Police Departments Should Record Custodial Interrogations

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Police Departments Should Record Custodial Interrogations

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 false confession of guilt.

These are not cases in which it is 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.


Each of 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 Drizin and Neufeld.

Far from being extremely rare, false confessions are, in fact, far more common than is generally understood.

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 freely are people within the normal range of cognitive abilities.

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

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

A very recent study devotes specifically to false confession cases by professors Steven A. Drizin and Richard Leo reports on the coercion and manipulation, and systematically subjected to a coerced form of police interrogation that broke his or her will to maintain his or her innocence.

The following themes throughout these cases is that the suspects were repeatedly and systematically subjected to an interrogation process which is typically aggressive, manipulative and suggestive — and ultimately very coercive.

Of course, the Fifth Amendment privilege and the Due Process Clause of the Fourteenth Amendment 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 always depends 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 hears to decide a legal issue by weighing a police officer's testimony against that of any other witness is 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 stricture 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), it is little reason to believe police will change interrogation practices merely because of the opinions in these cases.

If, in fact, this 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, verifiable 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 of the guilty, 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." It is 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.

In a recent New Jersey Supreme Court case (State v. Cook, 847 A.2d 1282), when a video was not available 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 "require a comprehensive, foolproof means of recording both to the state and the accused afforded by electronic recording."

Moreover, such vulnerabilities are far from being the complete answer. Studies continually show that the vast majority of individuals who confess freely are people within the normal range of cognitive abilities. However, such vulnerabilities are far from being the complete answer. Studies continually show that the vast majority of individuals who confess freely are people within the normal range of cognitive abilities.

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