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BALANCED APPROACHES TO THE FALSE CONFESSION PROBLEM: A BRIEF COMMENT ON OFSHE, LEO, AND ALSCHULER

PAUL G. CASSELL*

The editors have offered me a chance to provide a brief comment on two disparate but intriguing papers on coercion during policy interrogation—one by Professors Richard Ofshe and Richard Leo,[1] the other by Professor Albert Alschuler.[2] A short comment cannot possibly do justice to all of the valuable insights in these articles or tie all their divergent strands neatly together. The papers undeniably offer important perspectives on, respectively, the psychological processes involved in police questioning and the legal doctrine surrounding it. No doubt they will be—and should be—widely read and discussed. But the expected role of a commentator is not to praise articles but critique them, so my observations will be confined to the most important practical strand of the arguments: that police questioning should be restricted to prevent frequently occurring miscarriages of justice from false confessions.

At least as presented here,[3] a gap in the articles' arguments is that they appear to reason "dramatically, not quantitatively," as Justice Oliver Wendell Holmes once put it.[4] Proceeding from a few dramatic examples of false confessions that led to wrongful convictions, the authors suggest substantial changes in current confession doctrine. Those inclined to oppose such proposals, however, will suggest that policy reforms must be justified with more careful thinking about both the frequency of false confessions and any offsetting—and potentially larger—costs that might follow from the restrictions. After all, devising appropriate rules governing the coerciveness of police interrogation requires striking a balance between the competing concerns of protecting suspects and securing public safety. In assessing the Supreme Court's

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* Professor of Law, Univ. of Utah College of Law. B.A., 1981, J.D., 1984, Stanford University. I thank Professors Ofshe and Leo for gracious access to prepublication drafts of their various articles and the editors of the *Denver University Law Review* for inviting me to participate in this symposium. Symposium, *Coercion: An Interdisciplinary Examination of Coercion, Exploitation, and the Law*, 74 DENV. U. L. REV. 875 (1997).

1. Richard Ofshe and Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979 (1997).

2. Albert W. Alschuler, *Constraint and Confession*, 74 DENV. U. L. REV. 957 (1997).

3. Professors Ofshe and Leo have another paper on this subject that will be published shortly. Richard A. Leo & Richard Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY (forthcoming 1997) (paper presented at the Annual Meeting of the Law and Society Association, St. Louis, Missouri, May 30, 1997) [hereinafter Leo & Ofshe, *Consequences of False Confessions*].

4. OLIVER WENDELL HOLMES, *Law and the Court*, *in* COLLECTED LEGAL PAPERS 291, 293 (1920).

decision in *Miranda v. Arizona*,[5] for example, Professor Wertheimer chides both Chief Justice Warren's majority opinion and the views of the dissenting Justices for failing to forthrightly discuss the conflicts between the rights of suspects to be free from improper coercion and society's "interest in security."[6] Perhaps in recognition of such critiques, in later opinions the Court has been more candid about the tradeoffs. The Court now openly describes the *Miranda* doctrine as a "carefully crafted balance designed to fully protect *both* the defendant's and society's interest."[7] While doubts have been raised about whether the Court has really undertaken such balancing[8] and whether its proper role is to do so,[9] academic commentators proposing restructuring of police interrogation on normative grounds should certainly consider such factors. Moreover, these calculations involve largely empirical judgments. Again, as Professor Wertheimer has demonstrated, the moral problem involved in unintentionally punishing the innocent is one to be resolved on utilitarian judgments, rather than *a priori* considerations of justice: "The numbers do count, and in virtually all moral problems in which we sense a conflict between justice and utility, we are prepared to concede that there is some point at which utility will take precedence."[10]

To prevent misunderstandings before going any further, let me make clear my personal view that each miscarriage from a false confession is a grave tragedy; indeed, I am on record pushing for measures to reduce their incidence.[11] But in the public policy world, concern about miscarriages from false confessions is no substitute for logical thinking about their frequency and about any offsetting costs that might stem from restrictions on police interrogation. Failing to think carefully about such issues creates, as I suggest below,[12] the grave danger of inhibiting reform, by producing politically infeasible suggestions while overlooking more realistic and cost-beneficial alternatives. Without close attention to what Professor Wertheimer calls "the numbers," the articles' policy suggestions will not be taken seriously by those who actually have the power to implement them.

The first question that comes to mind while reading these articles is whether wrongful convictions from false confessions are pervasive or isolated? To briefly set the stage, recall that Professor Alschuler recommends at least

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5. 384 U.S. 436 (1966).

6. ALAN WERTHEIMER, COERCION 113 (1987).

7. Moran v. Burbine, 475 U.S. 412, 433 n.4 (1986).

8. *See* Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of* Miranda, 43 UCLA L. REV. 839, 921 (1996).

9. *See* 18 U.S.C. § 3501 (1994) (replacing *Miranda* with voluntariness test); JOSEPH D. GRANO, CONFESSIONS, TRUTH AND THE LAW (1993) (attacking *Miranda* as an "illegitimate" decision).

10. Alan Wertheimer, *Punishing the Innocent—Unintentionally*, 20 INQUIRY 45, 61 (1977).

11. *See, e.g.*, Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of* Miranda*'s Defenders*, 90 NW. U L. REV. 1084, 1121 (1996); Paul G. Cassell, *The Costs of the* Miranda *Mandate: A Lesson in the Dangers of Inflexible, "Prophylactic" Supreme Court Inventions*, 28 ARIZ. L. REV. 299, 311 (1996); Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty Year Perspective on* Miranda*'s Effects on Law Enforcement*, 50 STAN. L. REV. (forthcoming 1998); Paul G. Cassell, Miranda*'s Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 488-89 (1996) [hereinafter Cassell, *Social Costs*].

12. *See infra* notes 66-72 and accompanying text.

one additional restraint on police interrogation. While the bulk of his paper is a superb demonstration that constitutional "voluntariness" doctrine must focus on police methods—not the psyches of criminal defendants[13]—Alschuler detours briefly into the conclusion that courts "should forbid falsifying evidence and misrepresenting the strength of the incriminating evidence against a suspect."[14] Alschuler would have the courts adopt this rule as a matter of constitutional principle,[15] relying on a cross reference to his brilliant article about the historical origins of the Fifth Amendment.[16] This recommendation stems not (at least as I understand it) from any overarching moral queasiness about police deception. Alschuler keenly observes that American law on confessions "sometimes seems to rest on an etiquette more refined than Mrs. Astor's."[17] Given the pressing need for police to develop evidence to support criminal convictions, he suggests that police perhaps "should be allowed to express false sympathy for the suspect, blame the victim, [and] play on the suspect's religious feelings,"[18] among other things. But misrepresentations about evidence stand in a different category largely because of Alschuler's empirical premise such tactics are "likely to generate false confessions," especially "when suspects are retarded or easily suggestible."[19]

Ofshe and Leo take a similar tack. After developing a detailed psychological model of the decision to confess (with fascinating and generally unavailable insights into what really happens during modern policy interrogation), they conclude with policy proposals. Based on the premises that "false confessions still occur regularly,"[20] that psychological police interrogation tactics are "apt to cause an innocent suspect to confess,[21] and that false confessions are "likely to cause the wrongful conviction and imprisonment of an innocent person,"[22] Ofshe and Leo recommend a series of reforms: including judicial screening of the "reliability" of confessions,[23] greater police training to avoid eliciting false confessions,[24] and videotaping of police interrogations.[25] The important point, for present purposes, is that the recommendations in both articles hinge directly on the empirical claim that certain police tactics are apt to produce false confessions leading to miscarriages of justice.

My reading of these articles is that the empirical linchpin for their propos-

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13. Alschuler, *supra* note 2, at 960-967.
14. *Id.* at 974.
15. *Id.* at 957 (noting that the article focuses on "constitutional" requirements).
16. *See* Alschuler, *supra* note 2, at 958 n.6 (citing Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625 (1996)).
17. Alschuler, *supra* note 2, at 971.
18. *Id.* at 973.
19. Alschuler also relies on several other alleged consequences of police misrepresentations in support of his proposal. These appear to be of less importance in his argument and are discussed *infra* note 57).
20. Ofshe & Leo, *supra* note 1, at 983.
21. *Id.* ("interrogation manual writers . . . persist in the self-serving and misguided belief that contemporary psychological methods are not apt to cause an innocent suspect to confess—a fiction that is flatly contradicted by all of the scientific research on interrogation and confession").
22. *Id.* at 984.
23. *Id.* at 1117.
24. *Id.* at 1119.
25. *Id.* at 1120.

als is simply missing. Professor Alschuler reports little evidence on this point, relying primarily on a few general references to Professors Ofshe and Leo's articles to support the claim.[26] Ofshe and Leo, in turn, argue that wrongful convictions from false confessions are "numerous."[27] But burrowing through the footnotes attached to these claims, it appears that their primary empirical support is a soon-to-be published paper where these matters are discussed at greater length.[28] The reader of the current article is essentially left a promissory note that this proof will be supplied in the future. Because that future paper will be published shortly in another journal where I will be writing a detailed response,[29] I will not address the frequency of miscarriages from false confessions any further here. But it should be noted that the frequency claim is not proven in Ofshe and Leo's current article. While bearing the title "The Decision to Confess Falsely," the article turns out (on reading of the footnotes) to discuss not solely the dramatic subject of those who confess falsely. The reader will have difficulty knowing which topic is under discussion as Ofshe and Leo explain that "[w]e *often* choose *not* to indicate whether the quoted material was taken from the interrogation of an innocent or a guilty party."[30] The article thus cannot be cited (as Professor Alschuler may have uncritically done[31]) to support propositions about *false* confessions, because Ofshe and Leo have chosen—rather unhelpfully, in my view—not to separate the two here.

Even apart from the issue of the frequency of false confessions, however, Ofshe, Leo, and Alschuler's justification of their proffered remedies appears incomplete. Ofshe and Leo's centerpiece proposal is that courts should carefully evaluate the reliability of a confession by ensuring that it fits with the facts of the crime and is otherwise credible. Rather than "create any new rules or

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26. *See* Alschuler, *supra* note 2, at 969 n.60 (citing Leo & Ofshe, *Consequences of False Confessions*, *supra* note 3); Richard Ofshe & Richard A. Leo, *The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions*, 16 STUDIES IN LAW, POLITICS & SOC'Y 185, 198 (1997) [hereinafter cited as Ofshe & Leo, *Social Psychology of Interrogation*]). Alschuler also cites Professor White. Alschuler, *supra*, at 26 n.66 (citing Welsh S. White, *False Confessions and the Constitution: Safeguards Against Unworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 108-09 & nn.26 & 30 (1997)). White, however, concedes that a determination of the frequency of false confessions "is difficult to make accurately"; White will venture only (without any further definition of terms) that false confessions are "likely in a small but significant number of cases." White, *supra*, at 109, 111. Alschuler also refers to the dubious "study" by Professors Bedau and Radelet. *See* Alschuler, *supra*, at 26 n.66 (citing Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN L. REV. 21 (1987)). *Cf.* Stephen J. Markman & Paul G. Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121, 128 (1988) (concluding that article gives the impression "it is more an argumentative tract than a fair-minded inquiry"). The reference to Bedau and Radelet seems misplaced, because they most frequently discuss "coerced" false confessions, Bedau & Radelet, *supra*, at 57 tbl.6, produced by physical brutality or police perjury, not the psychologically-induced false confessions that form the basis for the policy recommendations of Alschuler and Ofshe-Leo.

27. Ofshe & Leo, *supra* note 1, at 1121.

28. *See, e.g., id.* at 983 n.16 (citing Leo & Ofshe, *Consequences of False Confessions*, *supra* note 3).

29. Paul G. Cassell, *Protecting the Innocent from False Confessions and Lost Confessions—And From* Miranda, 88 J. CRIM. L. & CRIMINOLOGY (forthcoming 1997).

30. Ofshe & Leo, *supra* note 1, at 984 n.32 (emphasis added).

31. Alschuler, *supra* note 2, at 969 n.60.

rely on any cumbersome procedures,"[32] they propose that courts should conduct this review under existing rules.

The examples in the article must be put into some perspective. Ofshe and Leo discuss transcripts of police interrogation of roughly 35 different suspects—both innocent and guilty—primarily from a ten-year period, 1987 to 1997,[33] although some of the examples are nearly a quarter of a century old.[34] Even looking solely to the last ten years, police officers around the country interrogated approximately 23 million suspects for index crimes.[35] The 35 interrogations discussed in the Ofshe-Leo paper are quite literally a few drops in this very large bucket.

Evaluating the proposal is quite difficult because Ofshe and Leo do little to explain how it would work in practice. For example, a regrettable omission from the article is even a single illustration of how their proposed test would have applied to any of the confessions they discuss. Their proposal may, therefore, either have too little "bite" or too much—that is, it may do nothing to solve any false confession problem or it may "solve" that problem at the expense of producing more serious unintended consequences.

Turning to the first possibility, Ofshe and Leo seem unaware that evidence rules conventionally admit relevant evidence and cannot be used as a basis for courts to screen out evidence they find to lack credibility.[36] A typical case is *Ballou v. Henrie Studies, Inc.*[37] There the Fifth Circuit reviewed a district court decision excluding a blood alcohol test in a civil case alleging negligent driving.[38] The district court had viewed the test result skeptically, excluding it because it lacked credibility.[39] The Fifth Circuit, following what is clearly the conventional approach in these matters,[40] would have none of it

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32. Ofshe & Leo, *supra* note 1, at 1118.

33. Ofshe & Leo, *supra* note 1, at 981 n.1.

34. *See, e.g., id.* at 1000 n.75 (discussing interrogation of Peter Reilly in 1973).

35. Each year during the period, police arrested roughly 2.9 million persons for the FBI index crimes of non-negligent homicide, forcible rape, robbery, aggravated assault, burglary, vehicle theft, and larceny. *See, e.g.*, FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES 1995, at 208 tbl.29 (1996) (reporting 1995 arrest totals). About 80% of these arrestees will be interrogated. *See* Cassell & Hayman, *supra* note 8, at 854 (finding 79% of suspects in sample questioned); *see also id.* (collecting evidence from other studies that about 80% of all suspects are questioned). This produces a total of about 2.3 million interrogations per year (2.9 million x 80%), for a ten-year total of 23 million. Looking behind index crimes to all crimes would produce a total number of interrogations about five times as high. *See* FED. BUREAU OF INVESTIGATION, *supra*, at 208 tbl.29 (reporting estimated total arrests five times higher than arrests for index crimes only).

36. *Cf.* Paul G. Cassell, *The Mysterious Creation of Search and Seizure Exclusionary Rules Under State Constitutions: The Utah Example*, 1993 UTAH L. REV. 751, 833–36 (discussing effect of Utah rules of evidence on court-created exclusionary rules).

37. 656 F.2d 1147, 1154 (5th Cir. 1981).

38. *Id.* at 1149-50.

39. *Id.*

40. *See, e.g.*, 22 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5214, at 265-66 (1978 & 1996 Supp.) ("It seems relatively clear that in the weighing process under Rule 403 the judge cannot consider the credibility of witnesses."); Edward J. Imwinkelried, *The Meaning of Probative Value and Prejudice in Federal Rule of Evidence 403: Can Rule 403 Be Used to Resurrect the Common Law of Evidence*, 41 VAND. L. REV. 879, 886-87 (1988) ("[T]he overwhelming majority of courts asserts that a judge cannot pass on credibility in assessing probative value.").

and *reversed* the district court's decision to exclude.[41] The Fifth Circuit explained that credibility determinations are *not* permitted under the rules, discussing Rule 403 (the best "hook" for the Ofshe-Leo proposal):

> [W]e have recently held that Rule 403 *does not permit exclusion of evidence because the judge does not find it credible.* Weighing probative value against unfair prejudice under Rule 403 means probative value with respect to a material fact *if the evidence is believed, not to the degree the court finds it believable.* Rather than discounting the probative value of the test results on the basis of its perception of the degree to which the evidence was worthy of belief, the district court should have determined the probative value of the test results *if true*, and weighed that probative value against the danger of unfair prejudice, leaving to the jury the difficult choice of whether to credit the evidence.[42]

Applying this reasoning to disputed confession evidence, it is clear that Rule 403, among other rules, can virtually never serve as the basis for exclusion. The confession "if true" (as the Fifth Circuit put it) provides powerful evidence of guilt and therefore has high "probative value." Rule 403 permits exclusion only if this high probative value is "substantially" outweighed by unfair prejudice, a balance that weighs heavily in favor of admitting evidence. Moreover, the unfair prejudice the rule refers to does not mean the effect on the jury from hearing evidence that might be untrue. Such concerns, as the Fifth Circuit and many other courts have phrased it, go "to the weight and not the admissibility of the evidence."[43] In short, the rules—as conventionally interpreted—offers little chance for a defendant to exclude disputed confession evidence.

Perhaps Ofshe and Leo could reformulate their proposal by devising something other than existing approaches as the basis of exclusion—although this would involve creating (in their words) "new rules" and "cumbersome procedures." But even if the courts could somehow be empowered to substitute their own credibility determinations for that of jurors, Ofshe and Leo will surely need to further develop their argument. They do not discuss how judges should decide cases in which the prosecution and defense legitimately view the confession differently. They instead focus on the almost trivial case of a "demonstrably unreliable confession," arguing it is likely to confuse the jury.[44] But if a confession is truly "demonstrably" unreliable, one would assume that this "demonstration" could be made for the benefit of the jury, which (given the proof beyond a reasonable doubt standard) would promptly acquit the defendant, particularly where there was no other evidence against the defendant. Juries do not automatically convict defendants who have reportedly "confessed"—even looking solely at the cases featured here by Ofshe and Leo.[45]

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41. *Ballou*, 656 F.2d at 1150.
42. *Id.* at 1154 (internal citations omitted) (first emphasis added).
43. *Id.* at 1154.
44. Ofshe & Leo, *supra* note 1, at 1118.
45. *See, e.g., id.* at 996 (noting acquittal of Richard Bingham after false confession); *id.* at

To make their argument fly, Ofshe and Leo need to demonstrate both that courts can accurately exclude false confessions while properly admitting the true ones and, further, that it is appropriate to divest juries of decisionmaking power on such a critical issue. If Ofshe and Leo attempt such a demonstration, they will need to confront the argument nicely made by Professor Alschuler, who in general sees little reason to take the reliability issue from the jury. As he explains, in our system "the trial of all Crimes . . . shall be by Jury,"[46] and therefore "permitting a jury rather than a judge to assess the evidentiary value of an appropriately obtained confession seems fully compatible with due process."[47] Indeed, the idea of allowing the judge to exclude supposedly incredible evidence would, leading authorities have commented, be "a remarkable innovation"[48] and "invade the jury's province and usurp its function."[49]

Professor Alschuler would seemingly abandon this long-standing general principle, however, when police resort to false claims to obtain a confession. Unlike Ofshe and Leo (who would allow "credible" confessions obtained through such tactics to go to the jury), Alschuler would require the courts to exclude all confessions obtained through police deception about incriminating evidence, even when the confessions are indisputably truthful. Given that Alschuler would create yet another exclusionary rule for defendants, he needs to explain specifically how courts across the country would adjudicate what are sure to be numerous claims that police questioning involved some sort of "false" evidence, a cost that in itself promises to be considerable.[50] For instance, the leading police interrogation manual recommends that, at the start of each interrogation, "the interrogator should finger though the case folder to create the impression that it contains material of an incriminating nature . . . ."[51] Is that a prohibited "misrepresentation" of the strength of the evidence? Nor is it clear that Alschuler's proposed rule would do much to solve any false confession problem that might exist. Ofshe and Leo (who provide what empirical support exists for Alschuler's recommendations) specifically disclaim any such approach, explaining that because false confessions come from the "improper use of interrogation as a whole, no single procedure can be proscribed and thereby adequately protect the innocent."[52]

Alschuler also fails to explore how many truthful confessions would be lost or later suppressed under his proposal in the quest to prevent a false one.

1024 (noting arrest of women who was apparently not tried).

46. U.S. CONST. art. III, § 2.

47. Alschuler, *supra* note 2, at 3; *see also* Colorado v. Connelly, 479 U.S. 157, 167 (1986) ("The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false") (internal quotation omitted).

48. 22 WRIGHT & MILLER, *supra* note 40, at 266.

49. Imwinkelried, *supra* note 40, at 887.

50. *Cf.* Fred E. Inbau & James P. Manak, Miranda v. Arizona—*Is it Worth the Costs? (A Sample Survey, with Commentary, of the Expenditure of Court Time and Effort)*, 1 CAL. W.L. REV. 185 (1988) (discussing consumption of court time as the result of *Miranda* issues); Davis v. United States, 512 U.S. 452, 465 (1994) (Scalia, J., concurring) (same).

51. FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 84-85 (3d ed. 1986).

52. Ofshe & Leo, *supra* note 1, at 1115.

The available data raise some concern on this point. Professor Leo's interesting study is the only recent observational research on what actually happens during police interrogation in this country. In 30% of the interrogations he watched, police confronted suspects with "false evidence of guilt."[53] If we can generalize from his sample, three out of every ten police interrogations in this country would have to be restructured to comply with Alschuler' proposal. Moreover, the Leo data strongly suggest that this restructuring would be costly to society. Leo found that, while confronting suspects with false evidence was apparently not among the most successful tactics in every case,[54] for suspects with prior felony records or below middle class status such tactics led to confessions at rate higher than the norm.[55] While Leo's figures do not permit exact quantification, they plainly suggest that such tactics are particularly useful in obtaining truthful confessions when dealing with hardened criminals or lower social class suspects.

This conclusion is supported by one of the few existing observational studies of police interrogation in Britain. The study reported that while officers generally tried to stick "as close to the truth as possible, . . . [i]nformational bluffs are understood and used in a more sophisticated manner than any other single kind of interviewing tactic. When properly used their effectiveness in obtaining confessions is beyond doubt, and much of the preparation for an important interview is aimed at providing a basis for their use."[56] As the proponent of change (indeed, a virtually unprecedented change), Alschuler has yet to meet his burden of explaining why the benefits of his proposal outweigh the tangible costs of preventing police from using this valuable questioning technique.[57] Indeed, even focusing exclusively on innocent suspects, it is not clear whether the restriction would be justifiable. Any restraint that reduces the

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53. Richard A. Leo, *Inside the Interrogation Room: A Qualitative and Quantitative Analysis of Contemporary American Police Practices*, 86 J. CRIM. L. & CRIMINOLOGY 266, 279 (1996).

54. Such a tactic was associated with a confession or admission in 83% of the cases where it was used, a result that was no a statistically significant improvement over that base success rate of 76%. *Id.* at 294 tbl.14.

55. For these groups, confessions resulted at rates of 96% and 88%, respectively. *Id.* at 295 tbl.15.

56. BARRY IRVING, ROYAL COMM'N ON CRIM. PROC., POLICE INTERROGATION: A CASE STUDY OF CURRENT PRACTICE 145 (1980) (Research Study No. 2).

57. Perhaps recognizing that the prevention of false confession cannot alone justify a ban on police trickery, Alschuler also justifies his proposal with other intrinsic and empirical consequences from such representations. Alschuler, *supra* note 2, at 974. However, it is not clear that these factors add much support for his proposal. With respect to the intrinsic evil of lying, even the philosopher that Alschuler relies upon most heavily (Sissela Bok) provides no justification for a ban on misrepresentation. *See* Christopher Slobogin, *Deceit, Pretext and Trickery: Investigative Lies by Police*, 76 OREGON L. REV. (forthcoming 1997) (analyzing police deception from a framework "[r]elying principally on the work of noted moral philosopher Sissela Bok" and concluding that "under Bok's framework . . . a good case can be made for the proposition that post-arrest trickery [of suspects] is permissible"). With respect to more pragmatic concerns, it is clear that a balancing of interests is called for. Yet Alschuler, having not discussed at any length the possible harmful consequences from his proposal, is in a weak position to claim that the balance of advantage tips in its favor. Indeed, Alschuler concedes in a disarmingly candid sentence that "[a]dmittedly, many of the harmful consequences produced by misrepresenting the strength of the evidence are also produced by deceptive interrogation practices that I do not disapprove" and "[t]hese troublesome consequences are in fact risked by every form of undercover investigation." Alschuler, *supra*, at 975 n.88. Alschuler seems to simply leave these pregnant observations hanging.

number of confessions from guilty criminals creates the risk that innocent persons might be erroneously charged in their stead.[58]

Professors Ofshe and Leo similarly fail to consider offsetting costs in arguing that courts should undertake "credibility" determinations of confessions. If their proposal is fleshed out to frequently prevent the admissibility of "false" confessions, then it may have too much "bite"—that is, it may exclude so many truthful confessions that it would be undesirable. Again, a thorough assessment of this possibility is difficult because Ofshe and Leo spend virtually no time discussing any possible negative effects from their proposal and citations to explanatory legal authorities are few and far between. Yet courts no less than police investigators can err and, when the errors involve the admissibility of evidence critical to the prosecution of criminal cases, costs to society are sure to follow in train. If their proposal is to make any real inroads on false confessions, it seems likely that a good number of truthful confessions would have to be excluded as well. Some sense of the potential risks comes from a study by Britain's Royal Commission on Criminal Justice. The Commission concluded that a rule requiring corroboration of a confession for a conviction would reduce convictions of apparently guilty defendants by as much as 3.1%.[59] If Ofshe and Leo hope to have policy proposal seriously considered, they will have to explicitly address such concerns.

The apparent failure of Professors Ofshe, Leo, and Alschuler to consider offsetting costs to their proposals[60] seems to be a common feature of suggestions from academics that police interrogation needs to be reined in. In the law reviews and psychological journals, one can read a veritable stream of new ideas for restricting—or even eliminating—police interrogation.[61] Academics

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58. *See* Cassell, *supra* note 29 (developing at length the argument about truthful confessions protecting the innocent); *see also* AKHIL R. AMAR, THE CONSTITUTIONAL AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 48 (1997) (criticizing current doctrine because "courts cripple innocent defendants while the guilty wrap themselves in the self-incrimination clause and walk free"); Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 680-81 (1968) (criticizing the Fifth Amendment because "[a] man in suspicious circumstances but not in fact guilty is deprived of official interrogation of another whom he knows to be the true culprit . . . ."); William J. Stuntz, *Lawyers, Deceptions, and Evidence Gathering*, 79 VA. L. REV. 1903, 1931 (1993) (concluding "it seems likely that making government investigation easier improves the welfare of innocent defendants").

59. *See* ROYAL COMM'N ON CRIMINAL JUSTICE, CORROBORATION AND CONFESSIONS: THE IMPACT OF A RULE REQUIRING THAT NO CONVICTION BE SUSTAINED ON THE BASIS OF CONFESSION EVIDENCE ALONE 86 (1993) (deriving this estimate although cautioning that it might be too high for several reasons).

60. In fairness to Professor Alschuler, it should be noted that a good part of his article is devoted to defending the current doctrine that confessions should only be excluded if caused by offensive *government* conduct, a proposition leading to greater admissibility of confessions. On balance, however, his proposals would most likely produce a net reduction in the admissibility of confessions. *See supra* note 53 and accompanying text (concluding that 30% of all confessions in America would need to be restructured to comply with Alschuler's proposals).

61. *See, e.g.*, Margaret L. Paris, *Faults, Fallacies, and the Future of our Criminal Justice System: Trust, Lies, and Interrogation*, 3 VA. J. SOC. POL'Y & L. 3, 44 (1995) (proposing a rule against police lies in interrogation because, *inter alia*, "the community will have lost a valuable opportunity to teach the very value that it finds so objectionably lacking in the suspect"); Slobogin, *supra* note 57 (proposing restrictions on non-custodial police interrogations because of lack of judicial determination of appropriateness for interview); White, *supra* note 26 (proposing restrictions to prevent false confessions); Deborah Young, *Unnecessary Evil: Police Lying in In-*

generally advance such suggestions not from historically-based constitutional principles, but rather policy-based normative ones.[62] But persuasive normative argument requires attention to not only the pros and but also the cons and striking a reasonable balance between contending interests. Modern academics give the impression of having little time to tarry over mundane concerns that guilty criminals might escape justice; most academics prefer to move immediately to a one-sided assessment of the risks that innocent persons might be convicted or defendants treated unfairly.[63] Professor Caplan's observation about the police interrogation literature ten years ago continues to ring true today, with regard to the articles in this Symposium and many others elsewhere: "Unlike the discussions of perceived police abuse, in which passion abounds, the passing references to the possibility of uncaught murderers and rapists are flat."[64]

Perhaps the academics will be successful in advancing such one-sided policy proposals for reforming police interrogation, but I have my doubts. This fact can be confirmed by the actions of the elected representatives of the people, who seem to be more interested in freeing the police from restrictions than imposing new ones.[65] Indeed, even unelected and unaccountable judges (frequently drawn from the ranks of the academics) seem generally reluctant to impose the wisdom of the law journals on everyday police operations.

While the failure of scholarly proposals to advance is no novelty, there is something troubling about the failure in this area. If wrongful convictions from false confessions are frequently occurring, then something should be done about it. Yet the one-sided approach of academics gives short shrift to more balanced suggestions that have a more realistic chance of adoption. For example, there seems to be virtual unanimity among those who have reviewed the problem that videotaping interrogations is an effective solution to the false confession problem.[66] But videotaping as a "stand-alone" proposal is unlikely to get far.[67] Rather than piling it on top of existing rules, videotaping should be imposed as a *substitute* for other restrictions on police—both to make it

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terrogations, 28 CONN. L. REV. 425, 477 (1996) (proposing elimination of lying in police interrogations to allow to help police regain the trust of "the people"); *see also* Charles J. Ogletree, *Are Confessions Really Good for the Soul? A Proposal to Mirandize* Miranda, 100 HARV. L. REV. 1826, 1842 (1987) (proposing that all suspects should receive a lawyer before any custodial questioning is allowed, a proposal that would effectively end most custodial police interrogation). For refreshing exceptions to the rule, see AMAR, *supra* note 58; GRANO, *supra* note 9.

62. Modern day academics, indeed, seem to invariably conflate the two. *See* GRANO, *supra* note 9, at i.

63. Even here, the academics' analysis is decidedly incomplete. *See* Cassell, *supra* note 29.

64. Gerald M. Caplan, *Questioning* Miranda, 38 VAND. L. REV. 1417, 1426 n.47 (1985).

65. *See, e.g.*, 18 U.S.C. § 3501 (1994) (overruling *Miranda* and substituting pre-*Miranda* voluntariness test); Davis v. United States, 512 U.S. 452, 465 (1994) (Scalia, J., concurring) (concluding that § 3501 "is a provision of law . . . . reflecting the people's assessment of the proper balance to be struck between concern for persons interrogated in custody and the needs of effective law enforcement"); *see also* ARIZ. REV. STAT. ANN. § 13-3988 (1978) (adopting statute modeled on § 3501).

66. *See, e.g.*, Cassell, *Social Costs*, *supra* note 11, at 488-89 (recommending videotaping to prevent false confessions); Ofshe & Leo, *supra* note 1, at 1118; Alschuler, *supra* note 2, at 977; White, *supra* note 26, at 153-54.

67. *See* Alschuler, *supra* note 2, at 977 (concluding "most police departments resist" videotaping); Cassell, *supra* note 38.

attractive to police and legislators and to reasonably accommodate society's interests in effective police interrogation. Previously I have explained such a plan at length, arguing for videotaping of custodial police interrogations coupled with abolition of *Miranda's* waiver and questioning cutoff requirements.[68] This proposal has the virtue of *both* reducing false confessions from the innocent and increasing truthful confessions from the guilty. Videotaping is the best remedy for the false confession problem because it allows reconstruction of what happened during interrogation and identification of suspects who have been induced to spout back information supplied by the police.[69] At the same time, relaxing the *Miranda* requirements eliminates very real costs from the decision.[70] The relaxation will not enlarge any false confession problem as exists. Persons susceptible to false confessions are particularly unlikely to be helped by the *Miranda* rules because they trust the police[71] and are very likely to waive their *Miranda* rights to convince the police of their innocence.[72] If anyone doubts this point, recall that *all* of the false confessions cited by Ofshe and Leo occurred under the *Miranda* regime.

As Justice Holmes might have put it, the videotaping and scaled-back *Miranda* proposal has both dramatic *and* quantitative appeal—which is what academic suggestions need to actually become real world policy reform. Ofshe, Leo, and Alschuler should support this balanced idea or, at the very least, explain where they stand on its merits. But instead they maintain a studious silence on the idea, focusing single-mindedly on their own plans to eliminate such false confessions may exist. Time will tell whether their proposals will go anywhere, but my sense is that they will languish. Without much of a nod to competing concerns, the proposals simply will not advance in fora concerned not only about the treatment of criminal suspects but also about the conviction of guilty criminals. If this prediction is accurate, then the innocent persons at the heart of the Ofshe-Leo and Alschuler articles will not be helped. The innocent, of course, would support my more balanced proposal (and others like it) over the status quo. Why won't the academics?

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68. *See* Cassell, *Social Costs*, *supra* note 11, at 486-98.

69. *See id.* at 488-89; *see also* Ofshe & Leo, *supra* note 1, at 1118; Alschuler, *supra* note 2, at 977.

70. *See* Cassell, *Social Costs*, *supra* note 11, at 492-97.

71. *See* GISLI H. GUDJONSON, THE PSYCHOLOGY OF INTERROGATIONS, CONFESSIONS AND TESTIMONY 232 (1992) (noting common personality factor of false confessors of "good trust of people in authority").

72. *See, e.g., id.* at 226 (discussing case of Peter Reilly, who did not exercise his *Miranda* right to a lawyer because "I hadn't done anything wrong"); Roger Parloff, *1993: False Confessions*, AM. LAW., Dec. 1994, at 33, 34 (reporting that suspect who would later give false confession waived rights because "I had nothing to hide"). *See generally*, Corey J. Ayling, Comment, *Corroborating Confessions: An Empirical Analysis of Legal Safeguards Against False Confessions*, 1984 WIS. L. REV. 1121, 1194-98 (arguing that *Miranda* rules have limited utility in preventing false confessions).