POLICE INTERROGATION AND AMERICAN JUSTICE

Richard A. Leo



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In memory of Welsh S. White (1940-2005)

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POLICE INTERROGATION AND AMERICAN JUSTICE

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Police interrogation is an important and inherently fascinating subject for social scientists and legal scholars. The process of modern interrogation—as well as the confessions it often produces, the crimes it sometimes solves, and the competing interests and ideologies it implicates—raises a multitude of important issues: How do police elicit confessions from reluctant suspects? How should they be permitted to interrogate in a democratic society that needs both crime control and due process to maintain public confidence in its institutions of criminal justice? How should law and public policy regulate police interrogation to accommodate the competing interests and values at stake while promoting fair procedures and achieving just results?

As a practical matter, interrogation involves some of the most important governmental functions in any society: the investigation of crime, the apprehension of offenders, the restoration of order, and the deterrence of future crime. As a symbolic matter, police interrogation is a microcosm for some of our most fundamental conflicts about the appropriate relationship between the state and the individual and about the norms that should guide state conduct, particularly manipulative, deceptive, and coercive conduct in the modern era. In short, police interrogation and confession-taking go to the heart of our conceptions of procedural fairness and substantive justice and raise questions about the kind of criminal justice system and society we wish to have.

Interrogation and confession-taking is of interest to a wide audience. To political scientists and sociologists, police interrogation offers a paradigm case of the constitutional exercise and control of state power in a democratic society. To psychologists, police interrogation offers a natural laboratory for the study of how social influence affects perception formation,

decision-making, and behavior in a closed, high-pressure environment in which the stakes may be high for both parties. Social psychologists are especially interested in understanding the counterintuitive processes that lead suspects—especially innocent ones—to confess, as well as how judges and juries evaluate confession evidence. To criminologists, interrogation is a microcosm of police organization, culture, and behavior; it offers a window into the logic and inherent contradictions of modern police work in America and is central to understanding what will occur at later stages in the criminal process, from prosecution and plea bargaining to trial and sentencing. To legal scholars, interrogation and confession raise fundamental philosophical and policy questions about the nature and role of law, agency, notification, voluntariness, compulsion, coercion, proper police procedure, due process, and how the balance of advantage should be struck between the state and the accused. Sociolegal scholars are interested in how the law on the books differs from police interrogation in practice, the impact of law on police behavior and ideology, and the multiple meanings, constructions, and uses of law in the interrogation process.

Interrogation and confession-taking is also of interest to many others. The American public is fascinated by police interrogation, which is often the subject of many of our most popular television shows. Interrogation and confession scenes also recur in American theater and cinema. This is because virtually every criminal investigation is a richly textured narrative and morality play involving innocence and guilt, good and evil, and justice and injustice. In American cinema, police interrogation and confessions often become the high point of these narratives. The drama and power struggle of interrogation hold our rapt attention as they feed our vicarious desire for justice, catharsis, and, ultimately, resolution and restoration.

Police interrogation and confession-taking is enormously important for society. It is, of course, often necessary in investigating and solving crime, especially felony crime. Some crimes, such as conspiracy and extortion, or even rape and child abuse, frequently can be conclusively solved only by a confession since there may be no other evidence of guilt. Other serious crimes, such as murder, are more commonly solved by confessions than by any other type of evidence (Gross, 1996). Done properly, police interrogation can thus be an unmitigated social benefit. It can allow authorities to capture, prosecute, and convict wrongdoers and deter crime. These are enormously important outcomes. Done improperly, however, police interrogation can be an unmitigated social disaster. Coercive interrogation can

lead to police-induced false confessions, which, in turn, can lead to the wrongful prosecution, conviction, and incarceration of the innocent (Leo and Ofshe, 1998a). Improper interrogation can also lead to loss of public confidence in the accuracy and integrity of the criminal justice system, skeptical juries that refuse to convict, and even social protest.

Police interrogation and confession-taking is also important to criminal justice officials, whose decisions can significantly affect the fate of individuals caught up in the system. Police interviews and interrogation are fundamentally about information acquisition and control. As a Rand Corporation study concluded in 1975, the quality of information that police obtain is the single most important factor in whether police will be able to solve a crime (Greenwood and Petersilia, 1975). Prosecutors make significant charging decisions, plea bargaining moves, arguments to juries, and sometimes even sentencing recommendations based on confession evidence alone. Confessions are the bane of defense attorneys, who often strenuously attack their legitimacy, voluntariness, or reliability. Judges are obligated to make numerous evidentiary decisions in pretrial hearings and criminal trials based on confession evidence. And juries often rely on confessions—indeed, they usually give them more weight than any other type of evidence—in making their judgments of innocence and guilt (Leo and Ofshe, 1998a).

Despite the importance of police interrogation to scholars, policymakers, the public, and criminal justice officials, in many ways we know very little about it. And no wonder: it is often intentionally hidden from view. Although technological advances have made it both easy and inexpensive to memorialize custodial police–citizen encounters, interrogation remains for the most part shrouded in secrecy. Most interrogation occurs in the bowels of a police station, off tape, unscrutinized by the public, the media, or the criminal justice system.

Because it is hidden from public view, interrogation remains a mystery to most people and even to most criminal justice officials. What actually occurs inside American interrogation rooms is sometimes counterintuitive. Most people are not aware, for example, that police detectives receive highly specialized training in manipulative and deceptive interrogation methods and strategies. Most people cannot identify the specific interrogation techniques police use. Most people—even many police and criminal justice officials—therefore do not understand how interrogation can distort a suspect's perceptions and lead him to make incriminating statements against his self-interest.

Partly because it has been a secret police activity, interrogation has recurrently sparked legal and political controversy in recent American history. As the journalist William Hart has noted (1981:7), "No law enforcement function has been more visited by controversy, confusion and court decisions than that of the interrogation of criminal suspects." In the first third of the twentieth century, there were numerous popular controversies over the alleged use of the third degree—physical force or psychological duress—to extract confessions. They culminated in the famous Wickersham Commission Report in 1931 that extensively documented and condemned the widespread use of third-degree tactics. This watershed report was followed five years later by the landmark United States Supreme Court decision *Brown v. Mississippi* (1936), which held that police use of physical force during interrogation violated the Fourteenth Amendment and thus invalidated any physically coerced confession.

In the middle third of the century, interrogation controversies tended to focus on how best to circumscribe and check police discretion through the rules of constitutional criminal procedure. The controversies culminated in the 1966 U.S. Supreme Court decision *Miranda v. Arizona*, which required police to inform suspects of their constitutional rights to silence and legal counsel and to elicit knowing and voluntary waivers from them before commencing interrogation. It generated a firestorm of controversy that continues to this day (Schulhofer, 2006).

With the advent of DNA technology and the release of several hundred innocent men and women from prisons across the country in the 1990s and the early twenty-first century (Gross, Jacoby, Matheson, Montgomery, and Patil, 2005), the most recent source of controversy has been the problem of police-induced false confessions and wrongful convictions. The numerous exonerations of the innocent in recent years have changed the landscape of interrogation and confession in America and will likely result in their own set of reforms as well. All of these controversies, however, share at least one common feature: the paucity of direct knowledge about what occurs during many interrogations.

To be sure, there is a well-developed theoretical and applied psychological literature on interrogation and confession-taking. It includes literally hundreds of studies dating back to Hugo Munsterberg's 1908 classic, *On the Witness Stand* (see Ofshe and Leo, 1997b; Gudjonsson, 2003; Kassin and Gudjonsson, 2004; Davis and O'Donahue, 2003). Yet there are comparatively few direct or observational studies of interrogation by psychologists, who

for ethical reasons cannot easily replicate inside university laboratories the inherently stressful and potentially coercive conditions of modern interrogation. And though interrogation is central to the study of policing, the criminal investigation process, and modern detective work (see, e.g., Skolnick, 1966; Sanders, 1977; Ericson, 1981), criminologists and sociologists have largely ignored it. Outside of the social sciences, the academic study of police interrogation has been left almost entirely to the legal academy. Lawyers, law students, and law professors have created a formidable law review literature, but, with rare exceptions, it focuses almost entirely on the doctrinal and ethical aspects of interrogation case law rather than on the routine activities of police interrogators and criminal justice officials.

This book is a comprehensive study of police interrogation in America. It aims to shed light on one of the earliest and most influential stages of the legal process and arguably still one of the darkest corners of the American criminal justice system. The book is based largely on the type of data most other scholars do not have access to: direct observations of hundreds of police interrogations. A little more than a decade ago, I contemporaneously observed more than one hundred interrogations inside the Criminal Investigation Division of the Oakland Police Department, as well as sixty videotaped interrogations by the Hayward and Vallejo Police Departments, in northern California (see Leo, 1996a). Since then, I have analyzed several hundred more electronically recorded interrogations by American police departments across the United States.

This book is also based on several other sources of original data. I have attended numerous introductory and advanced police interrogation training courses and seminars; analyzed police interrogation training manuals and unpublished training materials from 1940 to the present; interviewed many police interrogators, criminal justice officials (e.g., police managers, prosecutors, and judges), and criminal suspects; and analyzed archival and historical materials (e.g., government commission reports, newspaper stories, and court cases) as well as contemporary case documents (e.g., police interrogation tapes and transcripts, police reports, and pretrial and trial transcripts). In the past decade, I have studied more than 2,000 felony cases involving interrogations and confessions.

I argue that American police interrogation is strategically manipulative and deceptive because it occurs in the context of a fundamental contradiction. On the one hand, police need incriminating statements and admissions to solve many crimes, especially serious ones; on the other hand,

there is almost never a good reason for suspects to provide them. Police are under tremendous organizational and social pressure to obtain admissions and confessions. But it is rarely in a suspect's rational self-interest to say something that will likely lead to his prosecution and conviction. American police in the modern era have succeeded in eliciting confessions by developing interrogation methods that rely on fraud, persuasion, and impression management. Their goal is to elicit incriminating statements from suspects in order to build the strongest possible case against them and thereby assist the prosecution in securing conviction and incarceration.

The fundamental contradiction of American police interrogation is related to many other contradictions. To mention a few: interrogation remains largely secret even though America is arguably the world's leading democracy and most open society; police have created "scientific" interrogation methods, yet they are in reality pseudo-scientific; interrogation is designed to persuade suspects that they have no choice but to confess, but the law requires that all confessions be voluntary; police proclaim truth as the goal of interrogation, yet interrogators regularly rely on deception and sophisticated forms of trickery; while confessions are presented as reliable indicators of a suspect's culpability, interrogation is a social process through which culpability is orchestrated and constructed (not always accurately); and although juries view confession evidence as the most damning indicator of a suspect's guilt, it is sometimes among the most unreliable forms of evidence.

The key to understanding the larger institution of police interrogation in America (as opposed merely to a specific instance of interrogation and confession-taking) is to identify its systemic contradictions and then explain their logic and consequences. Those contradictions are political, psychological, legal, and criminological. They reflect the idiosyncratic historical development of interrogation practices in America, the conflicting goals of criminal investigation, the contradictions of modern police work, the conflicting imperatives of the American adversarial system of criminal justice, and the multifaceted nature of confession evidence. Short of fundamentally changing the American adversarial system so that it no longer needs confession evidence to solve many crimes or so that it actually becomes in a suspect's rational self-interest to give police a truthful confession, the systemic contradictions of American interrogation ultimately cannot be resolved. They can only be managed, more or less effectively, depending on the values, interests, and goals we wish to pursue. However, once we understand these ten-

sions and contradictions we are in a better position to evaluate how courts and legislatures should regulate police interrogation practices, the policy reforms we should promote, and ultimately what social value we should place on confession evidence.

Police detectives rely on deceptive and fraudulent interrogation techniques because of the structure of the American criminal justice system and the expectations of society: we demand that police solve crimes at high rates in order to apprehend and incarcerate "the bad guys," and American law permits, if not authorizes, police to use many of the manipulative and deceptive interrogation techniques that I describe. The dilemmas are therefore systemic, not individual. I cast an unflinching eye on the practices of American police interrogators not because I wish to condemn them but because I seek to accurately describe, analyze, and understand what interrogators do and its consequences for the pursuit of justice.

This is a book about police interrogation in America, not American military interrogation in the world. The two differ in significant ways. The purpose of domestic police interrogation is to gather incriminating evidence from a suspect that can be used to secure a criminal conviction, while the purpose of military interrogation is to gather intelligence that will, presumably, save lives. The techniques, and their perceived legitimacy by government officials, also differ: While domestic police use sophisticated psychological interrogation methods that have been developed as an alternative to the third degree, military interrogators appear to use highly coercive techniques that include both physical and psychological torture (Rose, 2004; Marguiles, 2006; McCoy, 2006). The two kinds of interrogation are also regulated differently: the former by the United States Constitution, the latter in theory—by the laws of war and the Geneva Convention. Nevertheless, domestic and military interrogation raise similar concerns about the limits of governmental power, the morality of means and potential abuse of rights, and the reliability of interrogation-induced statements and admissions. Because military interrogations are not electronically recorded and rarely leave a publicly accessible paper trail, they are difficult to study empirically. Despite the revelations in recent years about American interrogation practices in Afghanistan, Iraq, Guantanamo Bay, and elsewhere (Hersch, 2004; Begg, 2006; Harbury, 2006), we know even less about it than we do about domestic police interrogation.

Finally, a word about my own values, commitments, and beliefs. When I began studying the problems of police interrogation and confession-taking

in America more than a decade ago, my interest was purely academic: I wanted to learn how police routinely interrogated custodial suspects, the social psychology of interrogation and confession, and the impact of law on police behavior and case outcomes. Several years later, as I began to concentrate more of my energy on the problems of psychological coercion, police-induced false confessions, and wrongful convictions, my work became more applied. I have since consulted or served as an expert witness for many attorneys—including state and federal prosecutors and civil attorneys, but primarily criminal defense attorneys—in cases that typically involve disputed interrogations or confessions. Some of these cases are well known and highly controversial.

I believe that police interrogation is a necessary and valuable police activity in a democratic society, so long as it is conducted fairly and legally. What is considered fair and legal will inevitably change over time (Marx, 1992), but this does not render contemporary norms arbitrary or absolve us from making important distinctions in policy debates. Contrary to the suggestions of two leading American police interrogation training manuals (Inbau, Reid, Buckley, and Jayne, 2001; Zulawski and Wicklander, 2002), I am not an "opponent" of police interrogation. In fact, I have lectured to American police on numerous occasions; trained police interrogators in Louisiana, Texas, Florida, and the Republic of Cyprus; and even served on an advisory committee to one large police department (Long Beach, California). I have also lectured to, worked with, and testified on behalf of American prosecutors. One of my goals has always been to educate others undergraduates, graduate and law students, judges and juries, the media, and police themselves-to improve the quality of police interrogation in America and increase the likelihood that police will elicit confessions from the guilty while decreasing the chance that they will elicit them from the innocent.