officers to resort to coercive interrogation tactics which may lead to false confessions (Chapman, 2013, p. 160).

Police interrogation techniques focus on overcoming denials, to elicit confessions from suspects (Chapman, 2013, p. 164). According to Saul Kassin, the modern police interrogation as a psychological process involving three components: 1) isolation as a means to increase the

suspect's anxiety and desire to escape; 2) confrontation whereby the interrogator accuses the suspect of the crime using real or fictitious evidence to support the accusation; and 3) minimization, where the investigator conveys and provides a moral justification for the crime in order to lead the suspect to expect leniency upon confession (Chapman, 2013, pp. 164-165). The tactics of isolation, confrontation, and minimization are currently used in police interrogations to obtain confessions (Chapman, 2013, p. 165). These researchers also discuss the technique of maximization where the interrogators convey to the accused a solid belief that he or she is guilty and that any attempt to deny guilt will fail (Chapman, 2013, p. 165). Other techniques include invading the suspect's personal space; keeping light switches, thermostats, and other control devices out of the suspect's reach; and using one-way mirrors to allow others to look for signs of fatigue, weakness, anxiety and withdrawal, as well as to read the suspect's body language (Chapman, 2013, p. 165).

Kassin and his co-authors have also argued that use of fictitious evidence has been implicated in a vast majority of documented police coerced confessions as does the use of deception and trickery (Chapman, 2013, p. 165). "Investigator bias" – whereby officers focus on one suspect because they are convinced he or she is guilty, unfortunately also plays a significant role in false confessions (Chapman, 2013, p. 165). The difficulties associated with reading body language and non-verbal cues likewise have the potential to lead to false confessions (Chapman, 2013, p. 165). It is very difficult to determine which of these techniques result in a precise number of confessions that are entirely "valid" or "false" (Chapman, 2013, p. 166).

Typology of confessions

Chapman, Kassin and Wrightsman all discussed the different typology of confessions in order to distinguish the different known types of confessions (Chapman, 2013, p. 168). They isolated

three distinct types of confessions as follows: voluntary, complaint coerced, and coerced-internalized (Chapman, 2013, pp. 168-169). Although theorists have speculated that individuals voluntarily falsely confess for reasons ranging from a desire for fame to a psychological conduct making it difficult to tell reality from fantasy to a desire to aid the actual perpetrator, coerced-internalized confessions are those in which the individual actually believes he or she committed the crime, and this type is one of the most difficult to comprehend (Chapman, 2013, p. 169).

Canada's findings

In *R. v. Oickle*, in 2000, the Supreme Court of Canada acknowledged the existence of “hundreds of cases where confessions have been proven false by DNA evidence, subsequent confessions by the true predator, and other such independent sources of evidence (Chapman, 2013, pp. 167-168). Given the role of false confessions in wrongful convictions, that court urged for a study of why false confessions occur. Likewise, so should the United States.

Harmless error doctrine

In 1991, the criminal justice system witnessed another tide-changing event with the U.S. Supreme Court decision *Arizona v. Fulminante* (Kassin & Sukel, 1997, p. 27). According to Kassin and Sukel (1997), the primary rationale for excluding coerced confessions from the trial record was that although certain situations may increase the risk of false confessions, such information might unduly influence the jury (Kassin & Sukel, 1997, p. 29). As such, convictions were routinely reversed whenever an appeals court found that a coerced confession was erroneously admitted at trial (Kassin & Sukel, 1997, p. 29). In the case of Oreste Fulminante, Mr. Fulminante was convicted and sentenced to death for the murder of his 11-year-old stepdaughter (Kassin & Sukel, 1997, p. 29). There was no evidence linking him to the murder, but while serving time in prison for an unrelated crime, he was befriended by Anthony Sarivola,

a fellow inmate who was actually a paid FBI informant posing as an organized crime figure (Kassin & Sukel, 1997, p. 29). Sarivola warned Fulminante that other prisoners would attack him because of a rumor that he was a child killer – and that he would protect him in exchange for “the truth” (Kassin & Sukel, 1997, p. 29). Using fear for his safety, Sarivola obtained a confession from Fulminante – who had a low IQ, a slight physical stature, and difficulty coping with prison life (Kassin & Sukel, 1997, p. 29). Represented by counsel, he later sought to suppress the statement, but the trial judge denied the motion and ruled that the confession was not coerced (Kassin & Sukel, 1997, p. 29). On appeal, the Arizona Supreme Court disagreed and ordered a new trial (Kassin & Sukel, 1997, p. 29). The state petitioned for certiorari to the United States Supreme Court. In a 5-4 decision, the U.S. Supreme Court conceded that the confession was coerced and it admittedly found the statements to be “prejudicial error” (Kassin & Sukel, 1997, p. 29). However, despite existing prejudice, contradicting the long history of remands for this type of evidence, the Court stated that in certain situations (as when a confession is cumulative or when there is sufficient corroborating evidence), a wrongly admitted confession may be subject to the “harmless error” rule (Kassin & Sukel, 1997, p. 29). To determine whether such a confession was harmless beyond a reasonable doubt, an appellate court would thus review all the evidence and examine the error in context of the trial as a whole (Kassin & Sukel, 1997, p. 29). Essentially, the Court argued that “admission of an involuntary confession is a ‘trial error’ similar in both degree and kind to the erroneous admission of other types of evidence” (Kassin & Sukel, 1997, p. 29).

Mock trial experimental study

Motivated by *Fulminante*, in published findings of an experimental study, Kassin and Sukel conducted two experiments using a mock jury (Kassin & Sukel, 1997, p. 39). One tested the weight juries gave confession evidence providing variations of the nature and type of confession evidence (Kassin & Sukel, 1997, p. 39). In the second experiment, they measured the impact the knowledge of the confession had on the verdict (Kassin & Sukel, 1997, p. 39). It is important to consider the ways in which the results departed from the pattern that would be prescribed by law (Kassin & Sukel, 1997, p. 40). They found specifically, 19% of the participants in the baseline control group voted guilty (Kassin & Sukel, 1997, p. 40). The conviction rate increased, as it should, to 63%, when there was evidence of a low-pressure admissible of a confession (Kassin & Sukel, 1997, p. 40). In the second part, had participants done as they should in discounting the confession in a high-pressure situation and/or when admonished to disregard it, then the conviction rate would not differ significantly from that obtained in the control group of 19% (Kassin & Sukel, 1997, p. 40). In contrast, the conviction rates did rise in these situations indicating harmless error does not work. In the high pressure-inadmissible group in which there were two independent bases for discounting, the conviction rate remained high at 44%, more than double the 19% conviction rate on the no-confession control group (Kassin & Sukel, 1997, p. 43).

DNA's benefit to the criminal justice system

DNA exoneration has had a tremendous impact of the criminal justice system in little more than a decade (Berger, 2006, p. 320). DNA testing has shown to be an effective tool to prove both innocence and guilt. It has been used to call into question the reliability of confession evidence generally and to review police interrogation practices. In 1996, the Institute of Justice,

published an eye-opening study entitled *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, which documented twenty-eight cases of inmates serving long sentences were able to secure their release on the basis of DNA testing (Berger, 2006, pp. 320-321). Because of the special concerns over unjustified incarcerations, the U.S. Attorney General at the time, Janet Reno ordered a commission to make recommendations that would enable the innocent to gain relief at an accelerated pace (Berger, 2006, p. 321). In response, in 1999 the report was published and circulated widely (Berger, 2006, p. 321). By the time the report was completed, an additional 40 vacated convictions were obtained as a result of exculpatory DNA results (Berger, 2006, p. 321). Following the report, the legal structure radically changed throughout the U.S. (Berger, 2006, p. 321). Legislative bills addressing procedures over requests for post-conviction DNA testing were presented to state legislatures everywhere (Berger, 2006, p. 321).

Nonetheless, the DNA exonerations did make an enormous impact on fundamental assumptions about the American criminal justice system and how it operates (Berger, 2006, p. 321). Perceptions about guilt and the court process fell under scrutiny by jurors. Identified were three interrelated changes to the system: (1) attitudes changed about the desirability of death as a punishment for criminal behavior; (2) concerns grew about the operation of forensic laboratories; and (3) the attention to forensic science increased dramatically (Berger, 2006, p. 321).

Most profound about the advent and application of DNA analysis in criminal proceedings is, one, the realization that wrongful convictions do occur and, two, that the executive branch's historical right to grant pardons was insufficient to bring about justice. DNA testing is now done routinely while processing crime scenes, and the process is correctly viewed as the most remarkable forensic tool we have ever had (Berger, 2006, p. 322).

Like Berger, Bond and Hammond (2008) studied the value of DNA in an article for the *Journal of Forensic Sciences* from the perspective of the United Kingdom. They describe DNA evidence as a standard forensic technique for investigating and solving a wide spectrum of crime types from property crime (burglary and auto-theft) to serious and major crime such as murder and sexual assaults (Bond, 2008, p. 797). DNA material recovered from a crime scene is processed in order to produce a DNA offender profile (Bond, 2008, p. 797). Bond and Hammond found that DNA supported prosecutions were faster than cases without DNA evidence. For example, in cases of residential burglary, when a DNA match was obtained, the expected time elapse between the report of the offence and the day charges were filed significantly dropped from an average of 89 days to less than 45 days (Bond, 2008, p. 797). Also, they reported that the fast tracking of the DNA did, indeed, lead to more suspects being charged as a result of DNA matches although there was no evidence to suggest that the initiative had a crime reduction effect (Bond, 2008, p. 797). In other words, it would appear that the tracking of more criminal offences than rape and murders as once done by the United States appeared to cut down suspect identification time nearly by 50%.

Clow, et al. (2012) published research findings about the public perceptions concerning wrongful convictions. At the time of the article nearly 13 years passed since the NIJ's publication concerning DNA exonerations. The article stated that that as of January 10, 2012, there were over 280 post-conviction DNA exonerations brought to light. Of notable importance for future studies concerning released exonerated inmate cases, the researchers were surprised to hear six of the 15 individuals who were interviewed expressed concerns with the guilty who were not convicted (Clow, 2012, p. 1426). That was a most important question, in that while innocent persons were in custody serving out crimes they did not commit, the real offenders

remained at large, and may have continued offending in the absent of their identification, arrest, and deserving conviction.

House, et al., (2006), Canadian researchers, consistent with the findings of preceding researchers in the United Kingdom and the United States, they reported that forensic analysis of DNA had proved to be a useful procedure for the resolution of criminal investigations. They also noted that wrongly convicted persons were also being exonerated because their unique DNA profile did not match the DNA profile derived from biological trace evidence at the crime scene (House, et al., 2006, p. 62).

Use of DNA to prove guilt and innocence

Locard's Exchange Principle is said to be the cornerstone of forensic science in general and in crime reconstruction specifically (Turvey & Petherick, 2009, p. 122). It has come to refer to the belief that every contact between two objects leaves a trace (Turvey & Petherick, 2009, p. 122). One explanation from Locard himself, found in *La Police et Les Methodes Scientifiques*, helps us understand what he actually meant (Locard, 1934, pp. 7-8).

Searching for traces is not, as much as one could believe it, an innovation of modern criminal jurists. It is an occupation probably as old as humanity The principle is this one. Any action of an individual, and obviously, the violent action constituting a crime, cannot occur without leaving a mark. What is admirable is the variety of these marks. Sometimes they will be prints, sometimes simple traces, and sometimes stains (Turvey & Petherick, 2009, p. 122). Turvey and Petherick assert:

Forensic scientists have almost universally accepted the Locard Exchange Principle. This doctrine was enunciated early in the 20th century by Edmond Locard, the director of the first crime laboratory, in Lyon, France. Locard's Exchange Principle states that with

contact between two items, there will be an exchange of microscopic material. This certainly includes fibers, but extends to other microscopic materials such as hair, pollen, paint, and soil.

(Turvey & Petherick, 2009, p. 122). By recognizing, documenting, and examining the nature and extent of evidentiary traces and exchanges in a crime scene, Locard postulated that criminals could be tracked down and then later associated with particular locations, items of evidence, and persons (i.e., victims) (Turvey & Petherick, 2009, p. 122). Well before his time, the advent of DNA analysis has validated Locard's Exchange Principle. Offenders routinely leave their trace DNA at crime scenes, on murder weapons, with victims, which link them to the crimes committed.

House, et al. (2006), was a remarkable study which recognized power DNA has to protect society, in two regards: (1) ensuring the protection of society through the detention, assault, and conviction of guilty offenders, and (2) in the exoneration of others wrongfully convicted (House, et al., 2006, p. 63). While confessions may later be shown to be false or coerced, DNA cannot lie.

Need for reliable arrest and conviction rates

DNA has apparently increased prosecution success rates. Writing for the *Journal of Investigative Psychology & Offender Profiling*, in 2012, Lammers, et al. claimed that before DNA offender tracking, only 20% of all reported crimes led to arrests in Western countries (Lammers et al., 2012, p. 13). That percentage, known as the clearance rate, traditionally has been viewed as primary measure of police performance (Lammers et al., 2012, p. 13). But there is more to it than that. Solving crime is crucial to maintain the legitimacy of the criminal justice system and the effectiveness of any punishment (Lammers et al., 2012, p. 13). Low clearance

rates will negatively influence public confidence in the criminal justice system, not just confidence in the police (Lammers et al., 2012, p. 13).

Since the mid-1980s, DNA extract from physical evidence recovered at crime scenes have become routinely compared with DNA profiles generated from suspect biological samples (showing guilt) or from other crime scenes (showing serial conduct) (Taylor, et al., 2007, p. 851). The Federal Bureau of Investigation's DNA Index System (CODIS) is searchable by any police agency, has led to rising expectation that DNA will solve past crimes and future crimes (Taylor, et al., 2007, p. 851). These expectations have also led to a dramatic expansion of the samples collected for DNA analysis from convicted offenders to arrestees and from beyond felons to misdemeanants in effort to cast a broader net to catch more offenders (Taylor, et al., 2007, p. 851).

Taylor et al., identified four purposes of DNA offender legislation, to wit: (1) to identify possible perpetrators; (2) to solve crimes; (3) to exclude suspects; and (4) to deter potential offenders and detect recidivists (Taylor, et al., 2007, p. 852). The Taylor paper only focused on the deterrence value.

Recommended policy changes

Establishment of legislative policy favoring forensic evidence

Turning to *Escobedo v. Illinois* (1964), Congress has a duty to restore public confidence in the criminal justice system, it should protect the innocent from being falsely accused and convicted, and it should protect society through the encouragement of skillful investigations by law enforcement rather than allow law enforcement to rely on questionable interrogations tactics which have been responsible for many false convictions of the past. This legislation should quote the *Escobedo* assertion as the act's legislative intent favoring skillful police investigations over confession evidence. However, the act should not disallow confession evidence. When

confession evidence is obtained it is a crucial piece of evidence for the prosecution so long as the evidence is supportive of the truth and not merely to secure a conviction at all cost. The act should promote the careful collection and analysis of DNA evidence wherever possible for the investigation of violence and serious crimes, for burglary and auto theft cases, and when trace evidence is likely to be obtained from trace evidence, including stains, human body fluids and other material known to have belonged to the offender.

The accurate and proper analysis of crime scene DNA trace evidence has shown to be more reliable to prove guilt than confession evidence. Enacting policy that favors DNA collection to investigate crime over the use of confession evidence as the primary source to secure a conviction will satisfy judges and jurors as they deliberate, and this will improve public perceptions concerning law enforcement, prosecution, and the criminal justice system.

Establishment of policy overturning harmless error doctrine

As part of the act, Congress should include a provision that effectively overturns *Arizona v. Fulminante* (1991). Whenever an appellate court finds a former conviction relied on confession evidence, the case should be remanded to the trial court for a new trial. It is never harmless error for a trier of fact to hear confession evidence. As shown by Kassin and Sukel's experimental study, the harmless error doctrine should not apply to the accused's own statements. Statements rendered from the accused are prejudicial in that all too often they are given greater weight than other forms of evidence.

Moreover, as part of the act, when a confession has been obtained, Congress should require the interrogations and alleged confessions to be recorded by law enforcement to ensure a proper review of confessions for voluntariness of the suspect's statements. Law enforcement should

never resort to coercion as a means to obtain a confession. Confession evidence discriminates against the poor, ethnic and intellectually disadvantaged.

DNA collection update and the future

Recently, the United States Supreme Court in *Maryland v. King* (2013) upheld the post-arrest collection of DNA evidence concerning the 2009 arrest of Alonzo King (LET, 2013, p. 48). The collection was subsequently identified as an offender profile of a previous crime (LET, 2013, p. 48). The admission of the DNA profile led to the Alonzo's conviction. In the ruling the Court compared the procedure to fingerprinting and photographing the arrestee (LET, 2013, p. 48). In fact the Court referred to the DNA collection process as DNA fingerprinting (LET, 2013, p. 48). The decision has increased fears of big brother and the speculation that one day, DNA may be collected at birth or some other pre-arrest occasion. In reality, if the identification of an offender was certain, then DNA profile of every man, woman, and child would serve that end. However, the fear of the ultimate form of abuse is also present. Having a complete inventory of everyone leaves open the possibility that a DNA profile could be falsely identified as the offender linking the crime to an innocent non-offender.

Opposing view to empirical findings

Frantzen's 2010 law enforcement participatory study

In light of the volume of empirical studies and the articles being generated against the primary use of confession evidence by law enforcement, one would expect the response to be in defense of the practice providing empirical findings showing the reliability how case clearances are mostly accurate, and urging for the continued widespread promotion and use of confession evidence by police investigators. In the alternative, one might expect to read supported findings pointing out that the number of exonerations is minuscule to the number of valid confessions and rightful convictions. In contrast, that hasn't been the case. As further research on the topic as

revealed, the closest opposition was found to be a call for the status until further research can be conducted on the phenomenon of false confessions.

Most recently, Durant Frantzen, a professor of the University of Texas A & M, had his 2006 research findings published in the May/June 2010 issue of *Police Practice & Research*. Frantzen's 2006 research involved a mixed method approach of quantitative and qualitative data. Specifically, his study professed exploring the nexus among interrogations tactics, corroborating evidence, and case resolution (Frantzen, 2010, p. 227). According to the report, the study provided current insight into the nature of police interrogation from experience police officer's perspectives (Frantzen, 2010, p. 227). These volunteer participants were from the police departments of Austin, Laredo, San Antonio, Houston and Round Rock (Frantzen, 2010, p. 229).

The first part of the study included 43 voluntary police participants from several police agencies in Texas, who responded to mailed surveys, and the second part involved 18 police officials were selected for follow-up interviews, comprised of detectives, sergeants and one lieutenant; holding an average of 9.7 year of police experience (Frantzen, 2010, p. 229). The interviews lasted approximately 30 minutes each.

Frantzen evaluated the results which suggested a flaw in Kassin's empirical work, claiming "Due to recent advances in technology and training with regard to police interrogations, the study of the psychology surrounding false confessions will inevitably become more contentious" (Frantzen, 2010, p. 237). However, without further elaboration on the conclusion, Frantzen then recommended for additional studies be conducted in multiple regions around the United States so that police administrators could draw their on interferences from the research (Frantzen, 2010, p. 237). He reported that future researchers should attempt to establish a nexus between

interrogation training techniques and identifiable contextual variables such as the nature of existing evidence and the type of crime investigated (Frantzen, 2010, p. 237). Frantzen apparently believes that once accomplished new holistic, effective strategy to police interrogations may be developed (Frantzen, 2010, p. 237). The two stated views in the conclusion appear to directly contradict each other. Why would interrogation techniques have to change if “technology advances and training” will undermine the phenomenon of false confessions? Implicit in the statement is a call for change in policy as the main theme of this paper and the consortium of other researchers express.

Interrogation strategies not supported by practitioners

The truth is Frantzen’s own findings discredit current interrogation strategies in use. In Frantzen’s study, participatory officers were asked about their perceptions on various interrogation techniques, and the officers asked about their experience on the effect of *Miranda* warnings on interview suspects. Despite the developing 60-year-long history of police interrogation techniques and training, Frantzen’s participating officers’ support for the different promoted strategies were surprising low. Concerning the application of *Miranda*, the majority of the officers’ interviewed (n = 77%) admitted to actively avoiding situations where *Miranda* requirements would be necessary. They deliberately avoided in-custody interrogation in favor of non-custodial interviews in order to avoid *Miranda* impediments in order to obtain admissions without any warnings to remain silent. Despite the confessed amount of interrogation training by the participants, Frantzen urged for more training despite law enforcement’s 60-year experience of interrogation strategies.

History of interrogation use and methods

In contrast to Frantzen's argument, confessions have become one of the most important types of evidence for solving crimes (Leo & Liu, 2009, p. 381). Because criminal suspects rarely spontaneously confess, police detectives regularly employ interrogation techniques to overcome denials and elicit confessions (Leo & Liu, 2009, p. 381). The most relied on techniques are those which employ psychological pressure, as opposed to physical force to elicit a confession (Leo & Liu, 2009, p. 382). Psychological interrogation methods first emerged in the early 1940s (Leo & Liu, 2009, p. 382). Since then, Leo and Liu (2009) describe that police authors have published countless interrogation training manuals on the topic of interrogation methods and psychological techniques, and also that each year tens of thousands of police attend training workshops where they are taught how to employ these different techniques (p. 382).

Furthermore, over the years, these psychological interrogation methods have become more specialized and sophisticated, and arguably more effective (Leo & Liu, 2009, p. 382). They rely on a multi-step psychology of influence and persuasion to accomplish their goal of moving guilty suspects from denial to admission (Leo & Liu, 2009, p. 382). Psychological interrogation methods are supposedly designed only for use on guilty parties (Leo & Liu, 2009, p. 382). Leo and Liu (2009) reiterated the problem when these techniques are used in innocent persons, being that they can sometimes lead to false confessions (Leo & Liu, 2009, p. 382).

Various categories of interrogation evidence

In Frantzen's study (2010), he explained most of his participants initially reported that the suspect's simple confession to the crime, without corroboration, was insufficient to clear a case (Frantzen, 2010, p. 229). The participating officers were asked to identify which type of evidence they used to corroborate a confession and to make a determination about the level of

importance for each. The categories of evidence they had to choose from included ‘incriminating physical evidence at crime scene,’ ‘the offender’s knowledge of property stolen or victim characteristics,’ ‘the offender’s knowledge of offense location,’ and ‘the offender’s description of the offense premises’ (Frantzen, 2010, p. 229). Although it does not specify, ‘incriminating evidence at the crime scene’ would have to include offender DNA, even trace evidence. One variable, the ‘offender’s simple admission to the offense’ was excluded for the purpose of testing the hypotheses regarding corroborative evidence (Frantzen, 2010, p. 229).

The participants were then shown a list of 12 interrogation strategies in use to which the officers were to indicate whether each approach was ‘effective,’ ‘ineffective,’ or ‘no response’ (Frantzen, 2010, p. 229). In addition, respondents were requested to elaborate their answers describing an experience where the strategy was employed in support of their answer (Frantzen, 2010, p. 229). The 12 techniques identified were defined as (a) appeal to the suspect’s conscience, (b) identify contradictions in suspect’s story, (c) use praise or flattery, (d) offer moral justifications/psychological excuses, (e) employ behavioral analysis questions, (f) appeal to the importance of cooperation, (g) appeal to the detective’s expertise/authority, (h) confront the suspect with existing evidence of guilt, (i) minimize the moral seriousness of the offense, (j) undermine the suspect’s confidence in denial of guilt, (k) invoke metaphors of guilt, and (l) appeal to the suspect’s guilt (Frantzen, 2010, p. 229).

The support for any different strategy type did not exceed 33.3% ($n = 6$, out of 18) for all of the strategies. The majority of participants’ selections indicated those techniques that they felt were particularly effective or ineffective according to their own past experiences (Frantzen, 2010, p. 232). Additionally, there were participants who did not designate specific techniques from the main list but at some point later in the interview indicated that one or more strategies

were either effective or ineffective (Frantzen, 2010, p. 232). Adjustments were made accordingly to reflect which ones were effective and not effective, respectively.

Frantzen's results indicated that respondents perceived the technique of offering moral justifications and psychological excuses to be among the most effective interrogation strategies (n = 6, 0, 12) (Frantzen, 2010, p. 232). The next favored strategy was confronting the suspect with existing evidence of guilt (n = 6, 4, 10), that participants claimed worked well when used strategically during interrogations (Frantzen, 2010, p. 233). In third place, participants (n = 5, 2, 11) emphasized the importance of building strong rapport with the suspects before asking them incriminating questions (Frantzen, 2010, p. 233). Participants (n = 3, 3, 12) were divided on the issue of the effectiveness of the Reid technique (Frantzen, 2010, p. 233). Most participants (n = 2, 4, 12) who shared on the use of praise or flattery offered that it was not an effective way to get suspects to admit to crimes, some indicated the strategy often backfired (Frantzen, 2010, p. 235).

***Miranda* avoidance practice**

Frantzen reiterated in the report that *Miranda v. Arizona* (1966) held that police officers shall inform custodial suspects of their right to remain silent and of opportunity for appointed counsel (Frantzen, 2010, p. 229). The requirement was reaffirmed in *Dickerson v. United States* (2000) (Frantzen, 2010, p. 229). The responsibility for provide a *Miranda* warning was a constitutional safeguard warning that such that custodial statements may be entered into evidence so long as the statements were not obtained through deliberate coercion or improper tactics (Frantzen, 2010, p. 229). Subsequently, in *Missouri v. Siebert* (2004), the Supreme Court said that certain 'two-step' interrogation techniques that did not employ adequate curative measures were in violation of *Miranda* and thus unconstitutional (Frantzen, 2010, p. 229). *Seibert* recognized the inherent

temptation for law enforcement toward avoiding the *Miranda* rule (Frantzen, 2010, p. 229).

Frantzen admits, though, it is unclear to what degree officers are willing to interrogate outside of *Miranda* (Frantzen, 2010, p. 229).

Fourteen participants (n = 77%) indicated that the *Miranda* requirement was not an impediment to suspect interrogations, primarily they felt that most people were willing to provide statement to police outside of custodial (Frantzen, 2010, p. 235). Noncustodial statements are beyond *Miranda* warnings. For this reason, participants stated that they prefer conducting noncustodial as opposed to custodial interrogations (Frantzen, 2010, p. 235). One participant explained that most people don't understand the legal implications of their actions (Frantzen, 2010, p. 235). One participant explained that he does not prefer to give the *Miranda* warning if doesn't have to adding most suspects are willing to speak with officers (Frantzen, 2010, p. 235). Others also explained that many suspects are willing to waive their rights because they would prefer to lie to officers instead of appear uncooperative (Frantzen, 2010, p. 235).

Training

Of the 18 participants who agreed to be interviewed, some officers (n = 7) discussed having completed some type of formal interview and interrogation training, the most popular being the Reid technique (Frantzen, 2010, p. 231). The eleven others stated that they had not received formal interrogation training, but they did express becoming experienced with various techniques while serving on-the-job (Frantzen, 2010, p. 231). Some of these interviewed informed Frantzen that interview training was not a requirement for their agency hence they had no obligation to complete any course concerning interrogations and interviews (Frantzen, 2010, p. 231).

Summary and conclusion

We continue to learn from history, both ancient and modern, that a criminal justice system which comes to depend on the ‘confession,’ will in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently sourced through skillful investigation. This was the assertion stated in *Escobedo v. Illinois* (1964), which should be restored. As the Innocence Project has shown, more than 20-25% of the false convictions of exonerees were the product of false confessions, many of them coerced. Even the Frantzen study in support of law enforcement’s use of interrogation strategies tends to support a different approach to acquire case clearance and convictions.

Meanwhile, DNA analysis has proven itself not to discriminate. Legislation should be effected to favor the utilization of DNA analysis over confession evidence as the most reliable source to convict offenders. The anticipated outcome of these changes would restore public confidence in the criminal justice system. The public is shaken by the news of false convictions and due to the sensationalizing of high profile cases where confessions were later demonstrated to be incompetent. The public confidence runs high concerning DNA evidence.

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