FALSE CONFESSIONS AND FUNDAMENTAL FAIRNESS: THE NEED FOR ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS*

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'If the evidence shows I was there and that I killed her, then I killed her, but I don't remember being there.' — Richard Lapointe[1]

'Boy, it's almost like I'm making it up, but I'm not . . . It's like I'm watching a movie . . . like a horror movie.' — Paul Ingram[2]

'The psychological games that are played during an interrogation . . . are difficult at best to understand: assured by authorities you don't remember things, being led to doubt your own memory, having things suggested to you only to have those things pop up in a conversation a short time later but from your own lips.' — Peter Reilly[3]

OFFICER: What besides a rope was around her ankles? Something else. This is another test. I know and you know. Just think. Come on, John.
JOHNNY LEE WILSON: I'm thinking.
OFFICER: What are some things that could be used?
WILSON: Handcuffs, I think.
OFFICER: No, no. Wrong guess. What are some things you could tie somebody up with? A rope is all that he had, but that tells me something, John. That tells me something. That tells me something. I told you it's important that you are straight with me. You took the tape up there.
WILSON: Huh?
OFFICER: You took the tape up there, didn't you?

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[1] Statement from one of Richard Lapointe's three written confessions to raping and murdering Bernice Martin, the 88-year old grandmother of his wife. *See* CONVICTING THE INNOCENT: THE STORY OF A MURDER, A FALSE CONFESSION, AND THE STRUGGLE TO FREE A "WRONG MAN" 15 (Donald S. Connery ed., 1996) (hereinafter CONVICTING THE INNOCENT).

[2] Statement made at the end of an early interrogation of Paul Ingram, who confessed to long-term satanic cult sexual abuse of his daughters. SEE LAWRENCE WRIGHT, REMEMBERING SATAN: A TRAGIC CASE OF RECOVERED MEMORY 48 (1994).

[3] Speech by Peter Reilly at "Convicting the Innocent," a public forum in Hartford, Connecticut, September 16, 1995, organized by the Friends of Richard Lapointe and the Association of Retarded Citizens of Connecticut (hereinafter Hartford forum), *in* CONVICTING THE INNOCENT, *supra* note 1, at 85. In 1973, Reilly, then eighteen years old, confessed while under police interrogation to having murdered his mother.

WILSON: I didn't have anything with me. I didn't have tape or anything. I think Chris had the tape.[4]

I. INTRODUCTION

Speaking at a 1995 public forum titled "Convicting the Innocent" in Hartford, Connecticut, University of California at Berkeley social psychologist Richard Ofshe, a frequent expert witness in false confession cases,[5] predicted that if he handed any member of the audience the transcripts of ten interrogations and the resulting confessions, they could sort them accurately into two piles, true and false.[6] According to Ofshe, "[t]he difference between a true and a false confession is glaringly obvious when you see them side by side."[7] Whether the difference is that readily apparent, the fact remains that in the American criminal justice system today, judges and jurors generally do not have the opportunity to examine an objective record of interrogations of criminal suspects who give confessions. In the vast majority of cases, the police have not electronically recorded these proceedings. Instead, the description of what happened in the interrogation room typically depends on the memory and good faith of the parties involved. When disagreements arise, it comes down to the testimony of a law enforcement official versus that of a criminal defendant—frequently a man charged with a brutal crime such as rape or murder. Compounding the usual built-in disparity of credibility in this "swearing contest" is the particularly thorny Catch-22 that a defense attorney faces when disputing an allegedly false confession:

> On the one hand, he must convince a jury that the defendant is unreliable enough to have signed a false confession. But he also must convince a jury that the defendant is reliable enough that his version of what happened during the questioning should be believed over that of a police officer.[8]

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[4] Excerpt from the four-hour, tape-recorded interrogation of Johnny Lee Wilson, from a visual display used in a speech by Michael Atchison, Wilson's attorney, *in* CONVICTING THE INNOCENT, *supra* note 1, at 120-21. Wilson, who is mentally retarded, pleaded guilty to first-degree murder and served eight and a half years in prison before receiving a pardon from the governor of Missouri, Mel Carnahan, on September 29, 1995. *See id.* at 196. The victim had been tied up with duct tape, a fact that was not publicly known. The "Chris" referred to by Wilson is one of two other young men whom he implicated in the crime. *See id.* at 121.

[5] Movie buffs may remember Ofshe as the expert witness shown in the disturbing documentary film, PARADISE LOST, produced by the Home Box Office and released to cinemas around the country last year. Ofshe testified at the trial of Jessie Misskelly, Jr., a mentally retarded teenager who, under only partially recorded police interrogation, confessed to murdering three small boys in rural Arkansas. He implicated two other local youths who were subsequently tried jointly and convicted. There was no direct physical evidence linking any of the three teenagers to the brutal crime. *See id.* at 95-106.

[6] *See* Speech by Richard Ofshe, *in* CONVICTING THE INNOCENT, *supra* note 1, at 95.

[7] *Id.* at 95-96.

[8] Alex Wood, *Without Tape, Confession Can Be Unassailable*, CONVICTING THE INNO-

While the traditional concern of the law focuses on ensuring the voluntariness and reliability of the defendant's confession by protecting him from actual or threatened harm, psychological advances suggest that more subtle forms of coercion exist than physical beating or threats. Several recent high-profile cases of allegedly false confessions share a constellation of factors: intense public pressure on the police to solve a violent crime; a criminal suspect who is mentally or emotionally vulnerable because of youth, recent shock, or organic brain abnormality; a lengthy interrogation without the presence of a lawyer or a friend; and police misrepresentations about having extrinsic evidence implicating the suspect in the crime. The question then arises whether the state should have a duty to preserve a verbatim account of the interrogation when it relies on a confession in a criminal prosecution, in order to protect the defendant's right to a fair trial and reduce the incidence of wrongful conviction due to false confession in our criminal justice system. Part II of this article examines several examples of false confessions. Part III discusses the psychology of false confessions. Part IV looks at the interrogation techniques frequently employed in extracting confessions from suspects. Part V explains the importance of recording interrogations. Part VI examines the importance of confessions as evidence of guilt. Part VII discusses the current use of recording. This article concludes that interrogations should be recorded in order to prevent wrongful convictions based upon false confessions.

II. INSTANCES OF FALSE CONFESSIONS

A. *Richard Lapointe*

On March 8, 1987, 88-year old Bernice Martin was raped, stabbed, strangled, and left to die in an apartment fire at a senior citizens complex in Manchester, Connecticut. More than two years later, with the crime still unsolved, local authorities invited Richard Lapointe, the husband of the victim's granddaughter, to come to the police station to help them with their investigation.[9] Lapointe suffers from a congenital brain defect known as Dandy-Walker syndrome, which was not diagnosed until he was fifteen years old, well past the age when surgical intervention would have been most effective in preventing abnormal development in the brain. Although Lapointe eventually had five operations on his brain, his condition rendered him hard of hearing, severely nearsighted, lacking in coordination, and mentally slow.[10] Lapointe was interrogated for nine and a half hours without legal counsel. Although one of the interrogators also interviewed Lapointe's wife during this time period and recorded that conversation,[11] the

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CENT, *supra* note 1, at 46.

[9] *See* CONVICTING THE INNOCENT, *supra* note 1, at 1.

[10] *See id.* at 9.

[11] *See id.* at 16. According to Connecticut psychologist Dr. John Nolte, this tape was made for the purpose of protecting the officer against a possible subsequent accusation of improper sexual advances. *See id.* at 155.

lengthy interrogation of Lapointe was not recorded.[12] Lapointe signed three "confessions" which officers had written.[13] On June 30, 1992, a Connecticut jury found Lapointe guilty of capital felony murder and eight related charges.[14] He was sentenced to life imprisonment without the possibility of parole, plus 60 years.[15] On appeal to the Connecticut Supreme Court, one of the arguments made by Lapointe's attorney was that the court should require police to record electronically all interrogations, where feasible, in order for the confessions they produce to be admissible evidence in a criminal case. The Connecticut Supreme Court denied Lapointe's appeal in July, 1996.[16] Lapointe remains in prison today. His wife has divorced him.[17]

B. *Peter Reilly*

On the night of September 28, 1973, Barbara Gibbons was killed at her home in Falls Village, Connecticut.[18] Her eighteen-year old son, Peter Reilly, returning from a meeting at the local Methodist church, discovered his mother on the floor, practically naked and covered in blood.[19] Believing that he heard faint sounds of breathing from his mother, Reilly called the Madow family, who were members of the local volunteer ambulance squad.[20] Then he called a doctor and the hospital.[21] The hospital in turn contacted the State Police, who arrived just after 10 p.m.[22] Reilly, who stood shaking in a corner while medical and law enforcement personnel investigated, was soon told that his mother, the only parent he had ever known, was dead.[23] Just before 11 p.m., still on the scene, Reilly waived his Miranda rights and gave a statement about his whereabouts that evening and his discovery of his mother's body.[24] Police strip searched both Reilly and seventeen-year old Geoff Madow, who had arrived at the house before the police.[25] Although police told the Madows that they were only taking Reilly to the barracks for brief questioning and then would bring him to stay the night with them, they continued interrogating Reilly all the next day.[26] The interroga-

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[12] *See id.* at 1.

[13] *See id.* at 2.

[14] *See id.* at 3.

[15] *See id.*

[16] *See* State v. Lapointe, 678 A.2d 942 (Conn. 1996), *cert. denied*, 117 S. Ct. 484 (1996).

[17] *See* CONVICTING THE INNOCENT, *supra* note 1, at 25.

[18] *See* DONALD S. CONNERY, GUILTY UNTIL PROVEN INNOCENT (1977).

[19] *See id.* at 19.

[20] *See id.* at 28-29.

[21] *See id.* at 29-30.

[22] *See id.* at 21.

[23] *See id.* at 20.

[24] *See id.* at 34-35.

[25] *See id.* at 35-36.

[26] *See id.* at 37.

tion was audio-recorded.[27]

In April 1974, a Connecticut jury convicted Reilly of first-degree manslaughter.[28] The community galvanized support for Reilly. The next month, the judge sentenced Reilly to an indeterminate prison term of six to sixteen years. By that time, the community had galvanized support for Reilly and his friends had raised $60,000 so that he could post bond and be released pending his appeal.[29] In January and February of 1976, the court held a hearing on a motion for a new trial. The court permitted Reilly's new defense attorney, whom playwright Arthur Miller had persuaded to take the case, to present new evidence, including expert psychiatric testimony about Reilly's interrogation and confession.[30] A few weeks later, the judge granted a new trial, referring to Reilly's conviction as "a grave injustice" and stating that a new trial would "more than likely" result in an acquittal.[31] Before the new trial began, the original state's attorney handling the case died.[32] The prosecutor who succeeded him was more skeptical toward the evidence in the case, and he expressed no objection to the defense's motion to dismiss the new manslaughter charge based upon the insufficiency of the evidence.[33] The court granted the motion.[34]

C. *Johnny Lee Wilson*

On April 13, 1986, in Aurora, Illinois, someone attacked 79-year-old Pauline Martz, bound her with duct tape, and burned her house down around her.[35] Johnny Lee Wilson, who is mentally retarded, was twenty years old at the time of the murder.[36] At the scene of the fire, another mentally retarded member of the Aurora community told police that Wilson's brother was involved.[37] Wilson, however, is an only child. Four days later, the police picked up Wilson at a movie theater, ostensibly to identify a lost wallet.[38] Wilson waived his Miranda rights and the police interrogated him for the next four hours, until after midnight.[39] The police recorded the interrogation.[40] After denying his involvement in the crime more than thirty times, Wilson ultimately admitted to having partici-

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[27] *See id.* at 48.

[28] *See id.* at 250-52.

[29] *See id.* at 267-70.

[30] *See id.* at 295-323.

[31] *Id.* at 326.

[32] *See id.* at 335.

[33] *See id.* at 345.

[34] *See id.* For another discussion of the Reilly case, *see* Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 125-28 (1997).

[35] *See* CONVICTING THE INNOCENT, *supra* note 1, at 118.

[36] *See id.*

[37] *See id.* at 119.

[38] *See id.*

[39] *See id.*

[40] *See id.* at 120.

pated in the crime.[41] Wilson pleaded guilty to first-degree murder because he was extremely frightened of receiving the death penalty if the case went to trial.[42] The court sentenced Wilson to life in prison without parole. After Wilson went to prison, Chris Brownfield, while serving time for a different crime, confessed to killing Mrs. Martz and maintained his guilt for more than seven years.[43] Wilson lost his case on appeal to the Missouri Supreme Court.[44] On September 29, 1995, Governor Mel Carnahan, convinced of Wilson's innocence, pardoned him.[45] By that time, Wilson was thirty years old and had served more than eight and a half years in prison.

D. *Paul Ingram*

At a religious youth retreat in Washington state in 1988, twenty-two year old Ericka Ingram began sobbing and said that she had been sexually abused by her father, Paul Ingram.[46] At age forty-three, Ingram was a deputy sheriff and a local leader of the Republican party in Olympia, Washington.[47] Following the retreat, Ericka moved out of the Ingram household.[48] A few weeks later her younger sister Julie followed suit, also alleging that her father had molested her.[49] When initially confronted by his wife, Sandy, Ingram denied all of the allegations.[50] On November 28, 1988, while at work at the sheriff's department, his colleagues interviewed him about his daughters' accusations.[51] The interrogation took place

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[41] *See id.* at 119. Wilson implicated two other people.

[42] *See id.* at 123.

[43] *See id.* at 125.

[44] *See id.*

[45] *See id.* at 196.

[46] *See* WRIGHT, *supra* note 2, at 25. A version of this event suggesting a more passive role for Ericka comes from Karla Franko, a Charismatic Christian invited to speak at the retreat. According to journalist Lawrence Wright, Franko told him that she had been asked to pray over Ericka:

> Almost immediately, she felt the Lord prompting her with information. She stepped back and was silent as she listened to the Lord's urgings. The word 'molestation' presented itself to her. 'You have been abused as a child, sexually abused,' Franko announced. Ericka sat quietly weeping, unable to respond. Franko received another divine prompting, which told her, 'It's by her father, and it's been happening for years.' When Franko said this aloud, Ericka began to sob hysterically. Franko prayed for the Lord to heal her. When Ericka's weeping eventually began to subside, Franko urged her to seek counseling, in order to get to the memories that were causing her so much pain. At no time, says Franko, did Ericka utter a word; she was so scathed and devastated by Franko's revelation that she could do little more than nod in acknowledgment.

Id. at 26.

[47] *See id.* at 3.

[48] *See id.* at 26.

[49] *See id.* at 26-29.

[50] *See id.* at 27.

[51] *See id.* at 5-11.

without a lawyer present.[52] The authorities did not record the first few hours.[53] After that, they recorded the interrogation, though not continuously.[54] The authorities officially took Ingram into custody at the end of the day and placed him on suicide watch.[55]

Interrogations continued for days, often lasting from early morning until seven in the evening.[56] In addition to the investigating detectives, Ingram was frequently interviewed and counseled by both the pastor of the Pentecostal church to which the Ingram family belonged and a Tacoma psychologist who worked with the police.[57] Although his daughters had not initially alleged that the crimes were associated with any satanic rituals, Ingram eventually confessed to a bizarre and complex series of cult crimes, implicating several other men in the community, including other members of the Olympia Sheriff's department.[58] Two other men were also charged with rape along with Ingram.[59] The case gained notoriety as it mushroomed into one of the largest investigations of satanic cult activity in the United States.[60] Although Ingram's daughters ultimately made lurid accusations of the ritual murders of babies and said they had both been impregnated and forced to undergo abortions, there was neither medical evidence nor physical evidence to support their claims.[61]

When prosecutors hired social psychologist Richard Ofshe to consult on the case, Ofshe made every effort to impress upon them his grave reservations about the validity of Ingram's confessions, as well as his concern that an innocent man would be convicted.[62] Dissuaded by his pastor from reading Ofshe's strongly worded report, and urged by his wife not to take the case to trial, Ingram pleaded guilty to six counts of third-degree rape on May 1, 1989.[63] Two days later, prosecutors dropped charges against the two friends whom Ingram and his daughters had named as accomplices in the satanic ritual sexual abuse.[64] Soon afterwards, Ingram began to doubt the validity of his "memories."[65] He hired a new lawyer who filed a motion to withdraw his guilty plea, but it was denied.[66] Ingram told the judge at his sentencing hearing: "I stand before you, I stand before God. I have never sexually abused my daughters. I am not guilty of these

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[52] *See id.* at 7.

[53] *See id.* at 8.

[54] *See id.* at 9. The word "authorities" is used because not every law enforcement person who is conducting an interrogation is a member of the police department.

[55] *See id.* at 11.

[56] *See generally id.*

[57] *See id.*

[58] *See id.*

[59] *See id.*

[60] *See id.*

[61] *See id.*

[62] *See id.* at 177-78.

[63] *See id.* at 184.

[64] *See id.* at 185.

[65] *See id.* at 187.

[66] *See id.*

crimes."[67] Viewing Ingram's denial of culpability as a sign that he would not be amenable to treatment, the judge sentenced Ingram to twenty years in prison, with a possibility of parole after twelve years.[68] Ingram remains in prison today. His wife divorced him.[69]

III. THE PSYCHOLOGY OF FALSE CONFESSIONS

It has long been recognized that, even in the absence of physical coercion, the very process of interrogation has the potential to elicit confessions that are entirely false. Writing in 1924, State's Attorney Homer Cummings of Connecticut justified his refusal to try a man who had confessed to the murder of a priest:

> It was the opinion of the physicians that any confession made by the accused was totally without value, and they were of the opinion also that if they cared to subject the accused to a continuous and fatiguing line of interrogation, accusation, and suggestion, in due course he would be reduced to such a mental state that he would admit practically anything that his interrogators desired. They further stated that this was a common phenomenon with certain types of people, and that where such people are subjected to interrogatories, accusations or suggestions from persons of stronger will, the lesser mind will ultimately succumb and accept the conclusions of the more powerful intellect.[70]

Modern psychology has come a long way towards a more complex and sophisticated understanding of the interplay of factors leading to false confessions. In *The Psychology of Interrogations, Confessions and Testimony*, British psychologist Gisli Gudjonsson describes three types of false confessions.[71] First, there are voluntary false confessions, in which people initiate contact with the police to confess to a crime they did not commit. Motivations for giving voluntary false confessions include the following: (1) seeking notoriety;[72] (2) seeking to expiate either generalized guilt or guilt over past moral transgressions; (3) being unable to distinguish between reality and imagination; and (4) hoping to protect the actual perpetrator of the crime.[73] Second, there are coerced-compliant false confessions, in which the suspect confesses because of "the demands and pressures of the interrogators for some immediate instrumental gain," such as

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[67] *Id.* at 188.

[68] *See id.*

[69] *See id.* at 189.

[70] 15 J. CRIM. L. & CRIMINOLOGY 406, 416 (1924).

[71] *See* GISLI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS, CONFESSIONS AND TESTIMONY 226-28 (1992).

[72] *See* C. RONALD HUFF ET AL., CONVICTED BUT INNOCENT: WRONGFUL CONVICTION AND PUBLIC POLICY 112 (1996) ("In the 1930s, the unsolved murder of Elizabeth Short, a young and attractive California woman who came to be known as the Black Dahlia, brought forth some 2,000 confessions, many anonymous, but all of which consumed considerable amounts of the police force's time in tracking down the deliberately false leads.").

[73] *See* Gudjonsson, *supra* note 71, at 226-27.

ending the interrogation.[74] Finally, there are coerced-internalized false confessions, which occur "when suspects come to believe during police interviewing that they have committed the crime they are accused of, even though they have no actual memory of having committed the crime."[75] Gudjonsson cautions that these three categories probably overlap and are not exclusive.[76] He also underscores the counterintuitive point that perfectly normal people may still confess to crimes they did not commit under the pressures of interrogation.[77]

University of Connecticut psychology professor Stephen Greenspan, president of the Academy on Mental Retardation, referred to the interrogation of Richard Lapointe as "a form of 'gang mind rape,' in which three different police officers—none with any witnesses—proceeded to extract bogus confessions from this exhausted, confused and broken man."[78] Greenspan has identified three

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[74] *Id.* at 227. Researchers Ofshe and Richard Leo have developed a different classification scheme for confessions, replacing the category of coerced internalized confessions with what they term "persuaded confessions," which may or may not be "coerced" in the traditional sense, through threat of harm or promise of benefit. *See* Richard Ofshe and Richard A. Leo, *The Social Psychology of Police Interrogations: The Theory and Classification of True and False Confessions*, 16 STUD. IN LAW, POLITICS AND SOCIETY 189, 215-20 (1997)

[75] *Id.* at 228.

[76] *See id.* at 258. For example, while the case of Paul Ingram is most appropriately categorized as a coerced-internalized false confession, it also presents elements of the need for guilt expiation that is associated with voluntary false confessions. Ingram, in prison four and a half years after his initial arrest and interrogation, had reached the following explanation for his confessions:

> His theory about why he 'remembered' sexual and satanic abuse is that it helped him explain to himself why a man who was ostensibly a good Christian and a loving parent could have mistreated his children. 'I wasn't a good father, I know,' he admits. 'I wasn't there for the kids. I wasn't able to communicate with them as I should have. I never sexually abused anybody. But emotional abuse—you don't like to admit it, but somebody has to. A child is a pretty delicate creature. I did a lot of hollering as a father, and I think that must have intimidated the kids. One time, Julie ran a bath that was too hot and she scalded [her younger brother] Mark. I slapped her. Another time, she tried to run away. I saw her running down the driveway and [her mother] Sandy chasing her. She was about sixteen. I ran out and caught her and pulled her hair and said she was coming back home. I remember hitting Paul Ross [Ingram's son] once on the back of the head, and I kicked him. But I never beat my children. When I got angry, that's when I hollered. There was a lack of affection they should get from a father figure.' Is that all? Certainly that would be the most frightening conclusion of the Ingram case, that the bonds of family life are so intricately framed that such appalling perversions of memory can arise from ordinary rotten behavior.

WRIGHT, *supra* note 2, at 193-94.

[77] *See* GUDJONSSON, *supra* note 71. "The view that apparently normal individuals would never seriously incriminate themselves when interrogated by the police is totally wrong, and this should be recognized by the judiciary." *Id.* at 259.

[78] CONVICTING THE INNOCENT, *supra* note 1, at 150.

characteristics of what he terms a "naive confessor," someone who is factually innocent but nonetheless "a 'sitting duck' for coercive interrogation techniques."[79] These factors are:

> 1. personality factors such as a highly compliant and suggestible style,
> 2. experiential factors such as ignorance of the criminal justice system and lack of understanding of one's legal rights and options, and
> 3. social intelligence factors such as a relative inability to evaluate the intentions, plausibility and danger of threats, promises and deceptions used to manipulate suspects psychologically in interrogation sessions.[80]

Greenspan has explained how each of these factors combined to produce Lapointe's vulnerability to giving a false confession.[81]

In analyzing the Lapointe case, Greenspan was highly critical of the court's excessive reliance on Lapointe's I.Q. of 92, well above the current level that defines mental retardation, in deciding the crucial issue of the admissibility of Lapointe's confession. To a large extent, prosecutors successfully argued that because Lapointe was not retarded, both his waiver of rights and his confession were valid.[82] Greenspan has countered this argument by focusing on Lapointe's social intelligence, an aspect of intelligence unmeasured by the I.Q. test. Greenspan defines social intelligence as "how 'savvy' one is in social situations—that is, . . . how able one is to figure out what others are thinking or feeling, to understand and/or appreciate the significance of social situations, and to anticipate accurately the consequences of one's actions."[83] According to Greenspan, Richard Lapointe is "particularly deficient"[84] in social intelligence:

> [T]he best evidence that Richard is limited in his ability to understand social situations is that everyone who knows him can give many examples of socially unintelligent behavior on his part. That, and the overwhelming evidence of serious brain damage, should not be dismissed as irrelevant because of a number attained on a test of academic intelligence.[85]

Greenspan has described how the very strategies that helped Richard Lapointe cope with his disability would have exacerbated his vulnerability to interrogation:

> As a result of not being diagnosed [as having Dandy-Walker syndrome] until so late, Richard adopted a style of survival that was based on covering up his deficiencies (as is true of many people with serious neurological conditions). He is quick to give people what he thinks they want rather than admit he does not understand something. This was evident to me during his testimony, when the judge once interrupted to advise him that he did not

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[79] *Id.* at 148.
[80] *Id.*
[81] *See id.* at 149.
[82] *See* CONVICTING THE INNOCENT, *supra* note 1, at 149.
[83] *Id.* at 139.
[84] *Id.* at 136.
[85] *Id.* at 143.

> have to agree with everything the prosecutor asked him under cross-examination. This impression was strengthened during a recent interview, when he proved highly suggestible and willing to change a story in order to conform to the pressures and expectations of the examiner.[86]

Knowing that Lapointe was in fact diagnosed by a psychiatrist as having a Dependent Personality Disorder, indicating a high degree of suggestibility, Greenspan observed that Lapointe was doubly at risk of giving a false confession.[87]

One response to the recognition of the phenomenon of false confession is not to allow the police to subject certain groups of vulnerable people to traditional interrogation techniques. Greenspan has proposed this for "children, persons with mental retardation, and persons with other developmental disorders . . . [who] demonstrate considerable naivete in their everyday behavior . . . ."[88] Another approach is the British practice of requiring the presence of a neutral observer, such as a social worker, to assist the mentally disabled during interrogation in order to ensure that they understand their rights and the consequences of their admissions.

Once again, however, it is not just the mentally disabled who are at risk for giving a false confession. The question of how many people, under the circumstances faced by many criminal suspects who waive their Fifth Amendment rights and submit to interrogation by the police, would break down and confess to a crime they did not commit is as intriguing as it is unanswerable. At the Hartford forum, Ofshe relied on an anecdote to suggest that the number might be as high as sixty percent.[89] He related the story of the Phoenix temple murder case, "one of the most important confession cases of the 20th century."[90] Six Thai monks, a nun, and two people affiliated with the Buddhist temple outside of Phoenix, Arizona were murdered, execution style.[91] Because of the international attention, there was tremendous pressure on the local authorities to solve the crime.[92] When a man named Michael McGraw called them from a psychiatric hospital in Tucson to confess involvement in the killings, the authorities neglected to question him over the phone first to see if he actually possessed an insider's knowledge of the crime.[93] Instead, they brought him in for questioning and pressured him to name his accomplices.[94] McGraw gave them the names of five men in Tucson with whom he was acquainted, but who did not necessarily know each other.[95] When the police interrogated the five "quasi-randomly se-

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[86] *Id.* at 138.

[87] *See id.* at 145.

[88] *Id.* at 144.

[89] *See id.* at 97.

[90] *Id.*

[91] *See id.* at 98.

[92] *See id.*

[93] *See id.*

[94] *See id.*

[95] *See id.*

lected"[96] men, three of them confessed to being involved in the mass murder.[97] A few weeks later, the real killers were caught.[98]

IV. Shared Characteristics of the Interrogation Techniques used on Lapointe, Reilly, Wilson and Ingram

A. *Isolation of the Suspect*

Although the cases of Richard Lapointe, Peter Reilly, Johnny Lee Wilson, and Paul Ingram each raise doubts about the validity of their convictions for a unique combination of reasons, many common themes emerge when one examines their interrogations. First and foremost, the authorities isolated the suspects in the interrogation room without a lawyer, family, or friends present. In Peter Reilly's case, the authorities enhanced the effect of Reilly's actual physical isolation by lying to him about more general social isolation.[99] Even though his friends who had expected him to spend the night at their house were extremely concerned about him and even made inquiries about him the following morning, the police told Reilly that no one had asked about him.[100] In retrospect, this particular element of the coercive interrogation seemed to have a big impact among the various traumas weighing on Reilly's mind. When asked by a member of the audience at the Hartford forum why he had confessed if he was truly innocent, Reilly replied:

> I was so tired and so confused and so fatigued from this ordeal, my only family dead, the only people I knew, told by the police that my friends, or I thought my friends, weren't interested, nobody was asking for me. At that point, I would have signed anything. Anything they wanted me to sign, I would have signed.[101]

Furthermore, the police misled Reilly's friends when they tried to see him.[102] The police did not tell them that Reilly was a suspect in his mother's murder.[103] Moreover, when they specifically inquired if Reilly needed a lawyer, the officers gave them a negative response.[104]

Richard Lapointe similarly experienced a great deal of forced isolation. After recanting his first confession, Lapointe asked for a phone call to call his wife or a lawyer.[105] According to journalist Tom Condon:

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[96] *Id.* at 99.

[97] *See id.* For a more detailed account of this case, *see* Ofshe and Leo, *supra* note 75, at 220-21 and 226-31.

[98] *See id.*

[99] *See id.* at 146.

[100] *See* Connery, *supra* note 18, at 51.

[101] Convicting the Innocent, *supra* note 1, at 93.

[102] *See* Connery, *supra* note 18, at 83.

[103] *See id.*

[104] *See id.*

[105] *See* Convicting the Innocent, *supra* note 1, at 15. This was soon after Lapointe recanted his first confession. Apparently, he had only confessed in the first place in order

> [the detective] said he pushed the phone in front of Lapointe, but didn't leave the room or offer any other assistance. He said Lapointe never picked up the phone. Lapointe said when he asked about calling a lawyer, [the detective] told him: 'Later.' It's unclear if Lapointe understood why he needed a lawyer. He said he asked because he'd seen it done on a TV show.[106]

As in the Reilly case, the police misled Lapointe's family members. In fact, Lapointe's mother-in-law and another family member had gone to the police station to see if he needed a lawyer, or to take him home.[107] The police told them that they could not interrupt the interrogation and that Lapointe told them he did not want a lawyer.[108] The police never told Lapointe that his family had come for him.[109]

In both the Lapointe and the Ingram cases, the police used the anxiety produced by this isolation to exploit the suspects' concern for their family members in order to secure their confessions. In Lapointe's case, officers directly threatened to jail his wife and make his child a ward of the state if he did not cooperate.[110] In contrast, the police's approach with Ingram was more sophisticated though not more subtle.

> 'Do you know how badly damaged your daughter is?' asked [psychologist] Peterson, referring in this instance to Julie. 'Eighteen years old, she's a senior in high school, and she can't look at wedding things . . . . She thinks she's responsible for destroying your family.'
>
> 'That she's dirty,' said [Detective] Schoening.
>
> 'She shakes at the thought of having to talk about this stuff,' Peterson continued. 'She's frightened of you.'
>
> 'And she's frightened of whoever this other person is,' Schoening added, once again hypothesizing.
>
> 'She can't name the other person?' asked Ingram. 'I don't want to put her through this, don't get me wrong.'
>
> 'You're putting her through it by not recalling,' said Peterson.
>
> 'Yeah, you are, Paul, 'cuz right now she's havin' a difficult time talkin' about it,' said Schoening. 'You gotta help if you want this stopped or you may have either a suicidal daughter or a dead daughter . . . . She can't take

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to get permission to use the bathroom.

[106] *Id.* at 15.

[107] *See id.* at 17.

[108] *See id.* at 17-18.

[109] *See id.* at 18.

[110] *See id.* at 147. The only direct evidence that this is true is Lapointe's account, as the officers did not record the interrogation. There is, however, evidence that strongly suggests his veracity and accuracy on this issue. Officers made identical, thinly-veiled threats to his wife, Karen Lapointe, who suffers from cerebral palsy, in a contemporaneous police interview at her home which an officer did record. Periodically the officer told her: "Richard is going to get arrested, OK? I don't want that to happen to you, because you're going to have to deal with somebody else taking care of your son. Do you know that?" *Id.* at 16.

> much more of this, Paul. I mean, it's all comin' back to her and she's havin' a real difficult time.'
>
> 'Oh, Lord.'[111]

Ironically, the interrogation team manipulated Ingram's concern for his daughters' welfare in order to get him to "recall" — confess — that he had committed horribly violent and cruel acts against them.

B. *Nature and Length of the Interrogations*

A second theme common to the four cases was the relentless nature and grueling length of the interrogations, ranging from four and a half hours for Johnny Lee Wilson to days and days for Paul Ingram.[112] Ofshe has observed that "[i]nterrogation is a highly stressful experience, and one cannot appreciate it unless one has been there or listened to the full transcript or the full recording of an interrogation. It is not like anything that one has ever seen on television. It is a thousand times more intense."[113] For example, according to Johnny Lee Wilson's attorney, Wilson denied his involvement in the Martz murder more than thirty times during the first two hours of his interrogation at which point the authorities became more confrontational.[114] Peter Reilly described his own twenty-four hour ordeal:

> It becomes a guessing game, as you try to figure out what they want to hear. It's a combination of fatigue and a state of mind that no one in the world could believe this. They keep pushing, and saying maybe you did this, and they suggest things. And then a half-hour later, you pick it up.[115]

In the eloquent metaphor of playwright Arthur Miller, advocate for both Lapointe and Reilly, "Confession can very readily turn into a kind of coin with which to buy one's way out of a frightening and painful situation."[116]

C. *Lying to the Suspect*

A third practice that augments the confrontational and coercive aspects of the interrogation process is how the police often strategically lie to the suspect about both the overall strength of the case against him and their possession of specific pieces of physical evidence tying him to the crime. For example, the detective

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[111] WRIGHT, *supra* note 2, at 44-45.

[112] In another case of claimed false confession, the interrogation lasted for more than 80 hours stretched over four days. Mike Pardue, the suspect, had suffered child abuse and had a learning disability. He was seventeen years old when police interrogated him about three murders in Alabama. He eventually confessed, allegedly after officers beat him. Purdue was convicted in 1973 and remains in prison today. SEE CONVICTING THE INNOCENT, *supra* note 1, at 127.

[113] *Id.* at 108.

[114] *See* Speech by Michael Atchison, *supra* note 4, at 119

[115] *Id.* at 172.

[116] *Id.* at 88.

who elicited confessions from Lapointe began the interrogation by telling him "that the cops had plenty of proof that he did it, knew that he did it, had his fingerprints on a knife found at the scene, and now wanted to know why."[117] They also walked Lapointe past a display chart indicating that they had linked him to the murder of Bernice Martin through DNA testing.[118] Both of these were outright lies, but law enforcement authorities frequently employ deception as a technique which is perfectly legal.[119] Likewise, Wilson's interrogators lied to him when they told him that they had witnesses who identified him as the culprit, as well as laboratory evidence that incriminated him.[120]

First-time suspects are likely to enter the interrogation room with different expectations about the role of police officers from those of seasoned criminals. For instance, the police initially told Richard Lapointe that the reason they wanted to question him was so he could help them find Mrs. Martin's killer. In Greenspan's opinion "[s]uch a statement must have appealed to his need to feel competent and played into his general desire to be helpful."[121] Both Peter Reilly and Paul Ingram had a natural affinity for law enforcement personnel. In fact, Reilly had often thought about becoming a policeman.[122] One of the officers who interrogated him was a friend who had served on a youth center committee with Reilly.[123] Ingram was a deputy sheriff in the very office that investigated his daughters' allegations and conducted his interrogations. Thus, both Reilly and Ingram were especially inclined to trust their interrogators and believe that the interrogators had Reilly's and Ingram's best interests in mind. In a psychologically revealing move, Reilly, effectively an orphan in the wake of his mother's death, politely asked one of his interrogators if he would take Reilly into his home and family.[124]

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[117] *Id.* at 14.

[118] *See id.* at 7.

[119] *See* Comment, *True Blue? Whether Police Should Be Allowed to Use Trickery and Deception to Extract Confessions*, 31 SAN DIEGO L. REV. 729 (1994); *see also* Note, *Guarding the Guardians: Police Trickery and Confessions*, 40 STAN. L. REV. 1593 (1988).

[120] *See* CONVICTING THE INNOCENT, *supra* note 1, at 119.

[121] *Id.* at 145.

[122] *See* CONNERY, *supra* note 18, at 40.

[123] *See id.*

[124] *See id.* at 295. Specifically, Reilly asked:

> PETER REILLY: And, I was wondering if some way—when you and I spoke man to man you said you'd help me because—is there any possible way I could possibly live with your family if you had the room? If you had the room. I wouldn't want to impose and I know my godmother would pay my way.
>
> LIEUT. SHAY: Well, let's say this. It would be a rather unusual turn of events.

Id.

Lieutenant Shay was not the officer with whom Reilly had served on a committee. William Styron characterized Lieutenant Shay's interrogation of Reilly as a "triumph of benevolent intimidation." CONVICTING THE INNOCENT, *supra* note 1, at xv, *quoting* his introduction to Joan Barthel's A DEATH IN CANAAN.

D. *Undermining the Suspect's Confidence in His Own Memory*

Finally, interrogators often tell suspects that they have psychological problems that the suspects can only alleviate by remembering and admitting the awful things they have done. In the Lapointe and Reilly cases, the police went so far as to convince the suspects that they must have "blacked out" since they claimed not to remember having committed the crimes for which they were under investigation. In the Ingram case, the authorities used the terminology of "repression."[125] All three of these cases involved a fatigued and confused person who began to lose faith in his own memory when officers confronted him with confident and repeated assertions that the evidence showed he committed a crime.[126] Specifically, the police told Lapointe that it was possible that he blacked out all memory of having murdered Mrs. Martin.[127] Not suprisingly, Lapointe's first confession was only two sentences long: "On March 8 I was responsible for Bernice Martin's death and it was an accident. My mind went blank."[128]

Lapointe immediately recanted this confession after the officers permitted him to use the bathroom. Both Reilly and Ingram, however, came to believe in the veracity of their confessions for a temporary period of time. For them, the interrogation experience took on the rhetoric of psychological therapy. In Reilly's case, this came about through exaggerations by the police regarding the strength of their case against him:

> LIEUT. SHAY: We know—Pete, I'm going to tell you right now. We know by time now, that when your mother became deceased—when she died—
> PETER REILLY: Ya.
> SHAY:—you were there in the house. We know that. We can prove that.
> PETER REILLY: Oh, yes.
> SHAY: Okay. So, *this* is academic, I know. What I want you to do, Pete, I want you to understand that, you know, this is the best for you. There's no question about this. I want you now to sit back there and recite for me in a chronology of what happened now. I know this may be painful to you—
> PETER REILLY: It is.[129]

In Ingram's case, Richard Peterson, the psychologist who worked with the police on the interrogation team, provided Ingram with a framework for reconciling the conflict between his faith in his daughters' truthfulness and his inability to remember having committed the crimes of which they accused him:

> As they talked about the case, Ingram asked why, if he had committed these heinous acts, he had no memory of them. Peterson told him that it was not uncommon for sexual offenders to bury the memories of their crimes because they were simply too horrible to consider. He went on to

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[125] *See* WRIGHT *supra* note 2.

[126] SEE CONVICTING THE INNOCENT, *supra* note 1, at 42.

[127] *See id.* at 43.

[128] *Id.* at 14-15.

[129] CONNERY, *supra* note 18, at 271.

> say that Ingram himself had probably been abused as a child . . . . According to Ingram, Peterson then assured him that once he confessed, the repressed memories would come flooding back.[130]

Ingram did begin to "see" the crimes he had allegedly committed, but he experienced doubts about the veracity of these new "memories."[131] His pastor calmed him with assurances "that God would not allow thoughts other than those which were true to come into his memory."[132]

While false confessions may contain certain indicators that signify invalidity, they may also lack the indicia of emotional release traditionally associated with confessions of guilt. Describing Peter Reilly's case for the *New York Times*, Arthur Miller wrote:

> Once Peter begins to relieve himself of his guilt and feels "free" of its oppressiveness, testifying to having cut Barbara with a razor, it is remarkable that no flow—even now—of hateful, resentful emotion takes place. In short, having now characterized himself as her murderer, it does not occur to him to justify the act or to explain it by the evocation of her persecution of him.
>
> Instead, he maintains precisely the same attitude toward her as he had before he confessed. No cathexis is reached, no discharge of a new order of feeling toward the hated mother he killed.
>
> This is not believable. It is inconsistent with the confessional act, and it is simply the boy acceding to what powerful, respected, and helpful (however threatening) policemen insist he say.[133]

Similarly, least one participant in the Ingram investigation observed how unemotional Ingram's confessions were:

> Brian Schoening, who is a talkative and emotional man despite his hardbitten exterior, said later that he was deeply affected by Ingram's detachment in describing the sexual abuse of his daughters. Schoening had never seen such apparent remorselessness on the part of an offender, and it was even more galling to him because Ingram wore the same uniform that he did.[134]

V. THE VALUE OF INTERROGATION RECORDINGS AND TRANSCRIPTS

Recording interrogations and confessions is a potentially invaluable tool for assessing the veracity of a suspect's confession. It provides an objective means of distinguishing the suspect's actual level of knowledge about the crime from the details suggested to him by the police. Whether the suspect, in fact, knows information that only the actual perpetrator would know is essential to the analysis of any criminal confession. A transcript of the interrogation can illustrate

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[130] WRIGHT, *supra* note 2, at 34-35.

[131] *See id.*

[132] *Id.* at 59.

[133] CONNERY, *supra* note 18, at 277.

[134] WRIGHT, *supra* note 2, at 10-11.

both the suspect's suggestibility and his level of certainty. For example, consider the following excerpt from the interrogation of Johnny Lee Wilson:

> OFFICER: Okay, whenever you looked in and you seen Mrs. Martz tied, gagged, laying on the floor, what was she wearing? What did you see?
> WILSON: A blouse of some sort. I can't tell what color.
> OFFICER: Try to think. These little details are important, and it's important that you tell the true story as most accurate as possible because that will show that you're trying to tell the truth. This is an important time.
> WILSON: I'll say it was white, probably a white or bluish blouse.
> OFFICER: Okay. How about bluish? I'll go for that.
> WILSON: Yeah.
> OFFICER: How about bluish green maybe?
> WILSON: Yeah.[135]

Now imagine the difference in persuasive power between reading this exchange and reading a signed confession that states, in neatly constructed narrative: "[s]he was wearing a bluish green blouse."[136] Gudjonsson has warned that the latter has the danger of excessively attributing guilt where perhaps none exists:

> It is clear . . . that innocent suspects do sometimes give information to the police that, on the face of it, seems to have originated from the accused, whereas the information was probably unwittingly communicated to them by the police in the first place. Such apparently 'guilty knowledge,' which often makes the confession look credible, is then used to substantiate the validity of the confession given. The lesson to be learned is that, unless the information obtained was unknown to the police, or actually results in the

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[135] Speech by Michael Atchison, *supra* note 4, at 120.

[136] This is not a quote from an actual confession signed by Wilson but rather an example presented for illustrative purposes. Similarly, one could easily imagine that the crucial detail the interrogators supplied about the victim having been bound with duct tape (see epigraph) might come out in a written confession as simply, "I think Chris had the tape."

The one person who did provide independent knowledge of the Martz murder scene was Chris Brownfield (a different Chris), who was then serving a life sentence for committing a similar robbery/murder of an elderly woman just sixty miles northeast of Martz's town and only sixteen days after Martz was killed. *See* Robert PERSKE, UNEQUAL JUSTICE? WHAT CAN HAPPEN WHEN PERSONS WITH RETARDATION OR OTHER DEVELOPMENTAL DISABILITIES ENCOUNTER THE CRIMINAL JUSTICE SYSTEM 46 (1991). According to Wilson's attorney, Michael Atchison:

> The police initially heard of [Chris Brownfield] two days after the killing, when an officer from another local town called and said, "This sounds like a crime that Chris Brownfield could have committed, you ought to check into him." Brownfield wrote a letter from prison and said, "I did this crime in Aurora, Missouri." They wrote back and said, "We've got somebody in jail, we don't believe you." He then wrote, "Well, I bet you found a stun gun at the fire." That got their attention, because that was never publicly disclosed.

Speech by Atchison, *supra* note 4, at 124-25. In Perske's account of this story, police had showed the stun gun to Johnny Lee Wilson, who thought it was an electric shaver. PERSKE at 46.

> discovery of evidence to corroborate it (e.g. a body or murder weapon), then great caution should be exercised in the inferences that can be drawn from it about the accused's guilt.[137]

Given the intuitively obvious power of a confession to persuade one of a suspect's guilt, Gudjonsson's protective measures appear overly optimistic. The availability of an electronic recording of an interrogation provides a much more objective basis on which to argue that the police are the source of some of the information appearing in suspects' confessions.

Since officers did not record their interrogation of Richard Lapointe, there are only inferences that interrogators fed him the narrative of his confessions. Luckily for Lapointe, however, there is strong circumstantial evidence for this proposition. On several points regarding the physical evidence of the crime, Lapointe's confession matches the version of events described by the police in their arrest warrant, which the state's forensic medical examiner later contradicted.[138] A tape recording of Lapointe's interrogation, however, would undoubtedly prove to be more persuasive evidence that much of the information about the crime contained in his confession originated with the police.[139]

Paul Ingram's case differs from the other examples in that his confessions appeared to relate to crimes and acts that never occurred; hence there was no physical evidence.[140] Richard Ofshe and Lawrence Wright believe that Ingram went in and out of trance-like states when he "remembered" the abuse of his daughters. The record of his interrogation provides an unnerving picture of Ingram's suggestibility. What follows is an excerpt from his interrogation, when Ingram was describing the rape of his daughter Julie by a third person:

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[137] GUDJONSSON, *supra* note 71, at 259.

[138] *See* Tom Condon, *Reasonable Doubt: Richard Lapointe, Prisoner Number 184163, Is Inarticulate and Bumbling, But Is He Really a Murderer? Tom Condon Doesn't Think So*, NORTHEAST MAGAZINE, HARTFORD COURANT, February 21, 1993, *reprinted in* CONVICTING THE INNOCENT, *supra* note 1, at 16-17; 27-29. These details concern the questions of whether the victim was raped with a penis or a blunt instrument, whether she was strangled with two hands or by compression with a blunt object, and whether her body was on the couch that was set aflame.

[139] For example, in State v. Sawyer, 561 So. 2d 278 (Fl. Dist. Ct. App. 1990), the District Court of Appeal of Florida affirmed the suppression of Sawyer's murder confession, where the trial court had meticulously analyzed the tape recordings of Sawyer's interrogation. The court commented on "the grossly leading questions put by the detectives, repeatedly suggesting the answer desired or believed correct, whether or not it is later proven by independent lab tests from the forensic evidence gathered at the crime scene" and the fact that "the confession comes forth in a halting, hesitating, ambiguous, and utterly confusing fashion." *Id.* at 288, 290.

[140] As part of the investigation, police officers and a local anthropologist dug up the Ingrams' property looking for the burial ground of babies murdered during satanic rituals. The search was unsuccessful. *See* WRIGHT, *supra* note 2, at 174. In addition, medical exams of Ingram's daughters did not substantiate their claims that they had been forced to have abortions, and that they had scars on their bodies from other physical abuse. *See id.* at 115.

'What's this person doing?'
'He's kneeling. His penis is by her stomach. Uh, he's big. I mean, broad-shouldered, big person.'
'Any marks on his back?'
'He's hairy.'
'Does he have any jewelry on?' [Officer] Vukich asked.
'May have a watch on his right hand.' Rabie is left-handed and wears his watch on his right hand.
'What time does it say?'
'Uh, two o'clock.'
'How close are you to him?' asked [psychologist] Peterson.
'I'm pretty close.'
'How are you dressed?'
'I don't think I've got anything on.'
'Do you have an erection?'
'I think so . . .'
'Are you rubbing yourself against her?'
'Uh, yes . . .'
'Is somebody taking pictures?' Vukich asked.
'Uh, pictures—is there somebody off to the right of me? Uh, it's possible, let me look. I see—I see a camera.'
'Who's taking the pictures?'
'I don't know. I don't see a person behind the camera.'
'That person's very important,' Peterson said. 'He's the one that holds the key. . . .'
'Well, the person that I think I see is Ray Risch,' Ingram said.[141]

Wright notes that during this segment of the interrogation, Ingram's "voice was high and faint, . . . [and t]here was no doubt in anyone's mind that he was in a trance."[142]

When the prosecution called in Ofshe to consult on the Ingram case, Ofshe performed an experiment on Ingram by suggesting that Ingram had orchestrated sex acts between his children.[143] After time had passed and he had a chance to "pray on" the image, Ingram eventually presented Ofshe with a three-page written confession describing such a scene between himself, his daughter Ericka, and his son Paul Ross.[144] When confronted with Ofshe's opinion that the memory was a false one, Ingram responded that "[i]t's just as real to me as anything else."[145] Ofshe later asked Ericka if her father had ever forced her to have sex with her brother; she said no.[146] It was Ingram's "extreme degree of suggestibil-

[141] *Id.* at 47-48. Risch worked for the Washington State Patrol and is one of the two friends implicated by Ingram who both subsequently spent 158 days in custody before police finally dropped the charges against them. *Id.* at 48, 185.

[142] *Id.* at 46.

[143] *See id.* at 136-37. There had been no allegations from Ingram's daughters to this effect.

[144] *See id.* at 144.

[145] *Id.* at 146.

[146] *See id.* at 139.

ity," among other factors, which led Ofshe to warn the prosecutors that there was "a substantial danger that innocent people will be made to undergo a trial and a danger that they might be convicted."[147]

Recordings of interrogations that result in confessions can reveal much more than mere suggestibility. Gudjonsson hypothesizes that "the language structure used by false confessors during interrogation . . . may be linguistically distinguishable from genuine confessions."[148] More specifically, Ofshe asserts that some false confessors describe committing their crimes in the conditional or subjunctive tenses.[149] Thus they state, "I *must have*, I *would have* done this."[150] Speaking at the Hartford forum, Ofshe said:

> In every case I have seen of a persuaded false confession, they confess in those tenses, using that grammar, because we all do it. When we accept something in principle that we have no memory of, we talk about it in the conditional and in the subjunctive, and that's what happens to people who are moved by these tactics of interrogation to do this.[151]

The Ingram case provides a textbook example of Ofshe's theory. *Remembering Satan* author Lawrence Wright characterizes Paul Ingram's confessions as "maddeningly mired in conditional phrases."[152] He describes the authorities' frustration, evidenced by Detective Brian Schoening's briefing of Ofshe about the investigation:

> Practically nothing that anyone was saying could be verified. All the stories were at war with each other. People weren't even talking normally, Schoening complained. Ofshe asked what he meant by that, and Schoening described Ingram's third-person confessions in which Ingram saw himself from the outside, as if the Ingram who was watching and the Ingram who was acting were two different people. He mentioned the 'would've's and must have's that characterized Ingram's language.[153]

Consider Ingram's description of one of the rapes for which he was eventually convicted:

> Q: 'Let's try to talk about the most recent time, Paul. Ericka tells me that it was toward the end of September, just before she moved out. Do you remember that?'
> A: 'Well, I keep trying to, to recollect it, and I'm still kind of looking at it as a third party, but, uh, the evidence, and I am trying to put this in the first person, it's not comin' very well, but, uh, I would've gotten out of bed

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[147] *Id.* at 177.

[148] GUDJONSSON, *supra* note 71, at 233. Gudjonsson called for further study of this feature of false confessions.

[149] *See* speech by Richard Ofshe, *supra* note 6, at 105. Ofshe and Leo have characterized this as the "grammar of confabulation." Ofshe and Leo, *supra* note 75, at 218.

[150] *See* Ofshe, *supra* note 6 at 105.

[151] *Id.*

[152] WRIGHT, *supra* note 2, at 10.

[153] *Id.* at 135.

put on a bathrobe, gone into her room, taken the robe off and at least partially disrobing her and then fondling, uh, her breasts and her vagina and, uh, also telling her that if she ever told anybody that, that I would, uh, kill her . . .'

Q: 'Now you've talked about this in the third party. I'm going to ask you directly, is this what happened?'

A: 'Whew, I'm still having trouble gettin' a clear picture of what happened. I—I know in my own mind that these things had to have happened.'[154]

Ingram even told some of his "confession" stories in the present tense, such as the confession to to forcing his children to have sex with one other which he obediently produced for Ofshe.[155] Wright notes that Ingram wrote this confession as if it were a movie script, complete with instructions about setting.[156] Wright persuasively describes how far afield an uncritical acceptance of such linguistically suspect confessions can lead the authorities. *Remembering Satan* chronicles how a case that originally concerned one man's molestation of his daughters mushroomed into an expensive and lengthy investigation of satanic cult activity involving multiple perpetrators, forced abortions, and ritual baby murders.[157] The Ingram case is perhaps the most extreme and startling example of the guilt-confession-greater guilt feedback loop hypothesized by Yale humanities professor Peter Brooks:

> The story of what goes on in that closed room, where interrogations lead to confessions, always leaves us uneasy, like so many modern narratives proffered by "unreliable narrators," narratives indeed that give us no basis for judging what "reliability" might mean. In the case of confession, that unreliability can be contagious, since it suggests that the more the guilt confessed, the more the guilt there will be to confess, since the act of confession produces further culpability.[158]

A portion of Peter Reilly's recorded interrogation reveals not only the element of tentative language but also another recurrent theme in false confessions: when

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[154] *Id.* at 194-95.

[155] *See id.* at 144-45.

[156] *See id.* at 144.

[157] *See id.* at 70. Wright notes that:

> The detectives were groping to understand what was going on in their community—and, indeed, in their own department. The alleged central perpetrator was admitting to more depraved crimes than the victims were charging (until this point, neither of the Ingram daughters had said anything about satanic abuse). It seemed nearly impossible to coordinate all the accusations into a coherent set of charges. The investigators realized that they were probing into strange and unsettling territory. Jaded cops who regularly visited the worst precincts of the human psyche were thoroughly shaken by the emerging revelations of the Ingram case . . . . [There was] a growing conviction that the Ingram case was, as they frequently said to each other, "the tip of the iceberg"—the iceberg being the nationwide satanic conspiracy.

Id. at 70.

[158] Peter Brooks, *Storytelling Without Fear? Confession in Law and Literature*, 8 YALE J.L. & HUMAN. 1, 28 (1996).

the suspect has had a flash of insight where he seems to understand, consciously or unconsciously, the truth of what he has experienced:

> Sgt. Kelly: 'Did you step on her legs or something? When she was on the floor, and jumped up and down or something, and break them like that or what?'
> Peter Reilly: 'I could have.'
> Sgt. Kelly: 'Can you remember stomping her legs?'
> Peter Reilly: 'I think. But, I'm not sure because *you say it then I imagine that I'm doing it.*'
> Sgt. Kelly: 'No, no, no. You're not imagining anything. I think the truth is starting to come from you now. Because you want it out. You want that second chance.'[159]

Both Reilly and Ingram, on at least one occasion during their respective interrogation ordeals, articulated their feelings that they had invented their confession narratives.[160]

VI. THE POWER OF CONFESSIONS AS EVIDENCE OF GUILT

Obtaining a confession in a criminal investigation is very important. Defense lawyers are more likely to encourage a client to waive his or her constitutional right to a trial by pleading guilty when the client has given the police a confession. All parties involved in a criminal case, such as the police, prosecutors, defense attorneys, judges, jurors, family and friends of the accused and the victim, and the public, find it difficult to believe that someone who has confessed is truly innocent.

In addition, law enforcement authorities involved in these cases find it difficult to admit that they or their colleagues have made a mistake. Police and prosecutors, though duty-bound to seek justice over a conviction, naturally become personally invested in the narrative they construct in the interrogation room and the trial court. For instance, Peter Reilly's interrogation includes an eerily prophetic exchange between Reilly and one of his interrogators.

> SGT. KELLY: 'Oh, Pete, come on. You know it was you.'
> PETER REILLY: 'What would you do if something came up where it turned out that it absolutely wasn't me? If it happened?'
> SGT. KELLY: 'I'd apologize to you. But that isn't going to happen, Peter.'[161]

In fact, only one official has ever offered Reilly an apology, either personally or publicly.[162] During the question and answer session at the Hartford forum, retired

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[159] CONNERY, *supra* note 18, at 91 (emphasis added).

[160] Reilly said, "I think I'm making this up." Jonathan Rabinovitz, *For Many, Echoes of an Injustice in Connecticut,* N.Y. TIMES, September 15, 1995, *reprinted in* CONVICTING THE INNOCENT, *supra* note 1, at 172. Ingram said, "Boy, it's almost like I'm making it up, but I'm not." WRIGHT, *supra* note 2, at 48.

[161] CONNERY, *supra* note 18, at 325.

[162] *See* CONVICTING THE INNOCENT, *supra* note 1, at 92. Cleveland Fuessenich, who was state police commissioner when police arrested Reilly, later apologized to Reilly from re-

New York City police detective Nat Laurendi asked Reilly about the Connecticut State Police's attitude toward him after Reilly's case was dismissed:

> REILLY: 'They did say in the press, when it was the twenty-year anniversary of the death of my mother, her murder—they basically said that they stood by their original investigation, and they just don't seem to want to change their minds.'
> LAURENDI: 'Correct. They still feel you did it and you got away with murder; is that true?'
> REILLY: 'That appears to be their opinion, unfortunately.'
> LAURENDI: 'Law enforcement people—and I know because I've been one for 25 years—will never change their minds. Neither will prosecutors. They build up their resources; they have to fight the oncoming enemy; this is a pattern throughout the United States. Police and prosecutors and judges will never change their minds once a person has been convicted and given justice, a fair trial.'[163]

As for Johnny Lee Wilson, who has also been exonerated, the public admission of the injustice of his conviction was a long time coming. In 1990, Doug Seneker, the Missouri sheriff who had interrogated Wilson, defended his tactics in that case: "There is a principle in interrogation. A person will not admit to something they haven't done, short of torture or extreme duress. No matter how long you're grilled, no matter how much you're yelled at, you're not going to admit to something you haven't done."[164] When Missouri's governor, Mel Carnahan, pardoned Wilson in early 1995, he issued a carefully prepared statement that defensively asserted how tough he was on crime. Only then did he describe how the police had coerced an innocent, mentally retarded Missouri citizen into confessing to murder.[165]

The case of Richard Lapointe is remarkable for the grassroots community support it has garnered.[166] The case has received considerable local and national press coverage.[167] The state's attorney who tried the case, however, recently dismissed the attention Lapointe attracted stating that: "[i]t represents the opinion of a select few that Mr. Lapointe is the so-called wrong man, but they're unable

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tirement after Donald Connery encouraged him to read the transcripts of Reilly's interrogation.

[163] *Id.* at 91-92.

[164] PERSKE, *supra* note 136, at 50. Contrasts studies by Ofshe discussed, *supra* note 6, at 95.

[165] *See* Statement by Governor Mel Carnahan Re: Johnny Lee Wilson, Office of the Governor, State of Missouri, Jefferson City, Missouri (Sept. 29, 1995), *reprinted in* CONVICTING THE INNOCENT, *supra* note 1, at 196-98.

[166] The Friends of Richard Lapointe have been meeting twice a month at the Burger King community room in Wethersfield, Connecticut. *See* opening remarks of Margaret Dignoti, executive director of the Association of Retarded Citizens of Connecticut, Hartford forum, *in* CONVICTING THE INNOCENT, *supra* note 1, at 59.

[167] *See also* Colman McCarthy, *Disabled Man's Confession is Suspect,* WASHINGTON POST, September 6, 1994; *see* Jill Smolowe, *Untrue Confessions: Mentally Impaired Suspects Sometimes Make False* Confessions, TIME, May 22, 1995.

to point to anything substantive to indicate that he is in fact the wrong man."[168] Of course, without a tape recording of his interrogation, Lapointe's attorneys have had a hard time proving the invalidity of his confession. Unlike the Wilson case, the true killer has not come forward to take the blame.

Understandably, jurors find confessions to be convincing evidence of guilt.[169] The jury that convicted Richard Lapointe of capital murder after eleven weeks of trial testimony deliberated for only one hour. The jury foreman told journalist Tom Condon that "[t]he confession was at least 75 percent of it."[170] Reflecting on the themes of his play *The Crucible*, a dramatization of the Salem witch trials written, in part, as a response to McCarthyism, Arthur Miller observed:

> If one steps back and looks at this absolute reliance on confession from a world perspective, a certain equation emerges; namely, that the less evidence you have, the more vital the confession becomes for your case.
>
> Bureaucracies love confessions because they are so persuasive.[171]

One juror who convicted Peter Reilly of first-degree manslaughter asserted: "[i]f I was in that position, I'd have said I didn't do it no matter how tired I got."[172]

In *Crane v. Kentucky*, the Supreme Court of the United States recognized the primacy of confessions in a criminal case.[173] Holding that the exclusion of testimony about the circumstances of a confession was reversible error, the Court noted that when: "stripped of the power to describe to the jury the circumstances that prompted his confession, the defendant is effectively disabled from answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt?"[174] Because confessions are such powerful forms of evidence, the recognition that certain law enforcement strategies can create false confessions should translate into a duty on the part of police to preserve a record of what transpired behind the closed door of the interrogation room.

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[168] Rabinovitz, *supra* note 160, at 170.

[169] *See* White, *supra* note 34, at 134.

[170] Condon, *supra* note 138, at 22. In addition, jurors also said they believed the police officers who testified, describing them as "businesslike and professional." By contrast, Lapointe had appeared uncertain and confused under cross-examination. *See id.*

[171] Speech by Arthur Miller, Hartford forum, *reprinted in* CONVICTING THE INNOCENT, *supra* note 1, at 89.

[172] CONNERY, *supra* note 18, at 253.

[173] 476 U.S. 683, 689 (1986) (Crane appealed murder conviction from trial where his confession had been admitted as evidence against him. The Supreme Court held that the failure to admit evidence about the circumstances under which the defendant confessed, thereby demonstrating the voluntary nature of the confession, violated the defendant's right to a fair trial).

[174] *Id.*

VII. RECORDING INTERROGATIONS AND CONFESSIONS IN THE LAW AND IN PRACTICE

In 1936, the Supreme Court decided *Brown v. Mississippi*,[175] a case in which the authorities whipped and tortured three black murder suspects until they confessed.[176] The Court reversed the convictions, holding that the admission of the confessions at the petitioners' trial was a "clear violation" of due process.[177] In the unanimous opinion, the Court also rejected the state's contention that petitioners' counsel had waived their claims of error by failing to move for the exclusion of the confessions at the proper time.

> It is a contention which proceeds upon a misconception of the nature of petitioners' complaint. That complaint is not of the commission of mere error, but of a wrong so fundamental that it made the whole proceeding a mere pretense of a trial and rendered the conviction and sentence wholly void.[178]

When police elicit a false confession through more sophisticated psychological pressure from an isolated and vulnerable individual, admitting the confession at trial constitutes a denial of fundamental fairness and due process which is perhaps even more pernicious for its invisibility. One of the defendants in *Brown* bore a "plainly visible" mark around his neck because the deputy sheriff and a mob of white men had temporarily hung him from a tree to elicit his confession.[179] Moreover, the deputy took the stand at trial and admitted that he had overseen the whipping of three defendants.[180]

Psychological manipulation, suggestion of crime details, and verbal threats do not leave marks on the body that are discernible in a court of law. Nor are, police officers likely to testify accurately about, or perhaps even to understand, the ways in which their interrogation techniques and the defendants' personal characteristics might have combined to produce a false confession.

In *Miranda v. Arizona*,[181] the most famous confession case of the century, the Supreme Court set forth the classic list of rights that a suspect must understand and waive prior to custodial interrogation in order for the prosecution to introduce any resulting statements as evidence in a criminal trial.[182] Although the

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[175] 297 U.S. 278 (1936) (reversal of murder convictions where the defendants had been beaten and tortured into falsly confessing).

[176] *See id.*

[177] *Id.* at 286. The Supreme Court had not yet incorporated the Fifth Amendment privilege against self-incrimination into the Fourteenth Amendment's due process protections against the states.

[178] *Id.*

[179] *Id.* at 283.

[180] *See id.* at 284.

[181] 384 U.S. 436 (1966) (holding that statements made during police interrogations of defendants are inadmissable if the defendant is not made aware of their Constitutional rights. Any statement by defendant prior to being informed was obtained in violation of the defendant's Fifth Amendment right against self-incrimination).

[182] *See id. Miranda* has recently been attacked from both the ends of the political spec-

rhetoric of *Miranda* focused primarily on protecting values and interests apart from the inherent reliability of confessions as evidence, the Court did recognize the problem of false confessions.[183] In many United States jurisdictions, under the doctrine of *corpus delicti*, prosecutors may not introduce confessions into evidence until the state has shown independent evidence both of harm and that criminal agency caused the harm.[184] The rule developed in part to save people from themselves by preventing convictions where no crime has in fact been committed, the classic example being where the supposed victims of a confessed murderer walk back into town alive and well, but too late to save the confessed murderer from the gallows. The doctrine is incapable of protecting people like Richard Lapointe, Peter Reilly, or Johnny Lee Wilson, who confessed to crimes that someone else committed.[185] Other legal requirements, such as corroboration[186] are equally inapposite where, as with false confessions, "the police are coauthors of the confession . . . [who] can incorporate into the confession information known only to themselves and to the real perpetrator . . . [and thereby], in effect, corroborate the confession."[187]

Although England has required recorded interrogations since 1984, United States courts and legislatures have infrequently mandated the practice. Only three states presently have a recording requirement: Alaska,[188] Minnesota,[189] and Texas.[190]

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trum. *See* JOSEPH D. GRANO, CONFESSIONS, TRUTH, AND THE LAW (1996) (advocating for *Miranda* to be overruled); Charles J. Ogletree, *Are Confessions Really Good for the Soul?: A Proposal to Mirandize Miranda*, 100 HARV. L. REV. 1826 (1987) (proposing the exclusion of extrajudicial statements unless the suspect has consulted with an attorney prior to police interrogation).

[183] *See id.* at 456 n.24.

[184] *See generally* Thomas A. Mullen, *Rule Without Reason: Requiring Independent Proof of the Corpus Delicti as a Condition of Admitting an Extrajudicial Confession*, 27 U.S.F.L. REV. 385 (1993); Note, *Proof of the Corpus Delicti Aliunde the Defendant's Confession*, 103 U. PA. L. REV. 638 (1955).

[185] *See* Corey J. Ayling, Comments, *Corroborating Confessions: An Empirical Analysis of Legal Safeguards Against False Confessions*, 1984 WIS. L. REV. 1121, 1151-52 (1984) *quoting* State v. Lucas, 152 A.2d 50, 60 (1959) ("Indeed, it is ofttimes more likely that persons giving false confessions because of mental disease or defect will confess to crimes where there is abundant proof of . . . the *corpus delicti* but where there is no proof as to the perpetrator.").

[186] *See, e.g.*, Opper v. United States, 348 U.S. 84, 93 (1954) (requiring the prosecution to present "substantial independent evidence which would tend to establish the trustworthiness of the statement.").

[187] Ayling, *supra* note 190, at 1187. The author provides an example of a New York case in which the police fed an innocent suspect enough details about the crime to fill a confession sixty-one pages long.

[188] *See* Stephan v. State, 711 P.2d 1156 (Alaska 1985).

[189] *See* State v. Scales, 518 N.W.2d 587 (Minn. 1994). The Supreme Court of Minnesota instituted the requirement not on due process grounds, but rather as an exercise of the "supervisory power to ensure the fair administration of justice." *Id.* at 592.

[190] In Texas the recording requirement is much more limited than in either Alaska or

Alaska is the most progressive American jurisdiction that requires recorded interrogations. In *Stephan v. State*,[191] the Supreme Court of Alaska held that confessions would be excluded unless police recorded the interrogations which had preceded them.[192] The majority reasoned:

> Such recording is a requirement of state due process when the interrogation occurs in a place of detention and recording is feasible. We reach this conclusion because we are convinced that recording, in such circumstances, is now a reasonable and necessary safeguard, essential to the adequate protection of the accused's right to counsel, his right against self-incrimination and, ultimately, his right to a fair trial.[193]

The court cited several factors in support of its holding such as eliminating the "swearing match," protection of police officers "wrongfully accused of improper tactics," and prevention of the admission of false confessions.[194] The majority determined that the rule imposed minimal costs.[195] The court left no doubt that the scope of the recording requirement would include the entire interrogation and not just the formal confession. The opinion stated:

> A confession is generally such conclusive evidence of guilt that a rule of exclusion is justified, when the state, without excuse, fails to preserve evidence of the interchange leading up to the formal statement. This is particularly true when, as in these cases, the defendant may have been deprived of potentially favorable evidence simply because a police officer, in his own discretion, chose to turn the recorder on twenty minutes into the interview rather than at the beginning. Exclusion is warranted . . . because the arbitrary failure to preserve the entire conversation directly affects a defendant's ability to present his defense at trial or at a suppression hearing.[196]

Other jurisdictions have declined to adopt standards similar to those articulated in *Stephan*. In requiring recording of interrogations under its supervisory powers, the Supreme Court of Minnesota explicitly sidestepped the question of whether recording was a constitutional prerequisite for confessions to be admissible.[197] Many state courts, explicitly refused to follow Alaska's lead, but nonetheless expressed, indicta, their approbation for the practice of recording interro-

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Minnesota. By statute, in order to be admissible confessions must be electronically recorded, but the police need not record the interrogation preceding the confession. *See* TEX. CODE OF CRIM. P. §38.22(3) (West 1996).

[191] 711 P.2d 1156 (Alaska 1985).

[192] *See id.*

[193] *Id.* at 1159-60.

[194] *Id.* at 1161.

[195] *See id.* at 1164.

[196] *Id.* at 1164. One of the defendants in these consolidated cases alleged that the officer violated his Miranda rights and made threats and promises while the tape recorder was not running. The other defendant alleged that the authorities did not respect his invocation of his right to counsel and promised him leniency if he would talk.

[197] *See* Scales, 518 N.W.2d 587.

gations.[198] Other courts have simply asserted that they would not act on the issue absent leadership from the legislature.[199] Other courts declined for still different reasons.[200] One court failed to consider the feasibility limitation on the *Stephan* rule and refused to adopt a more absolute requirement:

> Notwithstanding the desirability of recording confessions, it is neither practicable nor possible to require contemporaneous recordings in all instances. When a formal confession is given in a police station, it could, and should, be recorded. But confessions, and admissions short of a confession, can be made anywhere at unexpected times and places where formal recording is impossible. Barring all such evidence would deprive the courts of much evidence that is generally reliable.[201]

Given the generally favorable stance of many state courts toward the practice of recording, it may simply be a matter of time before they decide to take more

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[198] *See, e.g.*, State v. James, 678 A.2d 1338, 1360 (Conn. 1996) ("We agree with the defendant that the recording of confessions and interrogations generally might be a desirable investigative practice, which is to be encouraged"); State v. Kekona, 886 P.2d 740, 746 (Haw. 1994) ("[W]e nevertheless stress the importance of utilizing tape recordings during custodial interrogations when feasible"); State v. Kilmer, 439 S.E.2d 881, 893 (W. Va. 1993) ("It would be the wiser course for law enforcement officers to record . . . the interrogation of a suspect where feasible and where such equipment is available, since such recording would be beneficial not only to law enforcement, but to the suspect and the court when determining the admissibility of a confession"); Commonwealth v. Fryer, 610 N.E.2d 903, 910 (Mass. 1993) (describing electronic recording as a "helpful tool" and noting that a rule requiring it "would have much to recommend it"); State v. Buzzell, 617 A.2d 1016, 1018 (Me. 1992) (referring to "the obvious benefits to be realized when statements are recorded"); Williams v. State, 522 So. 2d 201, 208 (Miss. 1988) ("We accept that whether or not a statement is electronically preserved is important in many contexts"); and State v. James, 858 P.2d 1012, 1018 (Utah App. 1993) (recognizing that recording interrogations has the potential to prevent "[a]ctual coercive tactics by the police.").

[199] *See, e.g.*, State v. Gorton, 548 A.2d 419, 422 (Vt. 1988) ("The most appropriate means of prescribing rules to augment citizens' due process rights is through legislation"); People v. Raibon, 843 P.2d 46, 49 (Colo. App. 1992) (stating that mandatory recording of confessions is not a constitutional matter, but one for the legislature to decide). In 1996 Peter Reilly submitted written testimony at a public hearing before the Connecticut legislature's judiciary committee in support of a pending bill that would require police to record interrogations. *See* Matthew Daly, *Peter Reilly Backs Bill on Taping Confessions*, HARTFORD COURANT, March 15, 1996, at A3.

[200] *See, e.g.*, State v. Rhoades, 809 P.2d 455 (Idaho 1991) (each state should decide for itself whether to extend state constitutional protections beyond federal guarantees); Jimenez v. State, 775 P.2d 694 (Nev. 1989) (jury can consider whether failure to record renders evidence of confession less reliable, but the court refused to require recording); and State v. Spurgeon, 820 P.2d 960 (Wash. App. 1991), *review denied*, 827 P.2d 1393 (Wash. 1992) (Washington Court of Appeals held that since federal law does not require recording, and the state and federal constitution have identical language, no state right to recording exists).

[201] State v. Villareal, 889 P.2d 419, 427 (Utah 1995).

than a hortatory approach towards recording, as the Supreme Court of Minnesota finally decided to do.[202]

The Supreme Court of the United States has not yet decided whether the Constitution requires the recording of interrogations. If the Court were to impose a recording requirement, it will most likely be grounded in the fundamental fairness elements due process, structured to protect a defendant's right to a fair trial. In *California v. Trombetta*, the Supreme Court of the United States first delineated the parameters for when due process requires the state to preserve exculpatory evidence.[203] The Court rejected the claim that the state had to preserve breath samples of suspected drunken drivers in order for a prosecutor to introduce the results of breath analysis tests against them. The Court established the following test:

> Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality, . . . evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.[204]

The Court held that Trombetta had failed to satisfy either of these prongs, because the chance that the preserved samples would have exculpated him was very low and because he had alternative means of demonstrating the inaccuracies of the breathalyser results.[205]

The Supreme Court of the United States erected a further hurdle to recognizing a constitutional recording requirement, however, when it decided *Arizona v. Youngblood*.[206] The Court held that in the absence of bad faith, the failure of the police to preserve useful evidence did not constitute a denial of due process.[207] The majority wrote of its "unwillingness to read the 'fundamental fairness' requirement of the Due Process Clause as imposing on the police an undifferentiated and absolute duty to retain and preserve all material that might be of conceivable evidentiary significance in a particular prosecution."[208] The Court will

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[202] *See* Scales, 518 N.W.2d at 592 (requiring the recording, when feasible, based on the court's supervisory powers rather than a constitutional basis).

[203] 467 U.S. 479 (1984).

[204] *Id.* at 488-89 (citation omitted).

[205] *See id.* In his brief to the Supreme Court on behalf of Richard Lapointe, New Haven civil rights attorney John Williams tried to distinguish Trombetta by noting how central the perceived reliability of the breathalyser device was to the *Trombetta* court's reasoning. "There is no such testimonial to the accuracy of police interrogations. In fact, decided cases are replete with instances in which police officers have violated the due process rights of suspects in order to secure a confession." Brief of Defendant-Appellant, State v. Lapointe, 11-12.

[206] 488 U.S. 51 (1988).

[207] *See id.*

[208] Youngblood, 488 U.S. at 58 (citation omitted).

not likely find "bad faith" in a police department's failure to record interrogations and confessions until such recording practices become much more widespread in the United States.[209]

Putting aside constitutional issues, what will it take for legislatures or law enforcement institutions to make recording a reality in United States police stations? Although courts and legislatures have only recently started mandating the recording of interrogations, the idea is not a new one. As early as 1932, Yale law professor Edwin Borchard argued for more stringent controls on police practices:

> [S]afeguards protecting the prisoner from duress can be established, by prohibiting the use in evidence of all confessions made to the police, by disciplinary measures, and by insuring that all questioning of the accused shall be carried on only before a magistrate and witnesses, perhaps in the presence of phonographic records, which shall alone be introduced as evidence of the prisoner's statements.[210]

In 1975, animated by similar concerns, the American Law Institute promulgated its draft Model Code of Pre-Arraignment Procedure, which set forth the state's obligation to make audio recordings of interrogations.[211] Perhaps the law now needs to catch up with the field of psychology. After all, the research on false confessions by Ofshe and Gudjohsson is quite recent. Some disability advocates, wrongful conviction activists, and criminal defense lawyers also hope that the attention garnered by the plights of Richard Lapointe, Johnny Lee Wilson, and Paul Ingram will have a positive effect on reform.[212]

There is cause for optimism. The United States Department of Justice's National Institute of Justice recently conducted a study on videotaping interrogations and confessions and published a report of their findings.[213] The study found

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[209] For example, in *Trombetta*, part of the Court's justification for rejecting Trombetta's claim was that the failure to preserve the breath samples was a result of normal practice and not a sign of "official animus towards respondents or of a conscious effort to suppress exculpatory evidence." Trombetta, 467 U.S. at 488.

[210] BORCHARD, *supra* note 70, at xvii.

[211] SEE MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, § 130.4, *reprinted in* Heath S. Berger, Comment, *Let's Go to the Videotape: A Proposal to Legislate Videotaping of Confessions*, 3 ALB. L.J. SCI. & TECH. 165, 169 (1993) (advocating for the Model Code to be updated to require videotaping).

[212] A recurring point of frustration at the Hartford forum among members of the Friends of Richard Lapointe, however, was that after the Peter Reilly case ran its course, Connecticut citizens thought, "never again." *See* speech by Peter Reilly, *supra* note 3, at 84-85; *see also* speech by Arthur Miller, *supra* note 171, at 90.

[213] *See* William A. Geller, *Videotaping Interrogations and Confessions*, National Institute of Justice Research in Brief, Office of Justice Programs, U.S. Department of Justice (1993). For a more detailed summary and analysis of this report, *see* Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 682-86 (1996) (arguing that substantive due process requires the electronic recording of custodial interrogations in felony cases).

that 16.4% of all police and sheriffs' departments in the United States used videotape technology to record some interrogations and confessions.[214] The study identified many benefits of videotaping. Significantly, 84.2% of local police departments surveyed reported that videotaping helped improve the quality of interrogations, 43.5% reported a decrease in allegations of defense claims of improper interrogation procedures, and 82.7% reported that videotaping encouraged guilty pleas.[215] Finally, while the surveys identified initial police misgivings about videotaping, the approval rating for the practice rose to 74.5% after a few years.[216] Overall, the report referred to "a consensus favoring videotaping."[217]

VIII. CONCLUSIONS

One commentator who has advocated for an interrogation recording requirement found it inadequate to meet the *Trombetta* standard for materiality:

> The failure to record a custodial interrogation should always fail the constitutional materiality test. Even if a court finds that the exculpatory value of the record satisfies the first prong of the test, a defendant always has an alternative means of obtaining and presenting that evidence: her own testimony about what occurred during the interrogation. The standard, therefore, as applied to police interrogations, gives federal judicial sanction to the "swearing contest" between the defendant and police.[218]

This approach to the problem, however, ignores the fact that phenomena occur during interrogations that neither the police nor the defendant is capable of speaking about accurately. A review of our current state of psychological knowledge about false confessions and an examination of the Lapointe, Reilly, Wilson, and Ingram cases indicates that a proper defense of a false confession case requires the availability of an accurate, detailed record of the interrogation and confession, including precise syntax, diction, and grammar used by the participants. We must recognize that the question is much more complex than the prototypical "swearing match" between a police officer and a suspect over whether the police beat or threatened the suspect into confessing or until he confessed.

One court that declined to adopt a constitutionally mandated recording requirement failed to take into account the phenomenon of false confessions. In *State v. Spurgeon*,[219] the court stated: "It is not technically a matter of preservation of evidence but rather the creation of additional evidence in the form of a

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[214] *See id.* at 2.

[215] *See id.* at 5, 6 and 10.

[216] *See id.* at 11. Another 18.8% experienced misgivings, while only 6.7% were mildly disapproving.

[217] *Id.* at 10.

[218] Ingrid Kane, Note, *No More Secrets: Proposed Minnesota State Due Process Requirement That Law Enforcement Officers Electronically Record Custodial Interrogations and Confessions*, 77 MINN. L. REV. 983, 997 (1993).

[219] Spurgeon, 820 P.2d at 960.

tape of the interview."[220] When the issue involves the custodial interrogation of a suspect in a criminal case, however, it is the police who create the "additional evidence." Most of the time, they procure an accurate confession of guilt that undoubtedly brings the suspect as much psychological relief as it does legal trouble. But what happens when the authorities harangue a deferential, mentally disabled man for nine and a half hours, lying to him about having matched his fingerprints and DNA to crime scene evidence and telling him that he must have blacked out? Or, when law enforcement authorities conduct a grueling interrogation of a fatigued eighteen-year old who is in a state of emotional shock because his mother has just been killed? Or, when the interrogators of a mentally retarded man ignore his numerous protestations of innocence, and confront him repeatedly, all the while suggesting to him important details about the crime? Or when deputy sheriffs convince their well-meaning, deeply religious colleague that he must have repressed his memories because his crimes were so horrible? Once we accept that false confessions exist, we must take responsibility for the fact that police officers usually co-author confessions, whether they realize it or not. When a false confession leads to a wrongful conviction, it is extremely difficult to overcome the stock story and prove the truth. We may find it hard to analyze interrogation and confession transcripts, and sort them correctly into two piles, true and false, but without electronic recording, we will never be able to carry out this duty and wrongful convictions based on false confessions will needlessly continue.

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[220] *Id.* at 962.