WHEN AND WHY SUSPECTS FAIL TO RECOGNIZE THE ADVERSARY ROLE OF AN INTERROGATOR IN AMERICA: THE PROBLEM AND SOLUTION

Myeonki Kim*

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* S.J.D. Candidate, University of Wisconsin Law School; LL.M.-LI, University of Wisconsin Law School; LL.B., Korean National Police University. I would like to thank Professor Keith A. Findley, Carrie Sperling and Cecelia M. Klingele for their helpful comments on the draft of this Article. I am also grateful to Catie White and Lucie Butner for their excellent editorial assistance. All errors are mine alone.
I. INTRODUCTION

American police interrogation is a distinctly adversarial process. In most cases, the police interrogate to obtain a confession, which is powerful evidence for criminal prosecution. To be effective, police place a suspect in an isolated space and exploit various strategies in a hostile environment. These features are somewhat different from the general (neutral) evidence-gathering activity of police investigation. If police are excessively adversarial in interrogation, this increases the risk of false confessions, which can in turn, lead to wrongful convictions. Therefore, it has been one of the primary concerns of the criminal justice system to control confrontational police interrogators. Adversarial police interrogation is a real problem and should be carefully addressed.

Although there has been much effort to control excessive interrogation, one important point has been missed. The adversarial characteristics of interrogation could be divided into two aspects: 1) adversarial strategies used in interrogation and 2) the adversarial identity itself of the police interrogator. The former includes most interrogation strategies used to obtain a confession, and the latter appears in the ways the interrogator’s adversarial identity is concealed or confused in order to easily extract a confession. Of course, the main approach used by police is the former, which receives the most attention from the courts and academic research. Police, however, also often use the strategies associated with their adversarial identities. Modern police interrogation, especially after the Miranda decision, increasingly relies on this strategy to obtain a confession because the former adversarial interrogation strategies may cause the defendant to invoke their Miranda rights. Thus, interrogators frequently confuse suspects by confusing or concealing their adversarial role while attempting to elicit confessions through confusion or trust. Although this strategy could result in false confessions and call into question the legitimacy of interrogation, the courts and scholars have rarely addressed this issue.

1. See infra Part II.A.
2. See infra Part II.A.
3. See infra Part II.A.
4. See infra Part II.B.
5. See infra Part II.C.
6. See infra Part III.A.
7. See infra Part III.A.
8. See infra Part III.A.
9. See infra Part III.B.
10. See infra Part III.B.
This article advocates for a new police code of conduct to resolve this problem. Specifically, this proposal is inspired by the Model Rules of Professional Conduct (MRPC), created by the American Bar Association (ABA), which prescribes standard rules for legal profession. The MRPC contains provisions that must be followed when, among other situations, a lawyer for one party contacts the other party. The enacted forms of these provisions, which also apply to the pre-trial stage, exist to prevent confusion about the loyalty of counsel retained for one party. Given that police interrogations are conducted under an obvious partisan relationship, it is worth examining the MRPC in order to develop similar rules.

There are likely two main criticisms of this position. First, it might be argued this proposal would excessively constrain police interrogation. This view draws upon the inherent difference between law enforcement officials, who search for the truth, and lawyers, who generally work for one party. Second, one might question the effectiveness of an internal regulation of police agencies. There exists a skeptical view about whether police interrogation could be changed through internal, non-binding regulation. This article also addresses these concerns.

Part II focuses on the adversarial nature of American police interrogation. This part examines the risk of false confessions arising from these adversarial characteristics and explores why American interrogations are distinctive. Part III points out the often overlooked issues inherent in the adversarial nature of police interrogation. Although detectives sometimes intentionally conceal or confuse their role in the process of an interrogation, this tactic is rarely regulated. This strategy should be banned, not only because it can lead to false confessions, but also because it casts doubt on the legitimacy of interrogation as a whole. To control this strategy, Part IV calls for an introduction of a new police code of conduct. This proposal is realistic, timely, and preferable to merely extending the exclusionary rule. Given the distinctly adversarial nature of police interrogation, the MRPC is put forward as a viable model for a new police code of conduct.

11. See infra Part IV.A.
12. See infra Part IV.B.
13. Model Rules of Prof’l Conduct r. 3.8, 4.2, 4.3 (Am. Bar Ass’n 2016).
14. See infra Part IV.C.
II. THE PROBLEM OF AMERICAN INTERROGATIONS

A. The Adversarial Excesses in American Interrogation

American police interrogation is adversarial in nature. Contrary to the purpose of a police interview, an interrogation is designed to elicit a confession from suspects. Thus, detectives are taught various strategies to effectively accomplish this goal. These strategies are well described in the so-called Reid technique, the influential (but highly criticized) approach in modern American interrogation. “The Reid Nine Steps of Interrogation” is a well-known and highly sophisticated system designed to obtain a confession. This technique initially attempts to create an adversarial environment by isolating


16. Saul M. Kassin et al., Police-Induced Confessions: Risk Factors and Recommendations, 34 Law & Hum. Behav. 6–7 (2010) (“In short, the single-minded purpose of interrogation is to elicit incriminating statements, admissions, and perhaps a full confession in an effort to secure the conviction of offenders.” (citing Richard A. Leo, Police Interrogation and American Justice (2008))).


18. See, e.g., Brian R. Gallini, Police “Science” in the Interrogation Room: Seventy Years of Pseudo-Psychological Interrogation Methods to Obtain Inadmissible Confessions, 61 Hastings L.J. 529, 531 (2009) (criticizing that the “Reid technique cannot distinguish between true and false confessions . . . [and] had no supporting scientific or experimental data”). Gallini argues that because the Reid technique was introduced after the “third degree” era, it “was initially a welcome and revolutionary change from the violent methods it replaced.” Id. However, he criticizes sharply that “[t]he story of Reid and Inbau’s work also reveals that the so-called nine-step Reid technique (and the Behavior Analysis Interview that precedes it) is no different from the lie-detector technique also created by Reid and Inbau.” Id. at 534.

19. See id. at 536 (explaining “[t]he prevalence of the nine-step Reid technique” in the United States, Canada, Europe, and Asia).

20. See generally Inbau et al., supra note 15, at 185–327. They are:
Step 1—Direct, Positive Confrontation;
Step 2—Theme Development;
Step 3—Handling Denial;
Step 4—Overcoming Objections;
Step 5—Keeping the Suspect’s Attention;
Step 6—Handling the Suspect’s Passive Mood;
Step 7—Presenting an Alternative Question;
Step 8—Bringing the Suspect into the Conversation;
Step 9—Written Confession.

Id.
suspects in the interrogation room.\textsuperscript{21} Professor Saul M. Kassin vividly depicts this isolation as an environment in which “suspects are removed from family and friends and taken into a closed and private room, preferably one that is small, windowless, barely furnished, and sound proofed.\textsuperscript{22} Under such a lonely and stressful situation, suspects are confronted by police interrogators aiming to get a confession. The interrogator then continues to strategically apply the technique step-by-step to overcome the resistance of the suspects and to obtain a complete confession.\textsuperscript{23}

The specific strategies used by police clearly reveal the interrogation’s adversarial nature. Interrogators exploit various psychological techniques, which make suspects think confessing would serve his or her best interest.\textsuperscript{24} These techniques are applied through the use of two styles; maximization\textsuperscript{25} and minimization.\textsuperscript{26} The maximization technique is “designed to convey the interrogator’s rock-solid belief that the suspect is guilty and that all denials will fail.”\textsuperscript{27} Thus, interrogators usually override or interrupt suspects’ denial or objection, and strong evidence of guilt is presented to suspects to exaggerate the seriousness of the offense.\textsuperscript{28} The minimization technique is the opposite. It is “designed to provide the suspect with moral justification and face-saving excuses for having committed the crime in question.”\textsuperscript{29} This technique includes methods such as lulling suspects into a false sense of security by blaming the victim and

\begin{enumerate}
\item[22.] \textit{Id.} Kassin further explains that “[t]he goal is to create a setting that is unfamiliar, unsupportive, and stressful—a setting from which suspects will want to extricate themselves.” \textit{Id.}
\item[23.] See Gallini, \textit{supra} note 18, at 539–43 (describing briefly how each step is done).
\item[24.] See Kassin et al., \textit{supra} note 16, at 12.
\item[25.] Brian Cutler et al., \textit{Expert Testimony on Interrogation and False Confession}, 82 UMKC. L. Rev. 589, 608 (2014) (“Maximization is . . . designed to heighten the suspect’s sense of the dire consequences that he will face if he does not own up to his responsibility for the offense. These techniques include repeated and forceful accusations of guilt, interruption and refusal of the suspect’s denials, the claim of real (or phony) evidence of the suspect’s guilt . . . . These maximization techniques are designed to make a suspect feel trapped, hopeless, and convinced that owning up to his role in the crime is in his best interest.”).
\item[26.] \textit{Id.} at 608–09 (“Minimization techniques help the suspect morally justify his actions. An investigator using minimization may convey to the suspect that the crime is less serious than it actually is, thus increasing the likelihood that the suspect will confess to his role. Minimization techniques include sympathizing and empathizing with the suspect’s situation. They include conveying the belief that the crime was a normal reaction, something anyone, including the investigator, would have done.”).
\item[27.] Kassin et al., \textit{supra} note 16, at 12.
\item[28.] Cutler et al., \textit{supra} note 25, at 608.
\item[29.] Kassin et al., \textit{supra} note 16, at 12.
\end{enumerate}
downplaying the seriousness of the crime. During interrogation, both techniques are used alternatively to make suspects think they have no choice but to confess to the crime.

The prevalence of deception and trickery in interrogations also reveals the adversarial nature of interrogation. Contrary to public perception, deceptive techniques are widely used in American interrogation. These techniques are usually employed as part of the maximization and minimization techniques. Deception and trickery generally involve deceiving a suspect about the existence or content of evidence. Professor Richard A. Leo points out that these strategies are linked to the adversarial context “because [interrogators] view themselves as agents of the prosecution and thus the suspect’s adversary.” Leo argues that American police use deceptive techniques as an “adaptive strategy” to “achieve maximum strategic advantage over the suspect” after moving away from the third degree era.

American interrogations are different from those in other countries, even countries with similar legal traditions. The interrogation culture in England, the

30. Cutler et al., supra note 25, at 609.
31. Id. at 590, 608–609.
32. RICHARD A. LEo, POLICE INTERROGATION AND AMERICAN JUSTICE 120 (2008) (“[P]olice interrogators resort to manipulation, deception, and fraud to secure admissions precisely because they view themselves as agents of the prosecution and thus suspect’s adversary.”). These techniques are usually employed as part of the maximization and minimization techniques. As a great example, see the fact-pattern in Frazier v. Cupp, 394 U.S. 731, 737–38 (1969) (“[T]he officer questioning petitioner told him, falsely, that [co-defendant] Rawls had been brought in and that he had confessed. Petitioner still was reluctant to talk, but after the officer sympathetically suggested that the victim had started a fight by making homosexual advances, petitioner began to spill out his story.”).
34. See Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (using fabrication about finding the suspect’s fingerprints at the scene of the crime); Frazier v. Cupp, 394 U.S. 731, 739 (1969) (admitting statements made by a suspect who was told, falsely, that his co-defendant had confessed); see also WAYNE R. LAFAYE ET AL., HORNBOOK: CRIMINAL PROCEDURE 415 (6th ed. 2017) (“[L]ower courts have held confessions admissible when they were prompted by such misrepresentations as that the murder victim was still alive or had died of natural causes.”).
35. LEo, supra note 32, at 120.
36. Id. Third degree means “[t]he process of extracting a confession or information from a suspect or prisoner by prolonged questioning, the use of threat, or physical torture . . . .” Third Degree, BLACK’S LAW DICTIONARY (10th ed. 2014).
birth place of the adversarial system, has significantly changed over the last four decades. After the discovery of wrongful convictions caused by false confessions, the English interrogation environment has become more conversational, and has focused on gathering information instead of primarily eliciting confessions. In addition, English interrogators use deceptive techniques much less than their American counterparts, because English courts have held these techniques are impermissible. Therefore, the difference between the two countries is now much greater than it traditionally had been.

The comparison with continental countries might not be directly applicable, because their inquisitorial system itself is somewhat incompatible with the use of deception. However, even if these countries have increasingly adopted many features of an adversarial system (e.g., a right to remain silent, a right to cross-examination), their interrogation practices do not seem to follow the practice in America. Thus, the adversarial nature of the American police interrogation is truly distinct.

B. Interrogation and Wrongful Conviction

Although this article has critically explored the adversarial nature of police interrogation, it does not intend to say that the adversarial nature of interrogation is always a bad thing. The important goals in the investigative stages are somewhat different from those in trial, where the Sixth Amendment primarily concerns fair and impartial proceedings. Police are obligated to resolve crimes, for public safety, in a timely manner, with finite resources. Adversarial and skillful interrogation may increase the efficiency and effectiveness of police

39. Id. at 217.
40. Christopher Slobogin, An Empirically Based Comparison of American and European Regulatory Approaches to Police Investigation, 22 MICH. J. INT’L L. 423, 443 (2001) (“English courts have declared that misrepresentation of available evidence and other types of deceit are not permissible.”) (citation omitted).
41. See Marvin Zalman & Ralph Grunewald, Reinventing the Trial: The Innocence Revolution and Proposals to Modify the American Criminal Trial, 3 TEX. A&M L. REV. 189, 218 (2015) (“[A] neutral and transparent investigation and search for the truth in the pre-trial phase is an integral part of any inquisitorial system.”).
43. U.S. CONST. amend. VI.
interrogation and thus help the police accomplish these objectives. Therefore, the adversarial interrogation is not problematic per se, so long as it elicits reliable confessions without violating defendants’ constitutional rights. Therefore, the real issue in American interrogation may be whether the adversarial nature is adequately controlled.

The history of American interrogation largely involved consideration of how to balance the adversarial character of such interrogations with the constitutional rights of the suspect. Landmark Supreme Court decisions from the Warren Era attempted to control the coercive interrogation culture. These decisions arguably provided more protection for a suspect’s constitutional rights, but were considered to interfere with the essential function of police—catch the criminal and protect the public. Strong resistance followed. Not only law enforcement agencies, but also many legal professionals have denounced the reach and scope of these decisions. Miranda v. Arizona was at the center of this controversy. Within one decade after Miranda, the Burger Court had loosened up Miranda’s effect.

The resistance may have been based on the strong belief that innocent defendants do not confess, along with confidence in the fact-finding accuracy of the American system. One can find many famous quotes from the 20th century that express the high faith held for the perceived accuracy of convictions.

44. See, e.g., Miranda v. Arizona, 384 U.S. 436, 444 (1966) (holding the accused has the right to be informed of his or her constitutional rights before the custodial interrogation begins). Escobedo v. Illinois, 378 U.S. 478, 492 (1964) (reversing conviction because the defendant was denied to consult with his retained counsel, and constitutional right to remain silent was not given to him).


47. See generally Kamisar, supra note 44.


confidence could easily lead many criminal justice personnel to be skeptical of decisions like *Miranda*.

However, these beliefs were shattered after the emergence of DNA exonerations in the mid-1980s.50 The data accumulated is staggering. To date in 2017, as of the time of this writing, there have been 349 DNA exonerations, and in 97 cases among them, false confessions (or admissions) were contributing causes of conviction.51 Another reliable (and more comprehensive) data set, maintained by the University of Michigan Law School, revealed in 2016 that false confessions were found in 227 cases of total exonerations dating back to 1989.52 Among those false confession cases, the most famous (and shocking) may be the brutal rape-murder case that occurred in New York’s Central Park.53 In that case, five innocent teenage boys all confessed, were convicted, and later exonerated after the real perpetrator confessed the crime.54 Professor Saul M. Kassin once reflected this event:

[T]his was not some obscure investigation in some small town in the middle of nowhere when no one was watching. It was Manhattan-and the whole world was watching.55

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50. Lucian E. Dervan et al., *Voices on Innocence*, 68 FLA. L. REV. (forthcoming 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2747604 (claiming that before DNA era, “[wrongful convictions] were either ignored or treated as individual tragedies, one-offs, rather than as illustrative of a criminal justice system that was structurally and persistently prone to factual error.”); Keith A. Findley, *Innocence Found: The New Revolution in American Criminal Justice*, in *CONTRIVORSIES IN INNOCENCE CASES IN AMERICA* 3, 4 (Sarah Lucy Cooper ed., 2014). Today, the Innocent Movement is even regarded as the most dramatic development since the Warren Court era. *See Id.* at 3.


52. Samuel Gross & Maurice Possley, *For 50 Years You’ve Had “The Right to Remain Silent” So Why do so Many Suspects Confess to Crimes they Didn’t Commit?*, NAT’L REGISTRY EXONERATIONS (June 12, 2016), http://www.law.umich.edu/special/exoneration/Pages/false-confessions-.aspx. This data collected by Sam Gross and his colleagues includes wrongful convictions beyond the DNA exonerations. *Id.* As of now, there has been 1810 exonerations. *Id.*


54. *Id.*

55. *Id.* at 528.
These wrongfully convicted boys were known as the Central Park Five. Even after this groundbreaking event, the miscarriages of justice involving false confessions continued. Following numerous exonerations, many began to distrust the American criminal justice system. Although the distrust is by no means universal, the contrary view is losing its ground. For instance, in Kansas v. Marsh, the late Justice Antonin Scalia notoriously noted that the rate of wrongful convictions would be at best “.027” percent by citing a newspaper article written by District Attorney Joshua Marquis. Based on this figure, Scalia concluded that “[o]ne cannot have a system of criminal punishment without accepting the possibility that someone will be punished mistakenly.” This numerical figure was harshly criticized by Professor D. Michael Risinger, because of its skewed calculation methods. Risinger claimed the assumed rate was inaccurate because the number of all exoneration cases was divided by the number of all criminal cases, even though most exoneration cases are limited to serious felony cases. He explored a more plausible rate of wrongful conviction by focusing on a single type of crime that occurred in a certain period (capital rape-murder cases from the 1980s). He concluded that the error rate is “an empirical minimum of 3.3% and a fairly generous likely maximum of 5% . . . .” Interestingly, after this debate, Marquis has changed his estimate to 0.75%, which is still lower than Risinger’s rate, but more than twenty times higher than Marquis’ previous estimate.

With this recognition, recent scholarly efforts have led to a demand for changes in police interrogation practices, which have been identified as a cause


58. For the comprehensive analysis of the doubtful accuracy in the American criminal justice system, see generally DAN SIMON, IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS (2012).


60. Id. at 199 (Blackmun, J., dissenting).


62. Id.

63. Id.

64. Id. at 780.

of false confessions. Experimental studies found that adversarial techniques, such as isolating suspects, deception, and minimization, can cause false confessions. Research has also shown these techniques may elicit false confessions from suspects who are particularly vulnerable to those techniques. These groups include adolescent and immature suspects, the cognitively and intellectually disabled, and individuals with susceptible personal traits. Nevertheless, the police seek to maintain the use of adversarial tactics, largely because they still believe the current practice is clearly more effective to get confessions and resolve crimes. However, these beliefs are no longer convincing: Studies indicate that the rates of confessions do not significantly decrease even when police adopt a conversational interview style. Based on these scholarly efforts, many now argue for reform of the adversarial strategies employed in American interrogation.

C. What Makes American Interrogation Practices so Adversarial?

One may wonder what made American police interrogation so adversarial. This article attempts to answer that question, because understanding those reasons would help inform plausible solutions.

The excess hostility in the American criminal justice system influences the interrogation stage. As Professor Richard A. Leo noted, there exists mutual influence between prosecuting attorneys and the police agencies. His studies, as Professor Mark A. Godsey noted, are distinguishable from other works in this vein, in that they include “groundbreaking empirical research” performed in the numerous police institutions; see Mark A. Godsey, Shining the Bright Light on Police Interrogation in America, 6 OHIO ST. J. CRIM. L. 711, 711 (2009).
activities without taking a broader view of the role interrogation has within the system as a whole.  

Leo argued that:

[The history, structure, and logic of American police interrogation have all been shaped by the culture and imperatives of the adversary system of criminal justice. The interrogation process is, in fact, thoroughly adversarial. This fundamental insight is at odds with the statements of criminal justice officials who treat interrogation as a value-free search for the truth. . . . Interrogators have internalized the values and goals of the adversaries (i.e., the lawyers) and emphasize case-building over impartial investigation and impression management over straight case reporting.

Leo concluded that “[i]nterrogation as practiced in the American adversary system is essentially a prosecutorial function, not an investigative one, even though it is carried out by police detectives.” In a similar vein, Professor William T. Pizzi also noted the intimate relationship between police and prosecutors is particularly strong in the United States. By comparing this with some European countries, he pointed out that in America, “we tend not to draw a distinction between the investigation and the prosecution or defense of a case.” Pizzi urges us “to resist the picture of the complete identity of police agencies with the prosecution” by arguing that “police should do a full and complete investigation of the crime” without aligning themselves as “‘against’ the suspected criminal . . . .” These views correspond to the adversarial reality of interrogation, which appears through the many confrontational strategies used by interrogators.

Strict evidentiary rules that developed in the American legal system also made the boundary between the interrogation and prosecution more faint. Contrary to the general expectation that the exclusionary rule will “protect citizens against police abuse[,]” Professor Pizzi noted, that America’s “toughest exclusionary rule in the world” has actually promoted the adversarial

74. Leo, supra note 32, at 10.
75. Id. at 33.
76. Id. at 33–34 (emphasis added).
77. See William T. Pizzi, Trials Without Truth: Why Our System of Criminal Trials Has Become an Expensive Failure and What We Need to Do to Rebuild It 119 (1999).
78. Id.
79. Id. at 40–41 (“A police agency that sees itself as aligned ‘against’ the suspected criminal may neglect to investigate evidence that helps ‘the other side’ or may fail to note in police reports or files evidence that might be consistent with the suspect’s innocence or that might suggest weakness in the case against the suspect.”).
80. See generally id. at 37–42.
characteristics of police. He further argues “that the highly technical system of pretrial investigation rules that the Court has erected, as well as the serious exclusionary consequences for any violation, push the police and the prosecutor close together.” Prosecutors have strong incentives to contact detectives early on and remain actively involved throughout the investigation. Prosecutors particularly want to “make sure no evidence is jeopardized and to assist the police on the many legal issues that will arise.” Thus, it can be said that the adversarial characteristics of prosecution in the American legal system substantially affect police interrogation.

In light of these relationships, the well-known “Sport-Game Theory” may also be applicable to police interrogation. Professor Gordon Van Kesser once explained why the “Sport-Game Theory” dominates American criminal trials. Kesser said that because of “our uncompromising worship of the adversary model, we have accepted the ‘Sport-Game Theory’ of adjudication….” He continued that “[t]he love of a good fight is an integral aspect of our national character, and we often value the adversarial contest more for itself than for what it produces.” In fact, in sports, victory is the ultimate goal, and various strategies are designed to achieve it; deception or trickery is usually encouraged as an efficient and effective strategy and few would blame players for employing deception unless they ostensibly violate the rules of the game. Given this analogy, the prevalence of adversarial strategies, including deception and trickery, in American interrogation is somewhat understandable. Therefore, so

81. Id. at 37–42. Pizzi described this effect: Rather than contributing to police professionalism, a draconian exclusionary rule feeds into this “us versus them” mentality among police officers and encourages cynicism about the system and even the practice referred to by police as “testifying,” meaning that officers “embellish” the actual facts in their suppression hearing testimony to avoid the possibility of suppression.

Id. at 38–39.

82. Id. at 119 (emphasis added).

83. Id.

84. Id.

85. See Kesser, supra note 72, at 448.

86. Id. at 448.

87. Id.

88. Id. Professor Christopher Slobogin once justified police deception. See Slobogin, supra note 33, at 1275. He noted that: Deception is usually considered a bad thing. We teach our children not to lie, we don’t like it when our politicians dissemble, and we root against the television character who misleads people. But we also officially permit deception in all sorts of situations, including sports, negotiations between lawyers (puffing about the client’s case), and scientific research (from whence the term “placebo” originated).

Id.
long as the adversary system is maintained, the adversarial nature of police interrogation will be inevitable.

III. AN UNNOTICED PROBLEM IN ADVERSARY INTERROGATION

A. Two Features of Adversarial Interrogations

Though American courts and scholars have long focused on the potential problems with the adversarial nature of interrogations, one important point has been overlooked. The adversary nature can be divided into two categories: On the one hand, most strategies in interrogations themselves are adversarial in that they are used to get confessions (the act). On the other hand, the identity of interrogators is adversarial given the very close connection with prosecutors (the actor). These two conflicting characteristics may appear in different forms during an interrogation. In the former, the adversarial strategy usually intends to put psychological pressure on the suspect to elicit a confession.89 In the latter, the interrogator often conceals his identify to emphasize his neutrality (e.g., reiterating that “I am only interested in searching for the truth”) or camouflages his/her identify to form a trust relationship with suspects (e.g., brainwashing that “we are on the same side”).90 Legal professionals have long been focused on the former to regulate its coercive effect on the suspect. However, discussion of the latter and how it should be addressed is rarely found. Perhaps, this is because unlike the prosecutor, the interrogator is not considered a traditional adversary actor in the criminal justice system, even though s/he is a virtual adversary. This new classification is made to urge the recognition of the two distinct aspects of the adversarial nature of interrogations and to point out the lack of attention on the actor characteristic.

Landmark Supreme Court cases have established police interrogation jurisprudence by focusing on the adversarial strategies (the act’s aspect). Yet, the Court has been less attentive to the actor’s aspect. For example, in Brown v. Mississippi, the Court applied the Fourteenth Amendment to reverse the conviction because the confession had been extracted “by brutality and violence.”91 Miranda v. Arizona mandated that police provide warnings for suspects before interrogation because of the compelling pressure that adversarial techniques place on an individual in an interrogation.92 In contrast, the discussion of the actor’s influence are rarely found. This disparity is somewhat understandable because the techniques of police interrogation have been

89. See generally Cutler et al., supra note 25, at 608.
90. See id. at 608–09.
developed to form an adversarial and confrontational atmosphere by using sophisticated psychological strategies. Therefore, the Court has usually recognized the adversarial nature of interrogation through those strategies and articulated its philosophy of how to properly manage or control them.

Some efforts, however, have been made to address the adversarial character of the interrogator. In Escobedo v. Illinois, the defendant was interrogated in the station house before he was formally indicted. Being handcuffed, he was under the pressure that he could only go home early if he cooperated. Although he repeatedly asked to see his retained lawyer, police did not allow him to talk with his lawyer and did not inform him of his right to remain silent. After being held with no access to his lawyer and without any knowledge of his constitutional right to remain silent, the defendant admitted to some knowledge of the crime and ultimately made more incriminating statements. Here, the Court found that what is important is the fact that “the investigation . . . has begun to focus on a particular suspect,” who is in police custody, and that “the police carry out a process of interrogations that lends itself to eliciting incriminating statements . . . .” The Court further stated:

[w]e hold only that when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate[.]

In other words, the Escobedo Court acknowledged that police interrogation is not just a neutral investigatory stage, but a part of the adversary system. This reasoning seems to open the door to formal recognition of the adversarial identity of the interrogator.

This shift in perspective, however, had a limited effect on regulating strategies that involve concealing or confusing the identity of interrogators. This is because the Supreme Court was primarily interested in strengthening the right to counsel for the suspect. The Escobedo Court was concerned “[t]he exercise of the power to extract answers begets a forgetfulness of the just limitation of that power” and will breed “a readiness to resort to bullying and to physical force

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94. See id. at 482.
95. Id. at 481, 485.
96. Id. at 483.
97. Id. at 490–91.
98. Id. at 492.
99. Id. (emphasis added).
100. Lederer, supra note 46, at 115.
and torture. As a countermeasure to this problem, the Court regarded the right of counsel as the key factor. So, the Court applied the right to counsel from the Sixth Amendment to the interrogation stage by viewing it as the starting point of the adversarial system. This shift seems to be only attributable to the prevalence of coercive strategies in police interrogation. There is, however, no discussion of how the adversarial identity of the interrogator should be addressed and regulated if police interrogation is regarded as part of the adversary system.

The Miranda Court also considered the nature of the interrogator under the adversary system, based on the reasoning of Escobedo. Miranda requires interrogators to provide suspects with four warnings before a custodial interrogation begins. One warning is that police should notify suspects that anything said during the interrogation could be used against them in court. The Court reasoned that this warning helps suspects reach a "real understanding and intelligent exercise of the [right to remain silent]." The Court further stated that "this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system—that he is not in the presence of persons acting solely in his interest." In other words, the real understanding of the right to remain silent, in Miranda’s view, means suspects’ awareness of the adversary nature of the interrogator.

Despite the above recognition, Miranda’s major shift in confession jurisprudence consequently weakened its meaning. Devoting almost fifteen pages to the topic, the Miranda Court revealed how modern interrogation uses various techniques to strongly pressure a suspect to confess. The Court showed

101. Escobedo, 378 U.S. at 489 (quoting 8 Wigmore, Evidence 309 (3d ed. 1940)).
102. Id. at 490–91.
103. However, Escobedo could be applied in a very limited scope because of its unusual fact-pattern.
104. See Miranda v. Arizona, 384 U.S. 436, 442 (1966) (“We have undertaken a thorough re-examination of the Escobedo decision and the principles it announced, and we reaffirm it.”).
105. See id. at 467–73. They are 1) “[I]f a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent.”; 2) “The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court.”; 3) “[T]he right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system . . . .”; and 4) “[I]t is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him.” Id. at 467–69 & 473.
106. Id. at 469.
107. Id.
108. Id. (emphasis added).
109. See generally id. at 445–58.
unprecedented concern that “without proper safeguards the process of in-custody interrogation . . . contains inherently compelling pressure . . .” In so doing, the Court recognized that the pressure of interrogation works “to undermine the individual’s will to resist and to compel him to speak where he would not otherwise do so freely.” Thus, the Court reasoned that warnings should be given to suspects in order “to permit a full opportunity to exercise the privilege against self-incrimination[ ]” protected by the Fifth Amendment. That is, 

\textit{Miranda} primarily revealed the extreme repulsion to the adversarial strategies used in police interrogation, which infringes on the privilege against self-incrimination.

In addition, the overall efficacy of \textit{Miranda} has proven to be questionable. Research shows that a considerable number of suspects do not understand the meaning of \textit{Miranda} warnings. And as noted, the influence of the \textit{Miranda} decision has been greatly criticized and reduced after the Burger Court continued to weaken \textit{Miranda}. Above all things, \textit{Miranda} distracted attention from criminal justice personnel and most of the decisions before \textit{Miranda} became invisible. Even though \textit{Escobedo} is still valid, its consideration of the interrogator’s role in the adversarial process has been overshadowed. Accordingly, there has been minimal discussions, from an adversarial system perspective, as to police interrogation and the interrogator’s authority and responsibility.

\textit{Colorado v. Connelly} further narrowed the Supreme Court’s main focus in regard to interrogation. In \textit{Connelly}, the defendant had been suffering from chronic schizophrenia, when he suddenly approached a police officer and confessed his past murder. The question before the Court was whether the defendant’s confession was voluntary when his psychological condition interfered with his “volitional abilities . . . to make free and rational choices.” The Court reasoned that “the Fifth Amendment privilege is not concerned ‘with moral and psychological pressures to confess emanating from sources other than
official coercion.” The Court then held that “coercive police activity is a necessary predicate to the finding that a confession is not ‘voluntary’ within the meaning of the Due Process Clause of the Fourteenth Amendment.” Simply put, the Court regarded the use of coercive strategies as the single most important factor when judging the voluntariness of confession.

As we have seen so far, the Court’s focus on the two aspects of adversarial nature is rather skewed. However, this is, not to say that equal effort should be invested in improving both aspects. There is no doubt the Court’s main concern should be the adversarial strategies employed (the act aspect). This section primarily aims to point out the limited awareness and regulation relating to the adversarial identity of the interrogator (the actor aspect). The next section explains how this indifference causes problems.

B. Modern Interrogation as a Confidence Game

Modern police interrogation takes full advantage of the unnoticed and unregulated adversarial identity of the interrogator. This gap is exploited to circumvent the increased regulation on police interrogation. By concealing or confusing their identity, interrogators usually attempt to build a trust relationship (albeit fake) with suspects to effectively get a confession. After observing numerous interrogations involving this strategy, Professor Richard Leo noted that modern police interrogation resembles a “confidence game[].” A confidence game, or “con,” is “[a]n act of cheating or tricking someone by gaining their trust and persuading them to believe something that is not true.” Leo found that during the interrogation, many interrogators engage in a “confidence game” with the subject of the interrogation, and rely heavily on deception to elicit confessions or incriminating statements. He continued that “the interrogator relies on a series of appeals that mystify both the true nature of the detective’s relationship to the suspect and the true extent of his influence with

119. Id. at 170 (quoting Oregon v. Elstad, 470 U.S. 298, 305 (1985)).
120. Id. at 167.
122. Id. at 259–61 & 263.
124. Leo, supra note 121, at 260–61.
other actors in the criminal justice system.”

According to him, this strategy is extensively used under minimal regulation.

Professor Leo explained in detail how this confidence game in police interrogation operates. First, the detectives begin “by ‘qualifying’ the mark” and determining if the subject is suitable for exploiting this strategy. If this is the case, the next step is to establish a trust relationship with a suspect through “cultivating the mark” by using various tactics. Next, an interrogator tries to achieve his goal of extracting a confession: the “money-extracting phase.” Finally, an interrogator convinces a suspect that cooperation serves his best interest: “cooling out the mark.” These sophisticated strategies are being used extensively to press suspects, and ultimately obtain confessions.

This confidence game strategy could be as coercive and unfair as other adversarial techniques, and the current legal standard may not rule it out. Although the exact effect and consequence of this strategy should be proven empirically, the confidence game strategy is regarded as an effective method when sophisticatedly used against vulnerable suspects. Given that the interrogation could be considered a part of the adversary system, this strategy could raise questions about its fairness (a violation of the game’s rules). To show the effect and consequence of this strategy, this article infers information from similar empirical studies, or compares with similar situations, because there is not a single study exclusively focusing on this issue.

1. The Confidence Game and Coerciveness

The coerciveness of the confidence game strategy could be recognized through the minimization technique. This is because there are some similarities between the confidence game strategy and minimization techniques, in that they all intend to create seemingly less confrontational environments. Thus, reviewing these studies regarding minimization techniques would give some insight into the mechanisms of the confidence game strategy.

125. Id. at 284–85 (emphasis added).
126. See id. (noting the limits on police power being the “legal norms and procedures . . .” which allows the post-Miranda “sophisticated interrogation strategies [to be] grounded in manipulation, deception, and persuasion.”).
127. Id. at 266–67.
128. Id. at 270.
129. Id. at 274.
130. Id. at 282.
131. Id. at 284.
Research has revealed both the effectiveness of and problems with minimization techniques.\(^{132}\) In one experimental study, after assigning a guilty or innocent status to participants,\(^{133}\) minimization techniques were used to get confessions from them. They were told “statements that expressed sympathy and concern, offered face-saving excuses (e.g., ‘I’m sure you didn’t realize what a big deal it was’), and suggested to participants that it was in their interest to cooperate by signing the [confession].”\(^{134}\) The result showed that both the true and false confession rate was higher when minimization techniques were used than when it was not.\(^{135}\) The important finding of this study is that the “diagnosticity (i.e., the ratio of true confessions to false confessions)” was highest when no strategies were used and lowest when minimization techniques were used in combination with offering a deal.\(^{136}\) In another study, through observations on 125 police interrogation transcripts, Professor Richard J. Ofshe and Richard A. Leo revealed that minimization strategies that can trigger inferences are widely used.\(^{137}\) They noted that during interrogations, police often suggest several reasons to justify the crime (e.g., an unintentional activity, self-defense, or an accident) in order to extract confessions from suspects.\(^{138}\) Additionally, some suspects are led to believe prosecutors and judges will treat

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\(^{132}\) See Kassin et al., supra note 16, at 18.

\(^{133}\) The treatment of a guilty or innocent condition in the experiment follows: After the experimenter obtained informed consent and conducted a brief rapport-building session, the participant and confederate began the problem-solving phase of the experiment. Before leaving them alone, the experimenter informed the pair that they should work together on designated ‘team problems,’ but that they should work individually and not discuss their solutions on designated “individual problems” (this served as the critical rule of the experiment). In the guilty condition, the confederate asked for help on a problem that was supposed to be solved individually, leading most participants to provide her with an answer (those who did not help were excluded from the analyses). In the innocent condition, the confederate did not seek assistance. After the pair completed the logic problems and a filler task, the experimenter informed them that there appeared to be a problem and that he needed to speak to each of them individually. The confederate was then escorted out of the room.

Melissa B. Russano et al., Investigating True and False Confessions with a Novel Experimental Paradigm, 16 PSYCHOL. SCI.481, 483 (2006).

\(^{134}\) Id.

\(^{135}\) Id. at 484.

\(^{136}\) Id.

\(^{137}\) See generally Richard J. Ofshe & Richard A. Leo, The Decision to Confess Falsely: Rational Choice and Irrational Action, 74 DENV. U. L. REV. 979, 981 n.1 & 1088–1106 (1997) (highlighting different ways interrogators may try to diminish the severity of the alleged crime causing the person being questioned to confess).

\(^{138}\) Id. at 1088–89.
them more leniently if they cooperate with police.\textsuperscript{139} Thus, these studies show that the expectation of leniency increases the rate of false confessions.

One may be wondering why suspects, including the innocent, tend to regard minimization techniques as an implicit leniency. Perhaps, this might be intuitively understandable. A more theoretical analysis, however, is helpful to understand in detail. One relevant theory plausibly explains the mechanism: the cognitive psychology of pragmatic implication.\textsuperscript{140} Professor Saul M. Kassin articulated this process by noting that:

\begin{quote}
[o]ver the years, researchers have found that when people read text or hear speech, they tend to process information “between the lines” and recall not what was stated per se, but what was \textit{pragmatically implied}. Hence, people who read that “[t]he burglar goes to the house” often mistakenly recall later that the burglar actually broke into the house; those who hear that “[t]he flimsy shelf weakened under the weight of the books” often mistakenly recall that the shelf actually broke.\textsuperscript{147}
\end{quote}

These findings explain that “pragmatic inferences can change the meaning of a communication, leading listeners to infer something that is ‘neither explicitly stated nor necessarily implied.’”\textsuperscript{142} The same might be true when suspects are exposed to minimization techniques.

The confidence game is well-positioned to exploit pragmatic inferences. A trust relationship between police and the suspect, established through the confidence game, could cause the suspect to pragmatically infer leniency.\textsuperscript{143} This inference could also be reinforced by the conventional image of police. The naïve suspect may regard police as public servants and thus confuses their adversarial identity.\textsuperscript{144} Accordingly, the confidence game strategy can have a similar impact and result as the minimization techniques. After all, the confidence game technique could be a powerful tool for police to get a confession.

However, controlling the confidence game strategy would be difficult, as would be regulating the minimization technique. First, it is unclear how minimization would or should be controlled. In the case of maximization, it is intuitive. The more maximized—the more coercive, and therefore the more likely the confession will be inadmissible.\textsuperscript{145} Minimization is not so simple to

\begin{itemize}
\item \textsuperscript{139} \textit{Id.} at 1069 & 1072 (“[t]he investigator encourages the suspect to reason that he will receive prosecutorial, judicial, and/or juror leniency.”).
\item \textsuperscript{140} Kassin et al., \textit{supra} note 16, at 18.
\item \textsuperscript{141} \textit{Id.} (citation omitted).
\item \textsuperscript{142} \textit{Id.}
\item \textsuperscript{143} \textit{Leo, supra} note 121, at 283.
\item \textsuperscript{144} \textit{See id.} at 275.
\item \textsuperscript{145} \textit{See Kassin et al., supra} note 16, at 30.
\end{itemize}
identify. Given that minimization techniques usually provide face-saving or self-defense excuses, it is difficult to determine whether more minimization is more coercive. The same is true for the confidence game technique. To control more systematically, Professor Kassin’s study classified minimization techniques into three categories (legal, moral, and psychological). According to the consequences of techniques used, Kassin explained that legal consequence usually comes from suggestions of self-defense and other themes; moral consequence arises when suspects are told that “he or she is still a good person” and psychological consequence occurs when statements like “he or she will feel better after confession” are told. He argued that among those three, the legal consequence technique “that communicates promises of leniency via pragmatic implication[,]” should be prohibited. This classification is useful, because it could protect many suspects from inferring leniency and could provide clear guidance for criminal justice personnel. However, this proposal is limited in regulating the confidence game technique because the legal consequence would rarely occur when using the confidence game technique.

The confidence game strategy would also be difficult to control because minimization itself is now out-of-control. More than one hundred years ago, in Bram v. United States, the Supreme Court reversed a lower court’s conviction because of a fairly minor minimization technique. The Court held that a confession “must not be extracted by any sort of threat or violence, nor obtained by any direct or implied promises, however slight . . . .” In effect, the Bram Court established a categorical “per se exclusion of confessions” elicited by any threats and promises. As Professor Alan Hirsch noted, “[o]ne can hardly conceive a more categorical rejection of the use of minimization . . . as tools of interrogation.” However, because the standard of admissibility articulated in Bram was so strict, “the Bram doctrine has been ignored or circumvented by state

146. Cutler et al., supra note 25, at 612.
148. Id.
149. Id.
150. Bram v. United States, 168 U.S. 532, 539 (1897) (in Bram, the interrogator said “‘Bram, I am satisfied that you killed the captain from all I have heard from Mr. Brown. But,’ I said, ‘some of us here think you could not have done all that crime alone. If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders.’”).
151. Bram, 168 U.S. at 542 (emphasis added) (quoting 3 RUSSEL ON CRIME 478 (6th. Ed.)).
153. Id. at 38.
courts, lower federal courts, and even the Supreme Court itself.”  

Arizona v. Fulminante is regarded as a “death knell” for Bram, when the Court, in dicta, said that “under current precedent [Bram] does not state the standard for determining the voluntariness of a confession . . . .” The treatment of the Bram holding shows that the courts are becoming comfortable with loosening control of minimization techniques. Therefore, controlling the confidence game strategy may also be difficult.

2. The Confidence Game and Unfairness

The unfairness of the confidence game could be easily understood, when viewing police interrogation in conjunction with the adversarial system. The abovementioned sports-game analogy with the adversarial system is a good starting point. In a sports-game, every participant already knows deception is prevalent. Low-level trickeries are therefore useless because most players are cautious against using them. The same is true for interrogation. Deception is usually considered a part of lawful police technique. Thus, if deceptions are not violent or coercive, they are mostly permissible in both sports games and police interrogation. However, there is an unnoticed difference between the two situations. The rules of sports games prohibit both sides from confusing their adversary; wearing a same or even similar uniform as an adversary is never allowable in any sports-games.  

There is, however, no corresponding rule in police interrogation. By using the confidence game technique, detectives sometimes intentionally camouflage themselves as being on the same side. When those techniques are skillfully used, vulnerable suspects would fail to notice that they are confronting their adversaries. In other words, the most basic and crucial rule of the game is not being followed.

Another study is also helpful to understand the unjust mechanism of the confidence game technique. Recently, Professor Darryl K. Brown explored the effects that follow “from the embrace of market norms in criminal process . . . .” Brown revealed how “proclivities for . . . market processes in

154. Id. at 39.
157. See Slobogin, supra note 33, at 1275.
158. See, e.g., Uniform Numbers, Colors and Messaging: Frequently Asked Questions Volleyball 2, Nat’l Collegiate Athletic Ass’n (Aug. 29, 2016), https://www.ncaa.org/sites/default/files/2016PR_Volleyball_FAQ_Uniforms_Messages_20160829.pdf (stating that if the jerseys of both teams have the same color and cause confusion, the home team should change the color of their jerseys).
criminal procedure make American criminal justice more lawless.”

He considered the greater power of the parties compared to a judge “regarding evidence production and the framing of legal issues” alongside the market-based incentives that encourage parties to “conduct thorough investigations and provide the court with all available evidence.” This market comparison could uncover the potential unfairness in the confidence game technique. In a free market economy, many ordinary citizens may be well aware of the famous quote: “[i]t is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest.” This quite simple recognition helps consumers be more prudent when purchasing items from merchants. They could exercise caution against immoderate marketing from the butcher, the brewer, or the baker, because they know the marketing is primarily based on the merchants’ interests. However, this recognition is less straightforward when the confidence game technique is used in police interrogation. Suspects who are exposed to those strategies may not recognize the fact that police officers work for their own interests—not for the suspect’s. Thus, they would be vulnerable to most immoderate marketing in the interrogation room. The most basic and important mechanism of the market economy is then not working in police interrogation.

Although the Due Process clause could regulate the unfairness aspect of police interrogations, deceptive techniques are widely accepted in the history of America interrogation. Frazier v. Cupp has been regarded as “a green light to deception” for criminal justice personnel to this day. In Frazier, a detective falsely told the defendant that his companion had already confessed to committing murder. The defendant finally confessed and was convicted. Although the defendant claimed his statement was not voluntary, the Court ruled that police misrepresentation was “while relevant, insufficient in our view to

160. Id. at 4 (“Instead of legal rules against illegitimate practices, the justice system trusts democratic or market-like mechanisms to prevent them.”). Although Brown’s analogy is generally related to prosecutorial and trial stages, this article applies this analogy to the investigation stage based on the analysis in Part III.
161. Id. at 8.
162. Adam Smith, Wealth of Nations 26–27 (1776). This famous quotation is well-known to many people. See Elena Cavagnaro & George Curiel, The Three Levels of Sustainability 120 (2012).
163. Lafave et al., supra note 33, at 408.
164. Id. at 415–16.
167. Frazier, 394 U.S. at 737 (“[T]he officer questioning petitioner told him, falsely, that [co-defendant] had been brought in and that he had confessed.”).
168. Id. at 738.
make this otherwise voluntary confession inadmissible.”

When reviewing suspects’ voluntariness under the totality of the circumstances standard, the reviewing Court regards deceptive techniques used as merely one factor to consider. Thus, as Jerome H. Skolnick noted, if a *Miranda* waiver is obtained, this test becomes more form than substance. After all, the confidence game strategy will be difficult to control through Due Process jurisprudence.

So far, this article has examined the effect of the confidence game strategy and its lack of regulation. Although the confidence game strategy could also be as coercive and unfair to suspects as other techniques, the courts have mainly focused on overt adversarial interrogation techniques. This article now turns to discuss how to address this gap.

**IV. POLICY DIRECTION**

**A. Regulation Through Police Code of Conduct**

This article looks for a solution through administrative reform of police, especially with a greater elaboration of police codes of conduct. This approach may be unfamiliar to most American lawyers. From their point of view, expanding the exclusionary rule—a typical remedy in the U.S. justice system—might be a more comfortable and plausible solution to the problems analyzed so far.

It is, however, practically difficult to suddenly exclude a confession because a confidence game strategy was used. As noted, the current confession jurisprudence has been firmly established not to exclude this kind of strategy. Additionally, conflicts are rampant when pursuing compromises on an appropriate level of regulation; a method of regulation; how to enforce the regulation; and a remedy for the violation. This is because, as the *Miranda* court stated, controlling interrogation is a discussion about “the roots of our concepts of American criminal jurisprudence.”

In fact, the rise and fall of *Miranda* is

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nearly the aggregation of these conflicts. Therefore, instead of a cursory suggestion, a more cautious approach is needed.

As a new measure, a stricter police code of conduct is worth considering. Above all things, this approach is timely. Recently, there have been burgeoning demands for police reform after tragedies since police brutality has repeatedly occurred. These recurring events have fueled public anger, because most police officers who abused their public power had been under investigations but ultimately not prosecuted. This amounts to an ironic conclusion: most criminal justice officials did not violate the law, but most communities were not satisfied with their performances. Thus, many scholars have stressed that when enforcing the law, police officers should not only comply with the law, but also be legitimate. Beyond a mere lawfulness, legitimate policing is seriously discussed. Studies show that legitimate law enforcement helps the police more effectively perform their duties by facilitating voluntary participation of citizens. Accordingly, a new police code of conduct could enhance the legitimacy of police interrogation.

In America, most police agencies have their own code of conduct which “consists of ethical mandates law enforcement officers use to perform their duties.” These codes usually include the various ethical principles for officers,


179. Id. at 1875; Tyler, supra note 177, at 85.

including professional integrity.¹⁸¹ For instance, the integrity section of the Milwaukee Police Department Code of Conduct notes that “[h]onesty and truthfulness are fundamental elements of integrity. It is our duty to earn public trust through consistent words and actions. We are honest in word and deed.”¹⁸² More specific code provisions aim to maintain public confidence in police officers in the society they serve.¹⁸³ If these codes are applied to interrogation, police use of the confidence game strategy becomes rather unimaginable.

Most police codes of conduct, however, have obvious exceptions for investigation and interrogation.¹⁸⁴ In the Milwaukee Police Department, the relevant code notes that “[t]he provisions of this guiding principle do not apply to a member’s questioning or interrogation of a person involved in a criminal investigation . . . .”¹⁸⁵ This kind of exception is also found in other law enforcement agencies.¹⁸⁶ To put it simply, ethical activity is not a primary consideration in police investigation.

Maintaining this exception is no longer in harmony with the recent trend of police reform. The confidence game technique explicitly aims to conceal the real nature of police interrogation. As noted, this technique might not be prohibited by the present laws and precedent, but it can raise questions about the legitimacy of police activity. Police agencies should therefore narrow this exception.

There may be questions as to whether police codes of conduct will be enforced properly and whether appropriate sanctions will be imposed if there is a violation. The effectiveness of internal regulations has always been a target of criticism. However, recent tragedies and subsequent efforts for reform are plausibly expected to strengthen the enforcement of those codes.

B. Inspiration from MRPC

For more concrete proposals, this article draws inspiration from the rules that regulate lawyers in adversarial litigation. The MRPC developed by the American

¹⁸¹ Id. (such as acting with impartiality, exercising appropriate discretion, using only necessary force, and maintaining professional integrity).


¹⁸³ Id.

¹⁸⁴ Id. at 8.

¹⁸⁵ Id. at 8 (emphasis added).

¹⁸⁶ See, e.g., Ethical Standards of Conduct, FLA. DEP’T OF L. ENFORCEMENT, r. 2.2, http://www.fdle.state.fl.us/cms/CJSTC/Officer-Requirements/LE-Ethical-Standards-of-Conduct.aspx (last visited Mar. 21, 2017) (“Police officers shall not knowingly make false accusations of any criminal ordinance, traffic or other law violation. This provision shall not prohibit the use of deception during criminal investigations or interrogations as permitted under law.” (emphasis added)).
Bar Association (ABA), are a set of rules that prescribe baseline standards of legal ethics and professional responsibility for lawyers in the United States.\footnote{See State Adoption of the ABA Model Rules of Professional Conduct, AM. BAR ASS’N, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html (last visited Mar. 21, 2017) (as of 2016, 49 states, except California, have adopted the rules in whole or in part).} Among them, some rules regulate lawyers’ conduct toward opposing parties through specific guidelines and prohibitions.\footnote{See MODEL RULES OF PROF’L CONDUCT r. 3.4 (AM. BAR ASSN 2016) (fairness to opposing party and counsel).} First, Rule 4.3 notes that a lawyer must not confuse his or her role, must correct any misunderstandings about his or her role to an unrepresented persons, and must not give legal advice to an opposing party.\footnote{The rule states that:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client. \textit{Id.} (emphasis added).} Second, Rule 4.2 imposes a duty on lawyers not to communicate about the subject of representation with a person represented by another lawyer.\footnote{MODEL RULES OF PROF’L CONDUCT r. 4.2 (AM. BAR ASSN 2016) The rule states that:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order. \textit{Id.} 4.2 (2016) (emphasis added).} Third, Rule 3.8(c) notes a prosecutor’s responsibility of not interfering with important pretrial rights of those who are unrepresented and accused, including preliminary hearings.\footnote{MODEL RULES OF PROF’L CONDUCT r. 3.8(c) (AM. BAR ASSN 2016) The rule states that:

[t]he prosecutor in a criminal case shall not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing . . . . \textit{Id.} (emphasis added).} After all, these provisions aim to
This article focuses on the similarities between the concerns of the above MRPC and the damaging effects of the confidence game technique. The MRPC (especially, Rules 4.2 and 4.3) intend to clarify the lawyers’ role to opposing parties, whereas the confidence game strategy is used to confuse or conceal the interrogator’s identity. Given the adversarial nature of police interrogation, the concern of those model rules could be aptly applied to police interrogations. If so, like the MRPC, there should be some restraints on the confidence game techniques of police. This article envisions controlling those techniques by introducing similar rules into police codes of conduct.

Even before hearing this proposal, one may simply reject the idea that comparing police with lawyers is appropriate. Surely, police are not lawyers; the ethics of police would be quite different from those of lawyers. An interrogation stage is also different from the situation of lawyers’ contact with an opposing party. In this vein, in Montejo v. Louisiana, the Court rejected this comparison by noting the difference between the code of legal ethics and the critical stages in the Sixth Amendment. The Court explicitly stated that “the Constitution does not codify the ABA’s Model Rules, and does not make investigating police officers lawyers.” Justice White expressed a similar view in his dissenting opinion in Massiah v. United States. White criticized that the majority’s opinion, which prohibited police from talking to a defendant without his counsel present, is similar to the ABA’s rules that regulates lawyers’ ability to interview the opposing party. The dissent noted that the ABA’s rules deal with “the supposed imbalance of legal skill and acumen between the lawyer and the party

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192. Model Rule of Prof’l Conduct r. 3.8 cmt. 2, r. 4.2 cmt. 1, r. 4.3 cmt. 1 (Am. Bar Ass’n 2016).
193. Model Rules of Prof’l Conduct r. 4.2, 4.3 (Am. Bar Ass’n 2016).
194. Montejo v. Louisiana, 556 U.S. 778, 790–91 (2009). The Court ruled that when the defendant waives his or her Miranda rights even in interrogation after indictment, a right to counsel on the Sixth Amendment could also be waived. Id. 798–99 The Court rejected the petitioner’s claim that Michigan v. Jackson, 475 U.S. 625 (1986) prohibits police from interrogating a defendant without his counsel present if he secured a counsel once the Sixth Amendment right to counsel attaches. Id. at 789–90. In Jackson, the Court held that “if police initiate interrogation after a defendant’s assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of defendant’s right to counsel for that police-initiated interrogation is invalid.” Id. at 782 (quoting Jackson, 475 U.S. at 636). The Court overruled Jackson and reasoned that a petitioner’s claim “appears to have its theoretical roots in codes of legal ethics, not the Sixth Amendment.” Id. at 790, 797.
195. Montejo, 556 U.S. at 790.
197. Id. at 208, 210–11.
litigant[,]” but this reason “does not apply to nonlawyers . . . .”

Those cases reveal the Court’s reluctance to borrow the purpose of MRPC in regulating for the police work.

The repulsion of the Court is attributable to the fact that the application of the MRPC (likely Rule 4.2) to police investigation prohibits most police contact with represented suspects if counsel is not present. This application would make most police useless because, as the Court expressed, “any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.”

The ongoing resistance to Escobedo and Miranda partly shows this aversion, simply because both decisions allow the suspect to enjoy a greater chance of appointing a lawyer and exercising the right to have the lawyer present with him at the interrogation.

This article’s suggestion, however, addresses different situations. Through the comparison with Rule 4.3, which regulates lawyers’ conduct when encountering unrepresented opposing parties, this proposal only attempts to regulate interrogators’ conduct with a suspect when his or her counsel is not present.

It should be noted that Rule 4.3 intends to clarify the identity of a lawyer to the unrepresented person. That is, the scope to which the rule applies is broader than the problem of “the supposed imbalance of legal skill and acumen between the lawyers and the party litigant[,]”

In fact, Rule 4.3 is also concerned with an unrepresented person’s potential assumption that “a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client.”

The comment to Rule 4.3 further states that “to avoid a misunderstanding, a lawyer will typically need to identify the lawyer’s client and, where necessary, explain that the client has interests opposed to those of the unrepresented person.”

Perhaps, for suspects, the possibility of misunderstanding the role of an interrogator could be as high as when parties contact opposing lawyers. This parallel may not be an exaggeration, given the similarity of adversarial circumstances between police interrogation and the situations that Rule 4.3 addresses.

The introduction of a Rule 4.3 type of regulation to police codes of conduct would discourage the interrogator from using the confidence game technique.

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198. Id. at 212.


201. Model Rule of Prof’l Conduct r. 4.3 (Am. Bar Ass’n 2016).


203. Model Rules of Prof’l Conduct r. 4.3 cmt. 1 (Am. Bar Ass’n 2016).

204. Id.
For the analysis, Rule 4.3 needs to be reiterated here. The Rule notes that a lawyer
1) must not confuse his or her role, 2) correct any misunderstandings about his
or her role to an unrepresented person, and 3) not give legal advice to them.\footnote{205}
The first two are most relevant to this article’s proposal. These regulations force
interrogators to make reasonable efforts not to confuse their adversarial role or
to rectify the misunderstanding of their adversarial role. The third one is not
directly relevant to the confidence game technique. Instead, it would ban the
minimization technique, which could have a legal consequence. For instance,
suggesting a self-defense scenario to the suspect would be prohibited.

C. Refuting Concerns

In addition to concerns about the effectiveness of internal controls, there are
other arguments against implementing the type of reform advocated here. These
arguments worry that over-regulation will prevent police from effectively
dealing with crime, and would further be unenforceable.\footnote{206} Initially, it might be
argued that this article’s idea will regulate interrogators too much and, after all,
harm the police’s ability to get confessions and resolve crimes. These new
restraints, however, would not be a big problem in administering criminal justice.
With the existing interrogation practice, the rate of confessions in interrogations
is assumed to be around 50\% to 64\%.\footnote{207} However, the vast majority of suspects
who did not confess during interrogation finally succumb during plea
negotiations. As is well known, 97\% of defendants in federal court and 94\% of
defendants in state court plead guilty.\footnote{208} That means even strong defendants, who
have survived the interrogation stage without a confession, finally surrender by
pleading guilty. Thus, a decrease of the confession rate would not seriously harm
the government’s ability to convict criminals.

Some critics further claim that additional safeguards are simply unnecessary
because \textit{Miranda} provides all necessary prophylactic warnings for suspects.\footnote{209}
This position would be understandable if the \textit{Miranda} warnings functioned as
initially intended. However, recent research proves otherwise. As noted, recent
research also shows that a fair number of ordinary citizens misunderstand the
core meaning of \textit{Miranda} warnings.\footnote{210} In fact, \textit{Miranda} is no longer a stumbling

\begin{itemize}
\item \footnote{205}{\textsc{Model Rule of Prof’l Conduct} r. 4.3 (Am. Bar Ass’n 2016).}
\item \footnote{206}{See Slobogin, \textit{supra} note 33, at 1284, 1291 (advocating the need for police
deception to some extent and opposing its complete ban).}
\item \footnote{207}{See Slobogin, \textit{supra} note 40, at 452 (discussion three empirical studies of a
confession rate).}
\item \footnote{208}{Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012).}
\item \footnote{209}{See Miranda v. Arizona, 384 U.S. 436, 467–68 (1966).}
\item \footnote{210}{Slobogin states that:}
\end{itemize}
block for law enforcement agencies to get confessions. Based on this awareness, this article’s proposal may force the interrogator to follow Miranda’s original purpose more seriously.

From another angle, there may be criticism that this proposal may make the relationship between police officers and suspects more hostile, aggressive, and confrontational. Yet, that is not necessarily the case. Even under new restraints, police officers can exploit most minimization techniques if there is no risk of confusing their identity. Beneficent advice and conversation from interrogators may also build relationships with subjects of interrogation. This proposal only seeks a little bit more honesty from police officers as public servants in a democratic society.

There are voices demanding for more fundamental reform of police practices. Rather than seeking a solution within the existing adversarial system, some argue for the need to make police interrogation a neutral evidence gathering activity.211 This suggestion aptly coincides with the general recognition that police investigation is basically gathering evidence. It would promisingly eliminate most of the techniques used in police interrogation. However, because of the deeply entrenched adversarial culture in the American legal system, it may be difficult to completely displace the adversarial nature of police interrogation. This is the very reason why this article’s proposal could be a realistic solution.

V. CONCLUSION

Although the identity of a police interrogator is clearly an adversary, courts have been less attentive to this aspect and, therefore, leave a fundamental element of police interrogation unaddressed. This article attempts to fill this gap. American police interrogators should be prohibited from confusing or concealing

What is more surprising is research testing the ability of nondisabled adults to understand the [Miranda] warnings. In one recent survey of adult defendants and college students in the United States, 30% believed that silence could be used as evidence, 25.9% believed that a waiver must be signed to be valid, 52% thought that ‘off the record’ comments were inadmissible, 12.8% believed that statements could be retracted, and 30.2% believed that once counsel is requested questioning could continue until counsel arrived. Slobogin, supra note 42, at 336–37. These misunderstandings did not correlate with intelligence or experience. “In particular ‘years of ‘attained’ education had virtually no relationship to Miranda knowledge.”” Id.

211. LEO, supra note 32, at 327 (“Police interrogation should be an investigative function, not a prosecutorial one. It should therefore not be guilty presumptive, and its purpose should not be to incriminate the suspect in order to build a successful case against him. Instead, the goal of American police interrogation should always be to get the truth . . . not to get a conviction. Only by deadversarializing the police interrogation process will we be able to achieve the ideals of American justice.”).
their adversarial role during interrogation. The adversarial criminal justice system and its complex evidentiary rules make the police and the prosecutor close allies. However, this is not evident to the subject of most interrogations. Police interrogators often confuse or conceal their identity because this strategy is effective in evoking confessions, but it is rarely regulated. This strategy should be more strictly controlled because, if applied in a sophisticated manner, it could be not only coercive, but also unfair. For a realistic reform, this article argues revised police codes of conduct could be a timely measure to ban that strategy. Rule 4.3 of the MRPC, which regulates the lawyer's contact with an unrepresented person, would serve as a good example.