

# The Cutting Edge of Confession Evidence: Redefining Coercion and Reforming Police Interrogation Techniques in the American Criminal Justice System

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*The American criminal justice system is at a tipping point. The Reid accusatory model of interrogation, which has for decades defined interrogation in the United States, is struggling to hold back a growing body of literature in the social sciences condemning such techniques and advocating for reform. While social scientists have for years criticized accusatory interrogation techniques by showing how certain techniques unnecessarily increase the risk of false confessions, this criticism has only led to marginal change. Accusatory interrogation techniques still exist within law enforcement, and courts continue to admit confessions elicited using these techniques.*

*Unlike previous articles on confession evidence, this Note is not a critique of the totality-of-the-circumstances test or an analysis of the current state of voluntariness law. Rather, this Note analyzes the disconnect between the courts and the social sciences, focusing on how the courts' outdated understanding of coercion has impacted the evaluation of confession evidence and fueled the continued existence of the Reid accusatory model of interrogation. Recognizing this disconnect, the Note maps out three paths away from the accusatory interrogation techniques of the past, toward a new understanding of coercion and a reformed, more reliable system of interrogation in the American criminal justice system.*

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### Introduction

Riley Fox was three years old when she died.<sup>1</sup> The police found her body floating face down in the water of Forked Creek in Wilmington, Illinois.<sup>2</sup> She had duct tape over her mouth and adhesive residue on her arms; she had also been sexually abused.<sup>3</sup> Because Kevin Fox, the girl's father, was the last one to see her alive, he automatically became a suspect.<sup>4</sup> The investigators called Mr. Fox into the station, claiming they had found new information about his daughter's murder.<sup>5</sup> The conversation started innocently enough, but the questioning soon turned accusatory.<sup>6</sup> Mr. Fox was being interrogated. Fourteen hours later, Mr. Fox confessed, recounting the crime in excruciating detail.<sup>7</sup> He admitted placing duct tape over his daughter's mouth; he even described plunging her underwater.<sup>8</sup>

Mr. Fox was arrested for first-degree murder, and the State was seeking the death penalty.<sup>9</sup> There seemed to be no way out. Once the jury heard the confession, his fate would be sealed. But after eight months in jail, against all odds, Mr. Fox was exonerated.<sup>10</sup> New DNA evidence ruled him out as a suspect.<sup>11</sup> He was not the killer.

After the exoneration, the Fox family sued county authorities, documenting the interrogation that led to Mr. Fox's false confession.<sup>12</sup> According to the lawsuit, the interrogators refused to listen to Mr. Fox's repeated denials.<sup>13</sup> They accosted him: "We know you killed your daughter," and "you did it. It's all right to say you did it."<sup>14</sup> They showed him pictures of his daughter's limp body taken immediately after she was pulled from the

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1. Bryan Smith, *The Nightmare: A Look at the Riley Fox Case*, CHICAGO (July 3, 2006), <http://www.chicagomag.com/Chicago-Magazine/July-2006/The-Nightmare/> [<https://perma.cc/C55Q-LXMV>].

2. *Id.*

3. *Id.*

4. Miguel Sancho et al., *Exclusive: Riley Fox's Parents Speak Out After Alleged Killer Found*, ABC NEWS (June 11, 2010), <http://abcnews.go.com/2020/riley-fox-parents-speak-scott-eby-charged-murder/story?id=10878773> [<https://perma.cc/G876-HE8L>].

5. Smith, *supra* note 1.

6. *Id.*

7. *Id.*

8. *Id.*

9. David Muir et al., *Who Killed Riley Fox?*, ABC NEWS (Nov. 7, 2008), <http://abcnews.go.com/TheLaw/killed-riley-fox/story?id=6196896> [<https://perma.cc/N9JS-9758>].

10. *Id.*

11. Bruce Fischer, *The Exonerated: Kevin Fox*, INJUSTICE ANYWHERE (2018), <http://www.injusticeanywhere.org/exonerated-kevin-fox/> [<https://perma.cc/XWM7-D633>].

12. Smith, *supra* note 1.

13. Second Amended Complaint at ¶ 25, *Fox v. Office of the Sheriff of Will County*, 2005 WL 4045131 (N.D. Ill.) (No. 04 C 7309).

14. *Id.* at ¶ 32.

water.<sup>15</sup> They asked him to take a polygraph test then confronted him with fabricated results indicating he failed.<sup>16</sup> And they even told him his wife planned on divorcing him.<sup>17</sup>

Unfortunately, Mr. Fox's case is only one of many where psychologically manipulative interrogation tactics have caused a false confession. Indeed, over 100 of the 362 wrongful convictions identified by the Innocence Project have been caused by false confessions.<sup>18</sup> But the magnitude of the problem is even greater than this number suggests. There is no national database on wrongful convictions, and most of the identified false confessions have come from DNA exonerations in highly publicized murder cases.<sup>19</sup> Moreover, the same tactics causing false confessions in murder cases have likely also caused false confessions in cases involving less severe punishments.<sup>20</sup> The current number is likely only the tip of the iceberg in miscarriages of justice.<sup>21</sup>

But regardless of the true number of false confessions, the sheer magnitude of the problem has attracted the attention of numerous scientists and commentators. These individuals have rigorously examined the interrogation process leading to false confessions, uncovering troubling realities about the accusatory interrogation tactics investigators often use to extract confessions. Specifically, such tactics unnecessarily increase the risk that innocent suspects will falsely confess. However, these red flags have largely been ignored, as accusatory interrogation continues to be commonplace in the American criminal justice system.

While there are different styles of accusatory interrogation, all major tropes can be traced back to a man named John E. Reid and his original work: *Criminal Interrogation and Confession* (the Reid Manual).<sup>22</sup> For over half a

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15. Smith, *supra* note 1.

16. *Inside Kevin Fox's Appellate Court Decision*, CHI. JUST. PROJECT (Apr. 13, 2010), <https://chicagojustice.org/2010/04/13/inside-kevin-foxs-appellate-court-decision/> [<https://perma.cc/F2F8-QQNR>].

17. Second Amended Complaint, *supra* note 13, at ¶ 36.

18. *DNA Exonerations in the United States*, INNOCENCE PROJECT, <https://www.innocenceproject.org/dna-exonerations-in-the-united-states/> [<https://perma.cc/48L2-XZYM>].

19. See Robert Kolker, "I Did It," N.Y. MAG. (Oct. 3, 2010), <http://nymag.com/news/crimelaw/68715/index2.html> [<https://perma.cc/S7WK-9DFX>] ("Most of the documented false confessions have been in highly publicized murder cases.")

20. *Id.*

21. See Saul M. Kassin, *On the Psychology of Confessions: Does Innocence Put Innocents at Risk?*, 60 AM. PSYCHOL. 215, 215 (2005).

22. FRED E. INBAU, JOHN E. REID, JOSEPH P. BUCKLEY & BRIAN C. JAYNE, *CRIMINAL INTERROGATION & CONFESSIONS* (4th ed. 2004) [hereinafter REID MANUAL]; see Robert Kolker, *A Severed Head, Two Cops, and the Radical Future of Interrogation*, WIRED (May 24, 2016), <https://www.wired.com/2016/05/how-to-interrogate-suspects/> [<https://perma.cc/63RF-VEM5>] (describing the Reid Manual as the source of accusatory interrogation techniques).

century, the Reid Manual, affectionately known as the Interrogator's Bible,<sup>23</sup> has set the standard for interrogation practices in the American criminal justice system. The company behind the Reid Manual, John E. Reid & Associates, Inc. (Reid & Associates), trains thousands of individuals from law enforcement and government agencies each year.<sup>24</sup>

Despite its dominance, or perhaps because of it, the Reid accusatory model of interrogation has also been heavily criticized. Individuals representing a variety of constituencies have spoken out against its techniques, advocating for reform. This criticism, however, has not translated to change. Lingering questions have prevented reform: Is the Reid accusatory model really responsible for the proliferation of false confessions? Would an alternative, non-accusatory model be as effective at eliciting true confessions? Are alternative, non-accusatory interrogation techniques effective at all? Until recently, there has not been enough evidence to definitively answer these questions. The literature was not mature. But this is no longer the case; these questions have all been answered. The literature is now sufficiently mature to justify significant reform—a movement away from the accusatory interrogation techniques of the past and toward a new understanding of coercion and a reformed, more reliable system of interrogation.<sup>25</sup>

Part I of this Note will discuss the development of the Reid accusatory model of interrogation in the American criminal justice system and why both stages of the model unnecessarily increase the risk of false confessions. Part II will discuss the research supporting the effectiveness of non-accusatory, information-gathering techniques. Part III will discuss the courts' outdated understanding of coercion, and how this understanding affects the courts' evaluation of confession evidence and fuels the continued existence of the Reid accusatory model of interrogation. Finally, Part IV will map out three possible paths toward a reformed, more reliable system of interrogation in the American criminal justice system.

Before beginning, it is important to note that this Note addresses the Reid accusatory model of interrogation as it relates to “mentally normal” adults.<sup>26</sup> It does not specifically address the effect of the Reid accusatory model on juveniles or the mentally disabled. Although juveniles and the mentally disabled are particularly at risk, more than half of all false

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23. Anne M. Coughlin, *Interrogation Stories*, 95 VA. L. REV. 1599, 1641 (2009).

24. JOHN E. REID & ASSOCIATES, INC., <http://www.reid.com/> [<https://perma.cc/QE8S-YA69>].

25. Saul M. Kassin, *The Social Psychology of False Confessions*, 9 SOC. ISSUES & POL'Y REV. 25, 27 (2015) (“Today, there is a substantial empirical literature on false confessions. . . . The literature is now sufficiently mature . . .”).

26. See Jordan Smith, *A Lesson in False Confessions*, AUSTIN CHRON. (Jan. 23, 2009), <https://www.austinchronicle.com/news/2009-01-23/729448/> [<https://perma.cc/DA72-HA46>] (relying on the term “mentally normal”).

confessions come from “mentally normal” adults.<sup>27</sup> Moreover, “[i]t is uniformly clear to all parties that vulnerable suspect populations—namely, juveniles and people who are cognitively impaired or psychologically disordered—need to be protected in the interrogation room.”<sup>28</sup>

I. The Reid Accusatory Model of Interrogation Increases the Risk of False Confessions

A. *The Evolution and Dominance of the Reid Accusatory Model of Interrogation in the American Criminal Justice System*

Through the mid-20th century, police interrogation and physical abuse went hand in hand.<sup>29</sup> While physical abuse was never legal in the United States, interrogators nonetheless frequently employed such tactics.<sup>30</sup> These tactics, which later became known as the third degree, usually involved blatant physical abuse—beating suspects with rubber hoses and sandbags, kicking them, and burning them with cigars.<sup>31</sup> Beyond physical abuse, third-degree tactics also often included the use of the “Sweat Box,” the “Water Cure,” and outright threats of harm.<sup>32</sup> Reid was a pioneer in the movement away from the third degree and the physically coercive interrogation tactics of the past. A former Chicago beat cop turned polygraph examiner, Reid combined his experience on the force with cutting-edge psychology to develop a new method of interrogation.<sup>33</sup> Unlike the brutalizing third-degree methods, Reid relied on his lie-detection skills to

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27. *Id.*; see, e.g., Dennis Chaptman, *Chris Ochoa Exonerated in Texas Crimes, Earns Law Degree*, U. WISCONSIN-MADISON NEWS (May 10, 2006), <https://news.wisc.edu/christopher-choa-exonerated-in-texas-crimes-earns-law-degree/> [<https://perma.cc/F74G-AH5A>]. Chris Ochoa, who confessed to the rape and murder at a Pizza Hut in Austin, Texas, was exonerated in 2001 after twelve years in prison. *Id.* His exoneration was in large part due to the work done by the Wisconsin Innocence Project at the University of Wisconsin Law School. *Id.* In 2003, Ochoa enrolled in the UW Law School. *Id.* And in 2006, Ochoa graduated; he even delivered a speech at the graduation ceremony. *Id.*

28. Saul M. Kassir et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 30 (2010); see *Miranda v. Arizona*, 384 U.S. 436, 468 (1966) (“It is not just the subnormal or woefully ignorant who succumb to an interrogator’s imprecations . . .”).

29. See Wyatt Kozinski, *Third Degree Lite: The Abuse of Confessions*, CRIME REPORT (Sept. 7, 2017), <https://thecrimereport.org/2017/09/07/the-third-degree-lite-the-abuse-of-confessions/> [<https://perma.cc/JTL6-D4DK>] (“The police would beat a suspect until he confessed and lie about it in court.”).

30. Wyatt Kozinski, *The Reid Interrogation Technique and False Confessions: A Time for Change*, 16 SEATTLE J. OF SOC. JUST. 301, 306–07 (2018).

31. RICHARD A. LEO, POLICE INTERROGATION & AMERICAN JUSTICE 46–49 (2008).

32. *Id.* at 50, 53.

33. See Douglas Starr, *The Interview*, NEW YORKER (Dec. 9, 2013), <https://www.newyorker.com/magazine/2013/12/09/the-interview-7> [<https://perma.cc/3YWH-2WTW>] (describing the rise of John E. Reid and the Reid accusatory model of interrogation).

identify guilt and on accusatory questioning to obtain confessions.<sup>34</sup> The Reid accusatory model of interrogation quickly gained popularity.<sup>35</sup> It was unarguably effective at eliciting confessions, and it did not require physical abuse.

Now, more than fifty years since Reid first introduced his revolutionary system of interrogation, the Reid accusatory model continues to dominate across the United States. While there are other accusatory models that advocate slightly different tactics, the Reid accusatory model is by far the most influential.<sup>36</sup> Today, Reid & Associates trains more interrogators than any other company in the world.<sup>37</sup> “[V]irtually every police department, sheriff’s office, and other law enforcement agency in the United States—federal, state, and local—employs Reid-style interrogation procedures.”<sup>38</sup> But this has to change. While the Reid technique was based on cutting-edge psychology for its time, many of its assumptions about coercion and human behavior have since been either discredited or significantly undermined. And while Reid & Associates has attempted to update its manual to reflect psychological developments over the past fifty years, these attempts have come up short. The model still rests on faulty assumptions, and it continues to endorse techniques that have been shown to increase the risk of false confessions.

*B. The Fundamental Flaws Underlying the Reid Accusatory Model of Interrogation*

The Reid accusatory model of interrogation can be divided into two stages: (1) a neutral, information-gathering interview to determine if a suspect is truthful or deceptive, innocent or guilty; followed by (2) a highly confrontational, accusatory interrogation aimed at extracting a confession.<sup>39</sup>

*1. The Behavioral Analysis Interview Leaves Innocence to Chance.*—According to Reid & Associates, the neutral, information-gathering interview functions as a gatekeeper for the actual interrogation.<sup>40</sup> Before interrogating a suspect, the investigators must first determine that the suspect is lying and is actually guilty. To help make this determination, the Reid Manual instructs interrogators to conduct a “Behavior Analysis Interview”

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34. *Id.*

35. *Id.*

36. Kassir, *supra* note 21, at 220.

37. Starr, *supra* note 33.

38. Kozinski, *supra* note 30, at 302 (footnote omitted).

39. Kassir, *supra* note 25, at 28.

40. See REID MANUAL, *supra* note 22, at 9, 173 (introducing the Behavior Analysis Interview).

(BAI).<sup>41</sup> During the BAI, the interrogator looks for verbal and nonverbal cues—such as eye contact, pauses, posture, and fidgeting—then draws a conclusion based on these cues whether the suspect is lying.<sup>42</sup> While Reid & Associates claims investigators are extremely accurate at detecting dishonesty based on these cues,<sup>43</sup> in reality, these investigators perform no better than chance.

In an experiment designed specifically to test the accuracy of the BAI, Vrij et al. gave several participants instructions to commit a mock crime.<sup>44</sup> After the selected participants had committed the mock crime, all the participants were then interviewed using BAI questioning and behavioral cues.<sup>45</sup> The results showed that the behavioral cues the BAI uses to determine veracity—the verbal and nonverbal triggers specified in the Reid Manual—did not significantly distinguish between truth-tellers and liars.<sup>46</sup> More concerning, however, many of the innocent suspects actually displayed behavioral cues that the BAI associates with lying, such as crossing legs or changing posture during the interview.<sup>47</sup> Subsequent studies have only confirmed this lack of diagnosticity. According to these studies, trained investigators are only slightly better than lay people at distinguishing between truth and deception—only a few percentage points better than chance.<sup>48</sup> Nonetheless, the investigators in these studies consistently displayed higher levels of confidence in their conclusions than their lay counterparts. Ironically, the more confident investigators were in their judgments, the more likely they were to be wrong.<sup>49</sup>

Reid & Associates suggests these studies are flawed. The company argues that these studies are not high stakes enough to mimic the actual interrogation room.<sup>50</sup> According to the company, there is no comparison between these studies, which often involve college students in low stakes situations, and a suspect in an interrogation room potentially facing life in prison.<sup>51</sup> However, in a meta-analysis of multiple studies over a forty-year

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41. *Id.* at 173.

42. Kassir, *supra* note 25, at 28.

43. *See id.* (outlining the methodological flaws in the single study cited by John E. Reid & Associates, Inc. to support its claims that the Reid technique is extremely accurate).

44. *Id.* at 29.

45. *Id.*

46. *Id.*

47. *Id.* at 29–30.

48. *Id.* at 29.

49. *Id.*

50. Letter by John E. Reid & Associates, Inc., rebutting *New Yorker* article (Dec. 7, 2013), <http://www.reid.com/pdfs/20131217.pdf> [https://perma.cc/NM89-FJCN].

51. *Id.*

period, researchers rebutted this argument.<sup>52</sup> They found that detectability of deception did not differ whether the stakes were high or low, or whether the speaker was a college student or non-student.<sup>53</sup> Thus, while Reid & Associates raises a legitimate point, the argument does not hold water when put to the test.

In sum, the BAI is fundamentally flawed. It rests on the assumption that investigators, based on prescribed verbal and nonverbal cues, can detect deception and determine guilt. The research shows this is not a reliable assumption. Indeed, according to the research, investigators' ability to detect deception is only slightly better than chance. The BAI is failing in its role as a gatekeeper. It is indiscriminately exposing innocent suspects to the rigors of a Reid-style accusatory interrogation. The BAI is not preventing false confessions; it is causing them.

*2. The Interrogation Extracts Confessions Through Psychological Coercion and Manipulation.*—While the human-lie-detector logic behind the BAI is fundamentally flawed, it is only concerning because it exposes suspects to the second stage of the Reid technique—the interrogation. The interrogation is where investigators extract a confession from the target. It is where psychological coercion and manipulation come into play. As summarized by Saul Kassin, one of the leading psychologists studying false confessions, the interrogation stage of the Reid technique is “a guilt-presumptive process, a theory-driven social interaction led by an authority figure who holds a strong a priori belief about the target . . . .”<sup>54</sup> By the time police reach the interrogation stage of the Reid technique, they have a single goal: get the suspect to admit guilt and sign a confession.<sup>55</sup>

While the Reid Manual divides the interrogation into nine steps,<sup>56</sup> the process can be more neatly distilled into three component parts:

- (1) tell the suspect you already know for sure he committed the crime, and cut off any attempts on his part to deny it; (2) offer the suspect [] more than one scenario for how he committed the crime, and suggest that his conduct was likely the least culpable, perhaps even morally justifiable (minimization); (3) overstate the strength of the evidence the police have inculcating the suspect—by inventing non-existent physical evidence or witness statements, for example—and assuring him he'll get convicted regardless of whether he talks.<sup>57</sup>

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52. See Maria Hartwig & Charles F. Bond, Jr., *Lie Detection from Multiple Cues: A Meta-analysis*, 28 APPLIED COGNITIVE PSYCHOL. 661, 667 (2014) (“The primary finding of our analysis is that lie detectability remains stable across contexts.”).

53. *Id.*

54. Kassin, *supra* note 21, at 219.

55. Kozinski, *supra* note 30, at 310–11.

56. REID MANUAL, *supra* note 22, at 213–14 (listing the nine steps of interrogation).

57. Kozinski, *supra* note 30, at 311–12 (citation omitted).

Each of these component parts increases the risk of false confessions and deserves attention.

*a. Assume the Suspect Is Guilty and Block Any Attempts at Denial.*—At the foundation of any Reid interrogation is the assumption of guilt. The interrogator is to assume the suspect has committed the crime; it is just a matter of extracting a confession. According to the Reid Manual, an effective interrogation should present the guilt of the suspect as fact, building a narrative that supports this version of events.<sup>58</sup> This is what the Reid Manual refers to as a “theme.”<sup>59</sup> It is designed to put the subject into a psychological state “where his story is but an elaboration of what the police purport to know already—that he is guilty.”<sup>60</sup> Once suspects enter the isolated interrogation room, interrogators immediately begin working on their theme. They start with strong accusations of guilt, such as “We know you killed your daughter,” or “you did it. It’s all right to say you did it.”<sup>61</sup> They employ closed-ended, confirmatory questions to gradually build up pressure, cutting off any denials that may interrupt the narrative or allow the suspect to consider an alternative version of events.<sup>62</sup> According to an instructor at a Reid training seminar, the key to dealing with suspects is “to shut them up” and “[n]ever allow them to give you denials.”<sup>63</sup>

The problem with this technique is that it creates tunnel vision. It blinds officers to the possibility that the person sitting across the table may be innocent or have valuable information to offer besides an admission of guilt. And it increases the risk of false confessions. Not because officers are intentionally ignoring the warning signs that a suspect may be innocent; but rather, because they are not even looking. Confirmation bias makes the problem even worse. Investigators who begin the interrogation presuming guilt can quickly rationalize any contrary explanations or denials. In the investigator’s eyes, any resistance or combativeness from the suspect is simply further evidence of guilt. This puts the suspect in a difficult situation. Denials will not change the investigator’s mind. And if the suspect fails to deny the accusations, it looks suspicious. The only way out is to confess.

*b. Use Minimization Tactics to Ease the Suspect into a Confession.*—In addition to assuming guilt and blocking denials, the Reid Manual suggests

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58. See REID MANUAL, *supra* note 22, at 232–33 (discussing the development of a “theme”).

59. *Id.*

60. *Miranda v. Arizona*, 384 U.S. 436, 450 (1966).

61. Second Amended Complaint at ¶ 32, *Fox v. Office of the Sheriff of Will County*, 2005 WL 4045131 (N.D. Ill.) (No. 04 C 7309).

62. See *Smith*, *supra* note 1 (describing a police interrogation).

63. *Starr*, *supra* note 33.

investigators use minimization tactics to extract confessions.<sup>64</sup> Such tactics offer suspects a face-saving excuse for committing a crime, an “expedient means of escape.”<sup>65</sup> They provide suspects with moral justification for their actions or present a version of events that minimizes the suspect’s role in the crime.<sup>66</sup> For instance, to minimize the crime of rape, the Reid Manual suggests the following:

Joe, no woman should be on the street alone at night looking as sexy as she did. Even here today, she’s got on a low-cut dress that makes visible damn near all of her breasts. That’s wrong! It’s too much of a temptation for any normal man. If she hadn’t gone around dressed like that you wouldn’t be in this room now.<sup>67</sup>

In a novel experiment known as the “cheating paradigm,” a group of researchers set out to test the effect of minimization tactics during interrogations.<sup>68</sup> Students in the experiment were asked to solve various problems, some individually and some with a partner.<sup>69</sup> The individual problems were to be completed independently; any assistance from other students was prohibited.<sup>70</sup> Several students, who were confederates of the researchers, were told to become visibly upset while working on an individual problem.<sup>71</sup> While the rules prohibited collaboration on the individual problems, many students could not help but assist their struggling classmates.<sup>72</sup> But their intentions did not matter. They had cheated.

The researchers began by directly accusing the students of cheating.<sup>73</sup> These accusations were similar to those used in the theme development component of the Reid technique. When directly accused of cheating, guilty students confessed 46% of the time, while innocent students confessed 6%

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64. See REID MANUAL, *supra* note 22, at 213–14 (discussing suggested minimization tactics).

65. Kassin, *supra* note 21, at 222.

66. See *id.* (“In the Central Park jogger case, every boy gave a false confession that placed his cohorts at center stage and minimized his own involvement.”) (citation omitted); REID MANUAL, *supra* note 22, at 256. The Reid Manual provides the following as an example of an interrogator justifying a suspect’s wrongful actions:

In one case that involved the interrogation of a 50-year-old man who had been accused of having taken indecent liberties with a 10-year-old girl, the suspect was told: “This girl is well advanced for her age. She probably learned a lot about sex from the boys in the neighborhood and from the movies and TV; and knowing what she did about sex, she may have deliberately tried to excite you to see what you would do.”

*Id.*

67. Coughlin, *supra* note 23, at 1647 (quoting the Reid Manual).

68. Melissa B. Russano et al., *Investigating True and False Confessions Within a Novel Experimental Paradigm*, 16 PSYCHOL. SCI. 481, 481 (2005).

69. *Id.* at 483.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

of the time.<sup>74</sup> The researchers then added minimization tactics to the questioning. When the researchers minimized the students' culpability, saying, "I'm sure you didn't realize what a big deal it was," confession rates increased dramatically.<sup>75</sup> The confession rate among guilty students nearly doubled, while the confession rate among innocent students tripled.<sup>76</sup> More concerning, the confession diagnosticity (the ratio of true confessions to false confessions) decreased by nearly 40%.<sup>77</sup>

Besides providing suspects with justifications for their actions, minimization tactics also involve implicit promises of leniency if the suspect admits guilt and confesses.<sup>78</sup> While most courts reject confessions elicited through explicit promises of leniency as involuntary,<sup>79</sup> they generally permit confessions elicited through implicit promises of leniency.<sup>80</sup> But these two tactics are functionally the same. People interpret information by reading "between the lines."<sup>81</sup> Multiple studies support this understanding; implicit promises cause suspects to infer leniency at the same rate as if an explicit promise had been made.<sup>82</sup> When a person hears "The burglar goes to the house," they mistakenly recall that the burglar broke into the house, even though that fact was not explicitly stated.<sup>83</sup> So regardless of whether a promise is explicit or implicit, the result is the same: an inference of leniency and an increased risk of false confessions.

*c. If Necessary, Deploy Deceit and False Evidence to Overcome Resistance.*—In contrast to minimization techniques that downplay a suspect's culpability, the use of deceit and false evidence—otherwise known as maximization techniques—play up the strength of the case against the suspect.<sup>84</sup> They imply the existence of incriminating evidence that will suddenly surface if the suspect does not confess. For example, interrogators

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74. *Id.* at 484.

75. *Id.* at 483–84.

76. *Id.* at 484.

77. *Id.*

78. REID MANUAL, *supra* note 22, at 246, 417–18.

79. Kassin, *supra* note 21, at 222.

80. *Id.*

81. Kassin et al., *supra* note 28, at 18.

82. *See* Dassey v. Dittmann, 877 F.3d 297, 335 (7th Cir. 2017) (en banc) (Rovner, J., dissenting) (citing studies showing that suspects infer leniency from minimization tactics at the same rate as if an explicit promise had been made); *see also* Saul M. Kassin & Karlyn McNall, *Police Interrogations and Confessions: Communicating Promises and Threats by Pragmatic Implication*, 15 LAW & HUM. BEHAV. 233, 248 (1991) ("[A]lthough the courts take promises and threats more seriously when they are made explicitly than when they are implicit in an interrogator's remarks . . . these different means of communication are functionally equivalent in their impact.").

83. Kassin et al., *supra* note 28, at 18.

84. Kozinski, *supra* note 30, at 343.

may falsely tell the suspect they have incriminating DNA evidence; that they have a matching fingerprint from the crime scene; that they found a missing murder weapon; or, most commonly, that a confederate has confessed.<sup>85</sup> The problem with those techniques is that “once you start down the road of using trickery and deception, the misuses are inherent in that. There are no clear lines of, ‘This is a good amount of trickery, and this isn’t.’”<sup>86</sup> Such tactics operate in a grey area on the edge of acceptable police conduct. They also elicit false confessions at a startling rate. Indeed, trickery and deception have been linked to the vast majority of documented police-induced false confessions.<sup>87</sup>

The classic alt key experiment makes this link clear. In the experiment, two students sat alone at a keyboard.<sup>88</sup> One student was instructed to type as the other student, a confederate of the researchers, read the keys aloud.<sup>89</sup> The researchers told the students that no matter what, they should not hit the alt key, and that if they did, the computer would immediately crash.<sup>90</sup> Unknown to the students, the computer was programmed to crash sixty seconds after the experiment began.<sup>91</sup> After the computers crashed, the researchers asked the students Reid-style accusatory questions to see if they would confess to hitting the alt key.<sup>92</sup> Nearly a quarter of the innocent students confessed.<sup>93</sup> The researchers then added false incrimination to the equation, instructing the confederate to attest to having seen the student hit the alt key.<sup>94</sup> This bit of deception nearly doubled the number of false confessions.<sup>95</sup> In 2011, researchers slightly altered the experiment: instead of having the confederate attest to seeing the student hit the alt key, the experimenters falsely told the students that their keystrokes had been recorded on a server and would be available for verification.<sup>96</sup> This sleight of hand nearly tripled the number of false confessions.<sup>97</sup>

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85. See Deborah Young, *Unnecessary Evil: Police Lying in Interrogations*, 28 CONN. L. REV. 425, 429–30 (1996) (articulating how police have employed trickery and deceit to extract confessions).

86. Eli Hager, *The Seismic Change in Police Interrogation*, MARSHALL PROJECT (Mar. 7, 2017) (emphasis omitted) (quoting false confession expert Saul Kassin), <https://www.themarshallproject.org/2017/03/07/the-seismic-change-in-police-interrogations> [<https://perma.cc/J9GH-HYHK>].

87. Kassin et al., *supra* note 28, at 12.

88. Starr, *supra* note 33.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

The alt key experiment has been criticized for being too low-stakes and not closely matching an interrogation scenario.<sup>98</sup> However, later studies involving higher stakes have refuted this criticism. For example, in 2009, Nash and Wade conducted an experiment where they confronted participants with fabricated video evidence in a computerized gambling experiment.<sup>99</sup> The fabricated video showed the participants stealing money from the bank during a losing round.<sup>100</sup> When the researchers confronted the participants with this evidence, the number of false confessions was even more shocking than in the alt key experiment. Every participant confessed.<sup>101</sup> Taken together, these experiments show the power and potential problems raised by the use of deceit and false evidence in interrogations. While such methods are extremely effective at eliciting confessions, they also drastically increase the risk of false positives. These tactics are not worth the risk, particularly when other reasonable alternatives exist.

While the Reid accusatory model was revolutionary for its time and certainly deserves credit for modernizing interrogation practices in the United States, its continued existence within the American criminal justice system can no longer be justified without significant reform. As it stands, the Reid accusatory model is substantially flawed: the BAI rests on the fundamental misunderstanding that police have the ability to detect deception, while the interrogation is littered with components that increase the risk of false confessions. The method ignores current psychological understanding in favor of coercion and manipulation.<sup>102</sup> The Reid accusatory model of interrogation is causing false confessions. It needs to be replaced in its entirety or significantly reformed.

## II. The Research Supports a Transition Away from the Reid Accusatory Model Toward a Non-Accusatory, Information-Gathering Approach

“It is hard to imagine any aspect of human behavior more counterintuitive than the proposition that an innocent person, as a function of social pressure, would knowingly confess to a heinous crime that he or she did not commit . . . .”<sup>103</sup> The idea that a man like Kevin Fox would knowingly confess to the murder of his daughter Riley, even after hours of coercive and

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98. See, e.g., John E. Reid Rebuttal Letter, *supra* note 49 (suggesting laboratory detection of deception research studies do not produce helpful results because the students have no motivation to be believed or to avoid detection).

99. Kassir, *supra* note 25, at 34.

100. *Id.*

101. *Id.*

102. See Starr, *supra* note 33 (“When [the author] asked [the President of John E. Reid & Associates] if anything in the technique had been developed in collaboration with psychologists, he said, ‘No, not a bit. It’s entirely based on our experience.’”).

103. Kassir, *supra* note 25, at 26.

manipulative interrogation, defies common sense. Innocent people do not confess. Yet the social sciences tell us just the opposite. False confessions do happen, and they happen on a somewhat regular basis.<sup>104</sup>

The social sciences have also explained how false confessions happen. They have shown how coercive interrogation techniques, techniques associated with the Reid accusatory model of interrogation, increase the risk of false confessions.<sup>105</sup> Until recently, however, the research could not justify a transition away from the traditional Reid accusatory model; there was not enough evidence to show that an alternative method of interrogation was more effective than the accusatory Reid-style techniques. This is no longer the case. The literature now justifies significant reform; the effectiveness of non-accusatory, information-gathering approaches is no longer in question. It has been demonstrated through multiple studies and implementations in countries across the world.<sup>106</sup> Non-accusatory, information-gathering approaches elicit about the same amount of confessions with far fewer false positives than traditional accusatory approaches.<sup>107</sup> This Part will discuss the development of the non-accusatory, information-gathering approach, the science behind the method, and its growing influence.

A. *The Non-accusatory, Information-Gathering Approach Is More Effective than the Reid Accusatory Model*

1. *The Development of the Non-accusatory, Information-Gathering Approach.*—In 1984, England passed the Police and Criminal Evidence Act.<sup>108</sup> The Act passed on the tail of several high-profile false confessions.<sup>109</sup> It gave judges discretion to prohibit confessions obtained through certain coercive interrogation practices, and it mandated recording custodial

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104. *Id.*

105. See Christian A. Meissner et al., *Improving the Effectiveness of Suspect Interrogations*, 11 ANN. REV. L. & SOC. SCI. 211, 220 (2015) (“Experimental research on accusatorial approaches has demonstrated that certain techniques, such as minimization tactics and false-evidence ploys, can increase the likelihood of a false confession from an innocent suspect.”) (citations omitted).

106. See Kassin, *supra* note 25, at 27 (“[The] literature is now sufficiently mature and has served as the basis of an official White Paper of the American Psychology-Law Society, only the second in the history of this professional organization.”) (citation omitted); *infra* notes 129–32 and accompanying text.

107. See Meissner et al., *supra* note 105, at 220 (noting that “noncoercive, information-gathering methods of interrogation preserved a high rate of true confessions and significantly reduced the likelihood of false confessions when compared with approaches involving minimization and maximization”).

108. Christian A. Meissner et al., *Accusatorial and Information-Gathering Interrogation Methods and Their Effects on True and False Confessions: A Meta-Analytic Review*, 10 J. EXPERIMENTAL CRIMINOLOGY 459, 462 (2014).

109. *Id.*

interrogations.<sup>110</sup> More importantly, it created a platform for developing a new model of interrogation—PEACE (Planning and Preparation, Engage and Explain, Obtain an Account, Closure, and Evaluation).<sup>111</sup> And while there are other information-gathering techniques, PEACE largely typifies the category.<sup>112</sup>

Unlike the Reid accusatory model of interrogation, PEACE focuses on gathering facts through open-ended, non-suggestive questions.<sup>113</sup> PEACE emphasizes “developing rapport, explaining the allegation and the seriousness of the offense, emphasizing the importance of honesty and truth gathering, and requesting the suspect’s version of events. Suspects are permitted to explain the situation without interruption and questioners are encouraged to actively listen.”<sup>114</sup> After the suspect has had the opportunity to explain their version of events, the investigator can question and challenge the suspect with inconsistencies; however, under no circumstances may the investigator lie.<sup>115</sup>

*2. The Research Supporting the Non-accusatory, Information-Gathering Approach.*—Over the past two decades since PEACE was introduced in the United Kingdom, scientific studies of the non-accusatory, information-gathering approach have proliferated.<sup>116</sup> And the results have been one-sided.<sup>117</sup> Systematic research has shown that “accusatorial methods increase the likelihood of false confession, while information-gathering methods protect the innocent yet preserve interrogators’ ability to elicit confessions from guilty persons.”<sup>118</sup>

For example, in 2011, Narchet et al. conducted an experiment comparing the non-accusatory, information-gathering approach with the maximization and minimization tactics commonly associated with the Reid accusatory model.<sup>119</sup> The study found that when compared with the accusatorial maximization and minimization techniques, the non-accusatory, information-gathering approach preserved a high rate of true confessions while minimizing the possibility of false positives.<sup>120</sup> In two similar studies,

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110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 463.

114. *Id.* at 462.

115. *Id.* at 463.

116. *Id.*

117. *See id.* at 479–82 (discussing the available literature on the non-accusatory, information-gathering approach).

118. *Id.* at 460.

119. *Id.* at 472.

120. *Id.*

Meissner et al. directly assessed the utility of non-accusatory, information-gathering techniques compared to Reid-style accusatory tactics.<sup>121</sup> Another study found that Reid-style accusatory tactics significantly increased the odds of both true and false confessions.<sup>122</sup> Non-accusatory, information-gathering techniques, on the other hand, not only significantly increased the odds of a true confession but also reduced the odds of a false confession by 74%.<sup>123</sup> Meissner et al. confirmed this finding in a subsequent meta-analysis comparing the two approaches.<sup>124</sup> Further, in 2013, Evans et al. found that non-accusatory, information-gathering techniques not only significantly increase admissions from guilty suspects but also increase the number of critical details elicited from suspects.<sup>125</sup>

*3. The Growing Influence of the Non-accusatory, Information-Gathering Approach.*—Since PEACE was introduced in the United Kingdom over two decades ago, other countries have started to abandon the Reid accusatory model of interrogation as “unethical and unreliable.”<sup>126</sup> Several European countries, fueled by the mounting body of literature in the social sciences, have banned the use of closed-ended, confirmatory questions and deception altogether.<sup>127</sup> Norway, New Zealand, and Australia have all joined the United Kingdom and amended their interrogation practices to employ non-accusatory, information-gathering techniques.<sup>128</sup> And Sweden and Denmark are not far behind.<sup>129</sup>

The movement has not gone completely unnoticed in the United States. In 2010, President Barack Obama announced the formation of the High-Value Detainee Interrogation Group (HIG)—a fulfillment of a campaign promise and a response to the public outcry against the torturous interrogation practices that took place during the Bush War on Terror.<sup>130</sup> The group’s purpose is to not only interrogate terrorists but also to be a “locus for interrogation best practices, lessons learned, and research for the federal

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121. Meissner et al., *supra* note 105, at 220–21.

122. *Id.* at 221.

123. *Id.*

124. *Id.*

125. *Id.*

126. Kolker, *supra* note 22.

127. Meissner et al., *supra* note 108, at 460.

128. *Id.*

129. Kozinski, *supra* note 30, at 334.

130. Kolker, *supra* note 22; Ali Watkins, *Elite Terrorist Interrogation Group Withers Under Trump*, POLITICO (Dec. 5, 2017), <https://www.politico.com/story/2017/12/05/elite-terrorist-interrogation-trump-279930> [<https://perma.cc/FS3R-NADJ>].

government.”<sup>131</sup> To date, the research arm of the HIG has funded some sixty studies in psychological and behavioral sciences aimed at identifying interrogation best practices.<sup>132</sup> The group’s research arm is “the first federally-funded large scale scientific research into interrogation techniques in decades,” and funded Meissner et al.’s meta-analysis in 2014.<sup>133</sup> And the group was deployed to interrogate Times Square bomber Faisal Shahzad and Boston bomber Dzhokhar Tsarnaev.<sup>134</sup>

Several years after formation, the group set out to apply its research to America’s police work. The goal was “to revolutionize police work with behavioral science, the same way law enforcement procedures were altered a generation ago by DNA evidence and, before that, when the third degree was put to rest.”<sup>135</sup> The group’s first test run was with the Los Angeles Police Department (LAPD). Two LAPD police officers were chosen as guinea pigs and sent to Washington, D.C. to undergo training with the HIG.<sup>136</sup> When the two officers returned from their training, they were tasked with re-interrogating a suspect linked with an unsolved murder case.<sup>137</sup> Using the non-accusatory interrogation techniques they learned from the HIG, the two officers uncovered several critical details that the previous interrogators employing Reid-style accusatory techniques had missed.<sup>138</sup> Based on these details, the Los Angeles County District Attorney’s Office issued a warrant for the suspect’s arrest that same day.<sup>139</sup>

Since this initial test run, the HIG has trained over thirty-five officers from the LAPD.<sup>140</sup> These officers have conducted roughly sixty non-accusatory interrogations using the HIG’s methods, achieving a 75%–80% success rate.<sup>141</sup> The HIG has also done a few rounds at other police departments across the country, lecturing on the effectiveness of non-accusatory methods compared to traditional Reid-style accusatory

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131. HIGH-VALUE DETAINEE INTERROGATION GROUP, FED. BUREAU OF INVESTIGATION, INTERROGATION BEST PRACTICES 1 (Aug. 26, 2016) [hereinafter HIG BEST PRACTICES], <https://www.fbi.gov/file-repository/hig-report-august-2016.pdf/view> [https://perma.cc/Z8R4-LLD6].

132. Kolker, *supra* note 22.

133. Watkins, *supra* note 130; HIGH-VALUE DETAINEE INTERROGATION GROUP, FED. BUREAU OF INVESTIGATION, INTERROGATION: A REVIEW OF THE SCIENCE 24, 67, 93 (2016) [hereinafter HIG REVIEW OF THE SCIENCE REPORT], <https://www.fbi.gov/file-repository/hig-report-interrogation-a-review-of-the-science-september-2016.pdf/view> [https://perma.cc/6Z9F-X4LC].

134. Kolker, *supra* note 22.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

techniques.<sup>142</sup> However, in recent years, with the changing political climate,<sup>143</sup> the organization has lost momentum and has gradually faded from relevance.<sup>144</sup> While the organization has helped fuel recent strides in our understanding of the psychological and behavioral aspects of interrogation, it is difficult to say whether the organization can maintain this role, or even its existence, moving forward.

Regardless of HIG's continuing viability, a gradual shift is happening in the United States—a movement away from the Reid accusatory model of interrogation. In 2017 Wicklander–Zulawski (W–Z), “one of the nation’s largest police consulting firms—one that has trained hundreds of thousands of cops from Chicago to New York and federal agents at almost every major agency—said it is tossing out the Reid technique because of the risk of false confessions.”<sup>145</sup> According to the CEO of W–Z, the move was in response to the growing body of literature showing alternative, non-accusatory methods of interrogation to be less risky.<sup>146</sup> W–Z’s transition reflects the mounting body of research and the growing consensus in the social science community supporting a move toward a non-accusatory, information-gathering approach. For years the research was not sufficient to justify a transition away from the Reid accusatory model of interrogation. But this is no longer the case. The research has pushed the American criminal justice system to a tipping point, and companies like W–Z are leading the charge.

### III. Despite the Growing Body of Research on False Confessions, Courts Continue to Apply an Outdated Understanding of Coercion when Evaluating Confession Evidence

In 2007, in the highly publicized trial of Brendan Dassey, the teenage boy from the Netflix documentary *Making a Murderer*, the State argued in closing that “[p]eople who are innocent do not confess.”<sup>147</sup> While numerous studies and DNA exonerations have disproved this notion, the outdated idea still survives in the court system. Courts have been hesitant to embrace the growing body of literature on coercion and false confessions, and they have been reluctant to condemn the Reid accusatory model of interrogation. The courts’ view of coercion and confession evidence is disconnected from the

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142. *Id.*

143. *See* Watkins, *supra* note 130 (“[T]hose who work for [HIG] . . . fear its days could be numbered under a president who has openly endorsed the torture of terror suspects.”).

144. *See id.* (“We run the risk of losing this innovative and important instrument of national power. . . [What happens] if it doesn’t have strong institutional support? It will lose budget and personnel, and no one will push back.” (quoting Professor Bobby Chesney)).

145. Hager, *supra* note 86.

146. *Id.*

147. *Dassey v. Dittmann*, 877 F.3d 297, 332 (7th Cir. 2017) (en banc) (Rovner, J., dissenting), *cert. denied*, 138 S. Ct. 2677 (2018).

social sciences. It emboldens those who adhere to the Reid accusatory model, and it stands in the way of reform.

This Part will first discuss the evolution of the courts' understanding of coercion and the framework of case law that has developed around this faulty understanding of human psychology. Second, this Part will analyze how the courts' understanding of coercion has influenced the evaluation of confession evidence and fueled the continued existence of the Reid accusatory model of interrogation.

A. *The Courts Have an Archaic Understanding of Coercion and False Confessions*

In 1969, the Supreme Court issued its opinion in *Frazier v. Cupp*.<sup>148</sup> In *Frazier*, the police used standard Reid-style maximization and minimization techniques: they bolstered their case by falsely stating that a confederate had confessed, and they minimized the suspect's culpability by providing him with an excuse for his conduct.<sup>149</sup> Nonetheless, the Court held that such tactics do not make an otherwise voluntary confession inadmissible.<sup>150</sup> In other words, *Frazier* gave police the green light to use trickery and deceit in interrogations.<sup>151</sup> It gave police permission to "deceive, trick, conceal, imply, and mislead in any number of ways, provided that, under a totality of the circumstances evaluation, they do not destroy a suspect's ability to make a rational choice."<sup>152</sup> It gave police "virtual carte blanche to engage in deceptive undercover work."<sup>153</sup>

Since *Frazier*, courts have consistently upheld confessions marred by coercive interrogation techniques.<sup>154</sup> They have been highly permissive toward the use of maximization and minimization techniques even though both techniques have been directly linked to false confessions.<sup>155</sup> The real problem with *Frazier*, however, is that its reasoning is based on an archaic psychological understanding of coercion and false confessions. According to

148. 394 U.S. 731 (1969).

149. *Id.* at 737–38.

150. *See id.* at 739 (finding that the misrepresentations in this case, while relevant, were insufficient to render the confession involuntary).

151. Katie Wynbrandt, *From False Evidence Ploy to False Guilty Plea: An Unjustified Path to Securing Convictions*, 126 YALE L.J. 545, 562 (2016).

152. *Dassey*, 877 F.3d at 331 (Rovner, J., dissenting).

153. Christopher Slobogin, *Deceit, Pretext, and Trickery: Investigative Lies by the Police*, 76 OR. L. REV. 775, 781 (1997).

154. *See, e.g., United States v. Villalpando*, 588 F.3d 1124, 1128 (7th Cir. 2009) (recognizing that "[t]rickery, deceit, even impersonation do not render a confession inadmissible"); *see also United States v. Rutledge*, 900 F.2d 1127, 1131 (7th Cir. 1990) (acknowledging that "the law permits the police to pressure and cajole, conceal material facts, and actively mislead—all up to limits").

155. *See supra* notes 80–85 and accompanying text.

*Frazier*, besides the most extraordinary of circumstances—such as when police use physical coercion<sup>156</sup> or particularly egregious forms of nonphysical coercion<sup>157</sup>—an innocent person would not confess to a crime someone else committed; any other understanding would be counterintuitive, illogical. While this understanding has since been invalidated, it is nonetheless the framework on which our case law has developed.<sup>158</sup>

For example, shortly after *Frazier*, the Supreme Court in *Oregon v. Mathiason*<sup>159</sup> upheld a confession elicited immediately after an officer falsely informed a suspect that his fingerprints had been found at the scene of the crime.<sup>160</sup> A few years later, the North Carolina Supreme Court in *State v. Jackson*<sup>161</sup> upheld a confession where a police officer obtained a knife that looked like the murder weapon, smeared blood on the knife, and then confronted the suspect with a fabricated fingerprint obtained from the knife.<sup>162</sup> And in a more high-profile case, a New York state court admitted the confession of seventeen-year-old Martin Tankleff even though the police falsely told him that his father had awakened at the hospital and identified him as the attacker.<sup>163</sup> While there are admittedly decisions where courts have condemned certain techniques as overly coercive,<sup>164</sup> the body of case law in the United States has developed in a factual framework that rests on a fifty-year-old understanding of human psychology and behavioral science.<sup>165</sup> Modern psychological understanding of coercion and the causes of false confessions have been largely ignored.

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156. See, e.g., *Brown v. Mississippi*, 297 U.S. 278, 287 (1936) (rejecting a confession elicited by officers using physical violence as inconsistent with the due process of law required by the Fourteenth Amendment).

157. See, e.g., *Spano v. New York*, 360 U.S. 315, 322–24 (1959) (concluding that a suspect’s confession was involuntary because it was made after hours of interrogation, the suspect had been denied his right to counsel, and the police had taken advantage of the suspect’s diminished mental capacity).

158. See, e.g., *Dassey v. Dittmann*, 877 F.3d 297, 332 (7th Cir. 2017) (en banc) (Rovner, J., dissenting) (“Innocent people do in fact confess, and they do so with shocking regularity.”).

159. 429 U.S. 492 (1977).

160. *Id.* at 495–96.

161. 304 S.E.2d 134 (N.C. 1983).

162. *Id.* at 143–44.

163. Bruce Lambert, *With L.I. Murder Conviction, the Same Old Question: Who Did It?*, N.Y. TIMES (Dec. 24, 2007), <https://www.nytimes.com/2007/12/24/nyregion/24tankleff.html> [<https://perma.cc/Y4WB-BKQZ>].

164. See Kassir et al., *supra* note 28, at 13 (collecting cases).

165. See *Dassey v. Dittmann*, 877 F.3d 297, 332 (7th Cir. 2017) (en banc) (Rovner, J., dissenting) (“And so our case law developed in a factual framework in which we presumed that the trickery and deceit used by police officers would have little effect on the innocent.”).

B. *The Courts' Understanding of Coercion and False Confessions Is Affecting the Evaluation of Confession Evidence and Contributing to the Continued Existence of the Reid Accusatory Model of Interrogation*

Courts today use a totality-of-the-circumstances test to evaluate the admissibility of confession evidence.<sup>166</sup> Under this test, courts analyze the voluntariness of confessions by asking “whether an examination of the totality of the circumstances indicates that the conduct of the law enforcement officials was such as to overbear petitioner’s will to resist and to bring about a confession that was not the product of a rational intellect and a free will.”<sup>167</sup> Coercive police tactics are a “necessary predicate to finding that a confession is not voluntary . . . .”<sup>168</sup> This test is not necessarily a poor fit for evaluating the voluntariness of confessions; it is, however, not being properly applied.

The test itself is designed to be flexible, to fit a variety of fact patterns. But this flexibility has afforded little protection to suspects. Judges routinely devalue the coercive effect of certain interrogation tactics that have been shown through psychological research to trigger false confessions.<sup>169</sup> In practice, judges “exclude only the most egregiously obtained confessions and then only haphazardly.”<sup>170</sup> This haphazard approach has helped fuel the continued existence of the Reid accusatory model of interrogation. It has provided a safe harbor for the Reid accusatory model in the face of a mounting body of literature linking the model to false confessions and endorsing the non-accusatory, information-gathering approach.

What the literature recognizes as coercive—such as Reid-style minimization and maximization techniques—the courts continue to condone. Under the veil of the totality-of-the-circumstances test and an outdated understanding of coercion, the courts continue to admit confessions tainted by Reid-style accusatory techniques, rejecting confessions only in the most shocking of circumstances. If the totality-of-the-circumstances test is going to provide any protection to interrogation suspects, courts have to start giving appropriate weight to Reid-style accusatory tactics directly linked to false confessions. The courts must update their understanding of false confessions and accept a new definition of coercion that aligns the courts’ understanding

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166. See *Withrow v. Williams*, 507 U.S. 680, 693 (1993) (“[C]ourts look to the totality of circumstances to determine whether a confession was voluntary.”).

167. *Robinson v. Smith*, 451 F. Supp. 1278, 1284–85 (W.D.N.Y. 1978).

168. *Colorado v. Connelly*, 479 U.S. 157, 167 (1986) (internal quotations omitted).

169. Eve Brensike Primus, *The Future of Confession Law: Toward Rules for the Voluntariness Test*, 114 MICH. L. REV. 1, 34, 37–38 (2015).

170. Kassin et al., *supra* note 28, at 11–12; see Mark A. Godsey, *Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination*, 93 CALIF. L. REV. 465, 470 (2005) (“[A] finding that a confession was made involuntarily [is] very rare in practice.”).

with that of the social sciences. They then must apply this definition through the totality-of-the-circumstances test, barring confessions elicited using Reid-style accusatory tactics where appropriate.

#### IV. Three Paths to a New, More Reliable System of Interrogation

While a growing body of research and an evolving understanding of human psychology have led to significant changes to eyewitness evidence and identification procedures,<sup>171</sup> the same cannot be said of false confession evidence. Despite the growing body of research endorsing non-accusatory, information-gathering approaches, the American criminal justice system has been slow to change. The much-maligned Reid accusatory model still dominates within law enforcement, and courts continue to admit confessions elicited using Reid-style techniques based on a fifty-year-old understanding of human psychology and behavioral science. But such resistance can no longer be justified. There is now a body of “rigorous, peer-reviewed, legal and psychological research” that supports a transition away from the traditional Reid accusatory model of interrogation.<sup>172</sup> This Part will discuss this transition and map out three paths for the American criminal justice system moving forward.

##### A. *A Complete Overhaul of the Police Interrogation System*

The first approach is the most drastic: a complete overhaul of the police interrogation system. This would involve abandoning the Reid accusatory model of interrogation in favor of a non-accusatory, information-gathering approach, such as PEACE. Given how deeply ingrained the Reid accusatory model is within law enforcement, and American interrogation culture in general, accomplishing such a transition would be a difficult task.

Such a solution would likely face intense resistance from law enforcement. “Police veterans aren’t exactly eager to be told they’ve been doing their job wrong for 30 years. . . . There’s an entrenched culture behind that blue wall . . . .”<sup>173</sup> Unlike reforms for eyewitness evidence, which only required police to make minor procedural changes, transitioning to a

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171. See Kassin et al., *supra* note 28, at 3–4. Discussing the enormous role of psychological research in preventing wrongful convictions, Kassin et al. observe the following about eyewitness evidence and identification procedures:

Eyewitness researchers have thus succeeded at identifying the problems and proposing concrete reforms. Indeed, following upon an AP-LS White Paper on the subject, the U.S. Department of Justice assembled a working group of research psychologists, prosecutors, police officers, and lawyers, ultimately publishing guidelines for law enforcement on how to minimize eyewitness identification error.

*Id.* (internal citations omitted).

172. *Dassey v. Dittmann*, 877 F.3d 297, 334 (7th Cir. 2018) (en banc) (Rovner, J., dissenting).

173. Kolker, *supra* note 22.

non-accusatory, information-gathering approach would require major substantive changes to how police officers conduct interviews. It would be an attack on an officer's life's work.<sup>174</sup> It would require upending years of police work and implementing an entirely new system of interrogation.

While such a complete shift could potentially be accomplished by focusing on the younger generation of officers,<sup>175</sup> such an approach would be tough to implement given the significant amount of informal training done by veteran interrogators. Moreover, this kind of targeted training would create confusion and cause tension between new officers and veterans practicing completely different interrogation techniques. But just because this approach will likely face intense resistance, that does not mean it should be taken off the table. England certainly faced resistance following the decision to completely reshape police interrogation practices and adopt PEACE, yet it successfully accomplished the transition. And other countries have achieved similar results.<sup>176</sup>

*B. A Targeted Reform, Eliminating the Most Offensive Aspects of the Reid Accusatory Model of Interrogation*

In contrast to a complete overhaul, the second approach would be a targeted reform, eliminating the most offensive aspects of the Reid technique while preserving as much of the model as possible. Canada, a country that has for decades primarily relied on the Reid accusatory model of interrogation, recently adopted such a solution, developing a hybrid approach of accusatory and non-accusatory interviewing.<sup>177</sup> The United States is poised to take a similar approach.

A targeted reform would likely face less resistance from the law enforcement community than a complete overhaul. And, like the Canadian system, it could be tailored to fit the specific historical and cultural needs of interrogation in the United States. However, for such an approach to work, there would have to be serious collaboration between the social science community and law enforcement—an open dialogue that combines the theory and research from the social sciences with the experience and practicality of law enforcement.

While any targeted reform would ultimately be a product of collaboration, there are five specific reforms that should be put on the table immediately for discussion: (1) eliminating the BAI; (2) requiring

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174. *See id.* (“Interrogation . . . is a very egocentric thing[.]”).

175. *Id.*

176. *See, e.g.,* Kassir et al., *supra* note 28, at 28 (“Indeed, New Zealand and Norway have recently adopted the PEACE approach to investigative interviewing as a matter of national policy.”).

177. *See The Art of an Effective Interview*, ROYAL CANADIAN MOUNTED POLICE (Jan. 13, 2017), <http://www.rcmp-grc.gc.ca/en/gazette/the-art-an-effective-interview> [https://perma.cc/3U4Z-ZJWQ] (discussing Canada's new hybrid interviewing model).

videotaping for all custodial interrogations; (3) eliminating the use of minimization techniques; (4) limiting the use of deceit and false evidence in interrogations; and (5) improving the quality of interrogation training.

*1. The Behavioral Analysis Interview Needs To Be Replaced.*—The BAI is an ineffective screen for innocence. Investigators perform only slightly better than chance when applying the verbal and nonverbal cues prescribed in the Reid Manual—such as eye contact, pauses, posture, and fidgeting—to distinguish between a suspect who is lying and a suspect who is telling the truth.<sup>178</sup> If the accusatory model is at all going to stay intact through a targeted reform, the BAI needs to be replaced.

One approach to replace the BAI is a method known as the cognitive load approach. This approach suggests that because it takes more effort to tell a lie than to tell the truth, investigators should tax the suspect's cognitive load then look for cues that betray cognitive effort.<sup>179</sup> One way researchers suggest taxing the suspect's cognitive load is to have the suspect tell the story in reverse chronological order.<sup>180</sup> The data shows that when researchers challenge suspects in such a manner, observers become more accurate in their ability to distinguish between a suspect who is lying and a suspect who is telling the truth—significantly more accurate than chance.<sup>181</sup>

A similar strategy, which could complement the cognitive load approach, would require investigators to strategically use case-specific facts and evidence during the interview.<sup>182</sup> In contrast to the Reid technique, which suggests investigators reveal evidence at the outset of the interview, this method would require investigators to withhold the evidence and wait to ask specific questions to reveal inconsistencies.<sup>183</sup> Investigators would then analyze the level of detail in the suspect's responses to detect deception.<sup>184</sup> According to the research, liars systematically avoid providing details related to the crime, while truth-tellers are much more forthcoming with information.<sup>185</sup> In early experiments, this understanding has produced

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178. Kassin, *supra* note 25, at 28–29.

179. *Id.* at 30.

180. *Id.*

181. Aldert Vrij & Pär Anders Granhag, *Eliciting Cues to Deception and Truth: What Matters Are the Questions Asked*, 1 J. APPLIED RES. MEMORY & COGNITION 110, 113 (2012); Aldert Vrij et al., *Pitfalls and Opportunities in Nonverbal and Verbal Lie Detection*, 11 PSYCHOL. SCI. PUB. INT. 89, 109–10 (2011).

182. Maria Hartwig et al., *Strategic Use of Evidence During Police Interviews: When Training to Detect Deception Works*, 30 LAW & HUM. BEHAV. 603, 604 (2006).

183. *Id.* at 605.

184. *Id.* at 615.

185. *Id.* at 605.

investigators that are considerably more effective at detecting deception than investigators not trained in this method.<sup>186</sup>

While Reid & Associates claims investigators trained to recognize the verbal and nonverbal cues prescribed in the Reid Manual can detect deception at an extremely high rate, “[t]here really is no Pinocchio’s nose.”<sup>187</sup> There is not a single cue or group of cues that can reliably detect deception. Thus, either of the methods described above, whether used individually or in combination, would be an improvement.

2. *Videotaping Should Be Required for All Custodial Interrogations.*—Videotaping is one of the least controversial reforms; its benefits are numerous and well-documented.<sup>188</sup> For instance, videotaping creates a record of the proceedings that can be used to address disparities in perceptions or preconceived biases as well as differences in how statements are interpreted.<sup>189</sup> It deters police misconduct and assures that *Miranda* warnings were properly presented to suspects.<sup>190</sup> And it reduces the number and length of motions to suppress, thereby decreasing congestion in the courts.<sup>191</sup> In short, “[r]ecording an interrogation is the most accurate means of preserving what happened in an interrogation room . . . .”<sup>192</sup> While twenty-five states and D.C. currently require custodial interviews to be videotaped, and over one thousand jurisdictions have voluntarily implemented videotaping policies,<sup>193</sup> a significant portion of the United States still needs to follow suit.

3. *Minimization Through Implicit Promises of Lenience Should Be Banned.*—Because explicit promises of leniency increase the risk that an innocent suspect will falsely confess, most courts reject confessions elicited using such tactics.<sup>194</sup> On the other hand, they generally allow confessions obtained through minimization tactics indirectly promising leniency.<sup>195</sup> On

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186. *Id.* at 603 (stating that interviewers trained to strategically use the evidence achieve a considerably higher deception detection rate (85.4%) than untrained interviewers (56.1%)).

187. Laura Zimmerman, *Deception Detection*, AM. PSYCHOL. ASS’N (Mar. 2016), <http://www.apa.org/monitor/2016/03/deception.aspx> [<https://perma.cc/GE23-D68A>].

188. Kassin et al., *supra* note 28, at 26.

189. HIG REVIEW OF THE SCIENCE REPORT, *supra* note 133, at 32.

190. *Id.*

191. *Id.*

192. Maurice Chammah, *Bill Would Require Police to Record Interrogations*, TEX. TRIB. (Dec. 5, 2012), <https://www.texastribune.org/2012/12/05/bill-would-require-police-record-interrogations/> [<https://perma.cc/36WF-UH68>].

193. *False Confessions & Recording of Custodial Interrogations*, INNOCENCE PROJECT, <https://www.innocenceproject.org/false-confessions-recording-interrogations/> [<https://perma.cc/M23W-63AB>].

194. Kassin, *supra* note 21, at 222.

195. *Id.*

the surface, this differentiation seems to align with common sense. After all, it is the suspect's fault if she mistakenly interprets these minimization tactics as indirect promises of leniency. Yet, as has been demonstrated repeatedly in recent years, the psychology behind false confessions often defies common sense. Numerous studies have shown that suspects infer leniency from implied promises at the same rate as if an explicit promise had been made.<sup>196</sup> The two tactics are functionally the same. And they have the same net effect: putting innocents at risk of providing false confessions.<sup>197</sup> The same logic that prohibits direct promises of leniency should also prohibit minimization tactics indirectly promising leniency. An officer cannot promise a suspect they will be charged with manslaughter instead of murder if they confess to killing the victim (a direct promise of leniency).<sup>198</sup> Nor should the officer be allowed to suggest that if the suspect confesses to killing the victim, the crime will be framed as unintentional or as a justifiable act of self-defense (an indirect promise of leniency).<sup>199</sup>

4. *False Evidence Has No Place in the Interrogation Room.*—Research in the social sciences has demonstrated how deceptive police tactics cause false confessions.<sup>200</sup> Nonetheless, suggestions that police should be limited in their use of such tactics draw fierce resistance. The strongest opposition comes from law enforcement officials, arguing that “lying is sometimes a necessary evil, effective, and without risk to the innocent.”<sup>201</sup> While a per se rule against all use of police trickery and deception may be desirable,<sup>202</sup> such a rule would likely be unworkable given the pervasiveness of such tactics and the inevitability of some trickery and deceit inherent in any accusatory model of interrogation.<sup>203</sup> A more reasonable reform would be to specifically bar the use of false evidence. While this suggestion would still face some resistance

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196. See *supra* notes 82–84 and accompanying text.

197. Kassir et al., *supra* note 28, at 19.

198. See *id.* (indicating that this would render a confession inadmissible).

199. See *id.* (describing how Reid-style minimization techniques provide “police with a loophole in the rules of evidence by serving as the implicit but functional equivalent to a promise of leniency . . .”).

200. See, e.g., Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 111, 148 (1997) (compiling specific instances where misrepresentations were used to elicit a false confession).

201. Kassir et al., *supra* note 28, at 29.

202. See, e.g., Daniel W. Sasaki, *Guarding the Guardians: Police Trickery and Confessions*, 40 STAN. L. REV. 1593, 1612–15 (1988) (recommending a per se rule against police using trickery during investigations).

203. See Welsh S. White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581, 582 (1979) (discussing how the Reid accusatory model will “inevitably involve some form of deception because [it] require[s] an officer to make statements that he knows are untrue or to play a role that is inconsistent with his actual feelings”); see also Starr, *supra* note 33 (discussing Saul Kassir’s view that the Reid accusatory model of interrogation is inherently coercive).

from law enforcement, it strikes a more reasonable balance between preserving society's interest in exposing criminals and protecting the individual's interest in being free from unduly coercive interrogation tactics.

This reform would bar police from both misrepresenting the existence of evidence and confronting the suspect with fabricated evidence—two ploys proven to increase the risk of false confessions.<sup>204</sup> It would prohibit falsely telling suspects such as Martin Tankleff that their father had awakened at the hospital and identified them as the attacker,<sup>205</sup> or an investigator telling a suspect that the police had a “Neutron Proton Negligence Intelligence Test” that could prove they fired the murder weapon.<sup>206</sup> It would prevent the police from confronting a suspect with fabricated visual props, such as a thick case file full of empty pages, videotapes, or fingerprint cards.<sup>207</sup> And it would put an end to the common ploy of confronting a suspect with falsified results from a polygraph or DNA test.<sup>208</sup>

5. *Interrogators Need Better Training.*—The LAPD is one of the largest and most well-known law enforcement agencies in the country. LAPD officers go through rigorous training before joining the force and are held to strict standards once in the field.<sup>209</sup> And if an officer wants to be a detective, they must go through an additional eighty-hour detective school.<sup>210</sup> Yet of these eighty hours, only four are devoted to interrogation skills.<sup>211</sup> If an organization with the history and funding of the LAPD is spending only four hours on interrogation skills, it is troubling to imagine the lack of training at other institutions. Thus, any targeted reform to police interrogation techniques should also include improved training for interrogators.

Unlike other countries that have standardized training and practices in investigative interviewing and interrogation, the United States has no such identifiable system.<sup>212</sup> There are few clearly defined boundaries of what is

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204. Kassir et al., *supra* note 28, at 28 (“From a convergence of three sources, there is strong support for the proposition that outright lies can put innocents at risk to confess by leading them to feel trapped by the inevitability of evidence against them.”).

205. See Lambert, *supra* note 163 (providing context).

206. See Richard A. Leo & Richard J. Ofshe, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 1033 (describing an interrogation where investigators told a suspect they had invented such a test).

207. See REID MANUAL, *supra* note 22, at 217 (describing the same).

208. See, e.g., *Inside Kevin Fox's Appellate Court Decision*, *supra* note 16 (discussing how officers confronted Kevin Fox with falsified polygraph results during his interrogation).

209. See *I Want to Know*, L.A. POLICE DEP'T, [http://www.lapdonline.org/i\\_want\\_to\\_know](http://www.lapdonline.org/i_want_to_know) [<https://perma.cc/7P7M-A4J5>] (describing the LAPD training academy experience).

210. Kolker, *supra* note 22.

211. See *id.* (“To be quite honest, we go to an 80-hour detective school, and probably about four hours is devoted to interrogation.”).

212. Kassir et al., *supra* note 28, at 28; Mary Schollum, *Bringing PEACE to the United States: A Framework for Investigative Interviewing*, POLICE CHIEF MAG., Nov. 2017, at 30, 31.

acceptable in interrogations. While amateur interrogators may attend one of the Reid & Associates one- to four-day training seminars, the bulk of their training is directed by a veteran interrogator who may or may not be familiar with the newest version of the Reid Manual. This has resulted in blurred lines and investigators pushing the boundaries of what they view as acceptable uses of coercion. It has resulted in investigators using decades-old interrogation tactics that even Reid & Associates has condemned. Put more bluntly, it has increased the risk of false confessions. If serious reform is going to take place, this style of training has to change. There needs to be a more formal, uniform system of training for interrogators. Such a system will help draw lines for officers in the interrogation room and will be necessary to effectively implement all other reforms.

*C. A Reform Shaped and Prompted by the Courts*

The third path away from the traditional Reid accusatory model of interrogation is through the courts. Instead of having legislatures or police departments take the initiative to reform interrogation practices, the courts may provide the appropriate incentives for change. If the courts began to throw out convictions because they found that certain Reid-style accusatory interrogation tactics led to coerced confessions, police departments would undoubtedly respond and reform their interrogation practices. For instance, it would only take a few decisions holding that an interrogator's use of false evidence was improper for police departments to bar the use of false evidence during interrogations. Similarly, if courts recognized the research in the social sciences and started to reject confessions elicited using Reid-style minimization tactics, police departments would certainly adjust and instruct their interrogators to refrain from such tactics. The problem is that there is a significant body of case law that condones such practices under the totality-of-the-circumstances test.<sup>213</sup> Like many veteran interrogators, most judges are not exactly eager to depart from over fifty years of precedent. Nonetheless, several judges have spoken out against Reid-style coercive interrogation practices, recognizing the disconnect between the courts' understanding of confession evidence and that of the social sciences.<sup>214</sup> While these judges are still in the minority, their opinions have created a foothold for future decisions and opened up a path to reform. The courts helped trudge the path away from physically coercive interrogation practices;<sup>215</sup> perhaps they can play a similar role as the American criminal justice system begins

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213. See, e.g., *supra* notes 159–63 and accompanying text.

214. See, e.g., *Dassey v. Dittmann*, 877 F.3d 297, 331 (7th Cir. 2017) (en banc) (Rovner, J., dissenting) (“I write separately simply to point out the chasm between how courts have historically understood the nature of coercion and confessions and what we now know about coercion with the advent of DNA profiling and current social science research.”).

215. See *supra* note 156.

the transition away from psychologically coercive, Reid-style interrogation practices.

### Conclusion

The Reid accusatory model was based on cutting-edge psychology for its time, but its assumptions about coercion and human behavior have since been either discredited or significantly undermined. On the other hand, support for non-accusatory, information-gathering approaches has continued to grow. While the literature supporting such approaches has been gaining momentum for years, it has only recently become sufficiently mature to justify starting the transition away from the Reid accusatory model of interrogation.

The transition will not be easy. The Reid accusatory model of interrogation is deeply rooted in the psyche of the American criminal justice system. Its methods have been passed down through the generations, and its followers have a near religious faith in its effectiveness. And while there have been many criticisms of the Reid accusatory model in the legal and social science communities, these criticisms are still a minority viewpoint in law enforcement.<sup>216</sup> Thus, any change will likely face resistance. But that does not mean such efforts should be abandoned. Indeed, the first steps of any worthwhile change are often the most difficult. It is time for the American criminal justice system to take these first steps, recognize the literature, and begin the movement away from the Reid accusatory model of interrogation toward a new understanding of coercion and a reformed, more reliable system of interrogation.

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216. Kozinski, *supra* note 30, at 306.