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Police Departments Should Record Custodial Interrogations

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By Robert Calhoun and Susan Rutberg

One of the most disturbing aspects of the recent wave of DNA exonerations is the fact that, in a remarkably high percentage of these plainly wrongful convictions, the evidence against the person included his own confession of guilt.

These are not cases in which it's speculated that the accused is probably innocent. These are cases in which scientifically incontrovertible evidence has shown the person could not have committed the crime. Yet, he confessed. How can this be?

Conventional wisdom would have it that false confessions simply do not happen except in the rarest of cases. Conventional wisdom is terribly wrong.

During the last 20 years, a number of major studies have addressed this issue of wrongful convictions. Each study has shown a surprisingly high percentage of false confessions.

These studies include Hugo Bedau's and Michael Radelet's famous "Miscarriages of Justice in Potentially Capital Cases," published in the 1987 Stanford Law Review; a 1996 study by Edward Connors, Thomas Lundregan, Neil Miller and Tom McEwen, titled "Convicted by Juries, Exonerated by Science: Case Studies of the Use of DNA Evidence to Establish Innocence" (1996); and two separate studies (one in 2000 and the other in 2003) by Barry Scheck and Peter Neufeld, co-founders of the Innocence Project at Cardozo Law School.

(The first of these did not exclusively focus on DNA acquittals and the absolutely certainty they provide. The last three did.)

These studies disclose the astounding fact that the percentage of false confessions in these wrongful conviction cases ranged from a low of 14 percent of cases in the Bedau and Radelet study, to highs of 24 percent and 28 percent in the two studies by Sheck and Neufeld.

Far from being extremely rare, false confessions appear to be astonishingly common.

Why would someone who is innocent confess to a crime he did not commit?

Sometimes this is explained by the particular vulnerabilities of the suspect, such as some form of mental impairment or youthful immaturity. However, such vulnerabilities are far from being the complete answer. Studies continually show that the vast majority of individuals who confess falsely are people within the normal range of cognitive abilities.

So, to rephrase the question: why would a mentally competent innocent person confess to a crime he or she did not commit?

It is difficult to see how the answer could be anything other than that the individual was subjected to a coercive form of police interrogation that broke his or her will to maintain innocence.

A very recent study devoted specifically to false confession cases by professors Steven A. Drizin and Richard Leo reinforces just such a conclusion. Professors Drizin and Leo analyzed 125 recent cases in which people proven factually innocent nonetheless confessed to the crime.

The recurring theme throughout these cases is that the suspects were repeatedly and systematically subjected to an interrogation process that was confrontational, manipulative and suggestive — and ultimately very coercive.

Of course, the Fifth Amendment privilege and the Due Process Clause of the U.S. Constitution are supposed to protect against coerced confessions. However, courts rarely suppress confessions on grounds that they were involuntarily obtained. This is true, unfortunately, because a judge called upon to decide the "voluntariness" of a confession almost always must depend upon an ex post facto verbal re-creation of the interrogation process — testimony by the very police officer who conducted the interrogation. And, any time a judge has to decide a legal issue by weighing a police officer's testimony against that of an accused, the result is not likely to favor the accused.

In fact, it was the failure of the courts to adequately and consistently apply the voluntariness standard that led the Supreme Court eventually to adopt the *Miranda* rule. *Miranda* was supposed to empower the accused with the ability to stop questioning when the "inherently compelling pressures" of custodial interrogation became too much.

However, in the cases studied, *Miranda* had no deterrent effect upon the process that produced all these false confessions. This should not surprise us either. The *Miranda* rule has been robbed of much of its force by Supreme Court opinions during the last 20 years. Moreover, even when its strictures still have some force, police have been trained to ignore it. This was recognized by the state Supreme Court last year in *People v. Neal*, 1 Cal.Rptr. 3d 650 (2003), and by the U.S. Supreme Court this year in *Missouri v. Seibert*, 2004 DJDAR 7795.

Although both courts condemned the practice (with particularly strong language from the state Supreme Court), there is little reason to believe police will change interrogation practices merely because of the opinions in these cases.

If, in fact, the process is often coercive enough to cause the indisputably innocent to confess to crimes they did not commit, and if the constitutional oversight provided by the courts has been unsuccessful in preventing this from occurring, what can be done?

Mandatory electronic recording of interrogation sessions would go a long way toward solving the problem.

As the New Jersey Law Journal stated in an editorial last spring, "The best evidence of what went on between the suspect and the police in the interrogation room is a timed and dated video record of the entire interrogation, from the first question to the eventual redaction of the statement. Such a record would allow the jury to see exactly how the confession was obtained, how the suspect was treated, and how he or she understood and responded to the process of questioning."

Transparency in the interrogation room benefits both suspect and police. When the entire interaction between police and suspect is on tape, an objective, reviewable record exists, permitting all participants in the criminal justice system — prosecutors, defense attorneys, judges and juries — to evaluate whether any of the factors that can lead to a false confession were present rather than relying on conflicting accounts of what occurred during the interrogation. Recording would deter police from using questionable interrogation tactics and, at the same time, deter defendants from claiming that confessions were induced by promised leniency, or the result of pressure of the good cop-bad cop variety, or by hunger, thirst, fatigue, isolation, or just plain shouting and bullying, unless these allegations are supported by the record of the interrogation.

Electronic recording of custodial interrogations is more than just a desirable law enforcement "best practice." In an increasing number of jurisdictions it is required. The supreme courts of both Alaska and Minnesota have mandated that police record interrogations in their entirety. (The Alaska court grounded its decision on due process grounds. Minnesota relied instead on the supervisory power of the court.) Great Britain requires videotaping of all interviews conducted in the police station. Illinois and Texas have enacted legislation requiring electronic recording of custodial interrogations.

In a recent New Jersey Supreme Court case (*State v. Cook*, 847 A.2d 530 (2004)), while declining to find failure to record denied a defendant due process, the court established a committee to study and make recommendations as to whether taping of interrogations should be required, at least in homicide cases, ruling that the "time has arrived" to evaluate fully the protections to both the state and the accused afforded by electronic recordation."

Last month, the Massachusetts Supreme Court issued an opinion in *Commonwealth v. DiGiambattista*, SJC-09155, in which it held that when interrogations are not recorded, defendants are entitled to jury instructions directing that evaluation of statements resulting from unrecorded custodial interrogation with particular caution. And, the court said that where the voluntariness of the confession is at issue at trial (as it can be in Massachusetts), the "jury should be advised that the absence of a recording permits (but does not compel) that the Commonwealth has failed to prove voluntariness beyond a reasonable doubt."

More than a decade ago, a comprehensive Department of Justice study found that a third of the largest police and sheriff departments across the United States already videotape some custodial interrogations voluntarily and that "after initial resistance, police departments and prosecutors came to embrace videotaping." As a matter of internal departmental policy, police departments in Broward County, Florida, and Santa Clara County require their officers to videotape custodial interrogations under certain circumstances.

Why isn't every police department in California mandating recording?

In late August, the State Senate established a commission to "study and review the administration of criminal justice." The California Commission on the Fair Administration of Justice is charged with studying the failures of the state's criminal justice system and examining ways to provide safeguards and make improvements in the way it functions. The new commission's findings and recommendations will be submitted to the Legislature and the governor by Dec. 31, 2007. There's no reason to wait that long to implement recording. Now is the time for California's law enforcement agencies to voluntarily require electronic recording of all custodial interrogations, acknowledging that the best evidence of whether or not an inculpatory statement was freely given is just a "record" button away. Requiring police officers to push that button every time they interrogate a suspect would both increase public confidence in the justice system and, at the same time, protect police officers from wrongful accusations of coercion. Mandatory recording places a tiny administrative and financial burden on the state, compared to the cost of convicting an innocent person.

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