

POLICE PRESSURE: THE HISTORY OF U.S. POLICE INTERROGATIONS

by

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## THESIS ABSTRACT

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In the past 150 years, the tactics used by police in the interrogation room have constantly been evolving. This paper will look back on the history of interrogation tactics used by police as well as the court's efforts to regulate those tactics. Starting with the definition of interrogation and tactics, the paper will slowly delve into the history of U.S. police interrogation tactics. Beginning with the early formulation of modern police departments and working through the important Wickersham Report. The paper will discuss the ban on physical third degree tactics and the impact of *Miranda* warnings. Finally, the paper will walk through one of the most popular interrogation methods, The Reid Technique, before briefly proposing eight suggestions on how to move forward with interrogation regulation.

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## I. AN INTRODUCTION INTO THE HISTORY OF POLICE INTERROGATION TACTICS

The modern TV crime drama would have everyone believe that all crimes are solved in either the forensics lab or the interrogation room. Two areas with vastly different rules, regulations, and procedures. In the forensics lab, a strict set of guidelines are followed in order to analyze and process evidence. It is a set of procedures that is followed in the same order, in every forensics lab. The interrogation room however, is a mix of style, tactics, procedure, and intuition. Unlike on television, where playing hardball, roughing up a suspect, and appealing to a suspect's emotions seem to be the only tactics used, real interrogations can produce the same outcome using different tactics, styles, and strategies. Police interrogations are incredibly important to the investigation process. In recent years, there has been an increase in claims of coerced confessions and false confessions made as a result of improper interrogation techniques. Harmful or improper interrogation techniques and tactics can cause false confessions. Those same tactics can also coerce an innocent suspect to confess and a helpful witness to lie. But why do false confessions matter? In our American system of justice we have a long standing principle that no person must accuse himself of a crime.<sup>1</sup> The court set out to ensure that the rights of the individual could stand up against overzealous police practices.<sup>2</sup> The regulation of police interrogation practices is important because it ensures that the rights of a suspect are protected from police overreach. The goal of this paper is to explore the tactics used by police interrogators throughout the United States. I will explore the history of interrogation tactics used over the past 150 years and the evolution of the interrogation process over that time. Additionally, I will explore the regulations

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<sup>1</sup> *Miranda v. Arizona*, 384 U.S. 436, 442 (1966) quoting *Brown v. Walker*, 161 U.S. 591, 596-597 (1896).

<sup>2</sup> *Id.* at 444.

and limits placed on interrogators by the courts throughout that time. I will finish my analysis by proposing some guidelines that should be used in the future regulation of interrogation tactics. In the past 150 years, how have interrogation tactics used by police evolved and how has the court regulated police interrogation tactics?

Before I can begin to delve into the history of interrogation tactics and regulation of interrogations, some topics and words need to be defined.

### **A. What is an Interrogation?**

Defining interrogation is difficult. While the Supreme Court has set up a definition, lower courts have taken that definition and expanded it to create grey areas. Additionally, the American public has their own definition of interrogation. What does an interrogation include? Is it only in a formal setting or only a formal police setting? Does an interrogation only occur when questions are being asked or when any talking occurs? Does an interrogation mean something different now, post-*Miranda*, then it did in 1900?

In *Miranda*, the court defined a custodial interrogation as “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.”<sup>3</sup> The *Innis* court elaborated on questioning saying, “the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term “interrogation” under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.”<sup>4</sup> Since the *Miranda*

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<sup>3</sup> *Id.*

<sup>4</sup> *Rhode Island v. Innis*, 100 S.Ct. 1682, 1689-1690 (1980).

decision, the court has consistently used this definition of interrogation. While the court's definition is clear and fairly neutral, the general public has a different definition and idea of what an interrogation is. Cambridge Dictionary defines interrogate as "to ask someone many questions in a formal situation, often in a forceful way that can be seen as threatening."<sup>5</sup> Merriam-Webster's Dictionary has a similar definition of interrogate, "to ask someone questions in a thorough and often forceful way."<sup>6</sup> Both dictionary definitions include an element of force that is not represented in the court definition. It is important to note that force or forceful questioning is not a required element for something to be considered an interrogation. Friendly questioning is just as much an interrogation as a series of questions that include lies, deception, and tricks.

The final piece of the definition to consider is who can be the subject of an interrogation? In *Innis*, the definition only says "whenever a person *in custody* is subjected to ... express questioning" (emphasis added).<sup>7</sup> Similarly in *Miranda*, the definition hinges on a person being in custody or being deprived of his freedom in any way.<sup>8</sup> The court's definition nearly guarantees that any suspect who is in police custody can be the subject of an interrogation. The question comes up when witnesses are questioned in police custody. Can the witness of a crime be interrogated? Under the *Miranda* definition it is possible. If a witness has been deprived of his freedom of action in a significant way and is questioned during the time of deprivation, an interrogation may have occurred. I bring up the question of witness interrogation because many interrogation tactics are used both on suspects and on witnesses. Moving forward, it is important

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<sup>5</sup> *Interrogate*, Cambridge Dictionary (Web 2016).

<sup>6</sup> *Interrogate*, Merriam-Webster's Dictionary (Web 2016).

<sup>7</sup> *Innis* at 1689-1690.

<sup>8</sup> *Miranda* at 444.

to remember that tactics are not insular. The tactics discussed are used in various situations involving both suspects and witnesses.

Using the word interrogation is a decision and a judgment on the type of questions being asked and the type of interaction that is occurring. I could just as easily use the word interview or something longer, such as, police interaction. Keeping in mind the definition of interrogation that I have already set out, I will continue to use the word interrogation throughout this paper. I mean it without judgment or any pre-conceived notions of how a police officer will treat the individual on the other side of the interview table. An interrogation does not automatically equal police brutality or the mistreatment of an individual. Instead, in this case, the use of the word interrogation is to signal that a person is being asked questions by the police in a police dominated environment. For simplicity, I will refer to those opposite the police in an interrogation as the suspect for the remainder of this paper. And for the purposes of this paper, when I say interrogation I mean police questioning, or any equivalent actions, by the police of a person that occurs in a police dominated environment.

### **B. What is an Interrogation Tactic?**

Good cop/bad cop, the two-step interview, make 'em sweat, silence, compound questions, appealing to emotions, minimizing the consequences, building a rapport. These are just a few of the possible tactics and techniques that an interrogator can use during an interview. Each police interrogator can use a vast number of styles, techniques, and tactics in order to get the information needed from an interrogation. Tactics, styles, and techniques overlap frequently. Officer will change tactics and approaches based on how the interrogation is going, how much information has been divulged, how comfortable the suspect is, the crime committed, and numerous other reasons. Each officer will approach each interrogation differently. Based on the

officer's training, personal experience, job experience, and intuition each officer will develop their own approach that mixes tactics, styles, and techniques in a way to benefits that personal officer. Additionally, every interrogation is different. Each suspect and witness will require a unique and personalized approach from the officer they're talking with.

Throughout the remainder of this paper there will be different discussions of cases where the court prohibits, approves, or cautions law enforcement about certain tactics used during interrogations. Some of those tactics are listed above. Others will be listed as the court discusses and explains the limits of those tactics.

### **C. Limitations**

The focus of this paper will be on the United States interrogation process used by local police departments. I will not be discussing tactics used by the military or by federal police agencies. Additionally, the focus of this paper will be on the *tactics* used during police interrogations and how the court has regulated those tactics. Numerous papers have been written about the theories behind why the court regulates police interrogation action the way it does. Those authors and articles delve into questions of admissibility and the voluntariness requirement that determine whether a suspect's statement is admissible. Instead of focusing on legal theories and how those theories evolve based on decisions of the court, my paper will focus on the tactics. My goal is to explore the history of interrogation tactics and explore how the court has regulated specific tactics.

Throughout this paper, I will outline and discuss as many police interrogation tactics as possible. However, I will be limited in the number of tactics discussed for a couple different reasons. First, only tactics discussed in cases have a definitive answer from the court as to whether or not those tactics are legal. Cases provide descriptions of the tactics used and a

declaration by the court as to whether those tactics violate individual rights, do not violate individual rights, or sit in the grey area in between. Without a court case, it is hard to definitely say how a tactic will be construed by the court. Second, local regulation prevents the use of some tactics. Currently, interrogation regulation occurs primarily on the state and local level. If a tactic has been outlawed in numerous states or localities, there may not be a definitive answer from the court about that tactic. Additionally, the regulations from each state/locality may say something different from one another. Without going through every set of state and local regulations it is impossible to make a complete and comprehensive list of legal and outlawed tactics. Third, this paper is meant to be a brief explanation of the history and legality of interrogation tactics. The purpose of this paper is not to write 200+ pages outlining every single possible interrogation tactic and the legality of every tactic. Although it would be a valuable undertaking, the goal of this paper is not to dissect and discuss every possible tactic and local regulation. Finally, interrogation tactics are constantly evolving. Each interrogation is different and throughout the interrogation different tactics will be used in conjunction with other tactics. Developing a comprehensive list of tactics that is complete would be near impossible.

In order to understand the history of interrogation in the United States this paper will cover three different time periods and major events that have shifted the landscape of police interrogation. First, we'll start in the late nineteenth and early twentieth centuries. We'll discuss the Third Degree, the tactics it employs, and its widespread use across the country. Within this examination will be a discussion of the Wickersham Report, which drastically shifted the landscape of police interrogations. After discussing the courts response to the Wickersham Report we'll move on to the late twentieth century and the courts important decision in *Miranda v. Arizona*. The paper will discuss the impact *Miranda* had on interrogations and police

interaction with suspects. Finally, we'll discuss modern interrogation tactics focusing on the widely used Reid Technique. I will conclude with a list of eight recommendations for how to move forward when regulating police interrogation tactics.

## II. THE HISTORY OF INTERROGATION TACTICS AND REGULATIONS

Modern day interrogation practices are relatively young. Prior to the latter half of the nineteenth century large-scale police forces did not exist in America.<sup>9</sup> Instead, in the eighteenth and first half of the nineteenth century there was a focus on community policing and courtroom investigations.<sup>10</sup> In his historical look at confession law, Steven Penney, discusses how a shift in investigatory responsibility occurred.<sup>11</sup> Criminal investigations used to primarily occur in pretrial judicial proceedings where magistrates questioned witnesses.<sup>12</sup> The evolution and development of pre-trial and trial procedures into the modern adversarial system with rights against self-incrimination and rules about admissibility caused a shift in responsibility.<sup>13</sup> In the latter half of the nineteenth century investigation responsibilities moved to newly formed large-scale police departments.<sup>14</sup> In 1853, New York reorganized their officers into what we think of as a modern department approach.<sup>15</sup> This reorganization required officers to begin investigating crimes. It was this shift in investigatory responsibility that led to the modern day version of interrogation.<sup>16</sup> Prior to this shift, there would not have been a strong reason to have an interrogation room where suspects were grilled for hours to get a confession. Interrogations have always been used but

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<sup>9</sup> Steven Penney, Theories of Confession Admissibility: A Historical View, 25 Am. J. Crim. L. 309, 314 (1998).

<sup>10</sup> *Id.* at 322.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 323.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 314.



prior to the latter half of the nineteenth century the pressure for the police to obtain a confession would not have been as strong.<sup>17</sup> The new investigation practices by police opened up a gap in the law. There were questions about whether the voluntariness doctrine, the privilege against self-incrimination, or the due process clauses in the 14th and 5th Amendments would restrict police investigatory techniques.<sup>18</sup> The court began to hear cases involving forced confessions and questionable interrogation practices by police. These cases demonstrate the development and early evolution of police interrogation tactics leading up to the Wickersham Report.

### **A. The Late 19th & Early 20th Century**

From the late nineteenth century through the beginning of the twentieth century the court is faced with reviewing interrogation confession cases. From 1896-1924, the court issues the decision of *Wilson*, *Bram*, and *Wan* and begins to set the foundation for all future interrogation cases.<sup>19</sup> The decisions in these three cases will serve as our jumping off point when covering the history of how the court regulates interrogation tactics used by the police.

In 1896, the court sets the foundation for coerced confessions with the decision of *Wilson v. United States*.<sup>20</sup> The court provides the test for admissibility stating, “the true test of admissibility is that the confession is made freely, voluntarily, and without compulsion or inducement of any sort.”<sup>21</sup> This test is used throughout frequently throughout the next 70 years. The court delves into the reason why coerced and compelled confessions are a detriment to the criminal justice system discussing how “one who is innocent will not imperil his safety or

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<sup>17</sup> *Id.* at 324.

<sup>18</sup> *Id.*

<sup>19</sup> *Wilson v. United States*, 162 U.S. 613 (1896); *Bram v. United States*, 168 U.S. 532 (1897); and *Ziang Sung Wan v. United States*, 266 U.S. 1 (1924).

<sup>20</sup> 162 U.S. at 623.

<sup>21</sup> *Id.*

prejudice his interests by an untrue statement, ... [but] when the confession appears to have been made either in consequence of inducements of a temporal nature, held out by one in authority touching the charge preferred, or because of a threat or promise, by or in the presence of such person, which, operating upon the fears or hopes of the accused in reference to the charge, deprives him of that freedom of will or self-control essential to make his confession voluntary within the meaning of the law.”<sup>22</sup> When a person confesses to a crime, his confession deserves the highest credit.<sup>23</sup> Confessions are viewed by the jury and the court as strong confessions of guilt.<sup>24</sup> The preferential weight placed on voluntary confessions is why the court must guard against involuntary confessions that have been coerced or compelled. The court must place limits on police in order to protect those subjected to interrogations from confessing falsely.<sup>25</sup> “All verbal confessions must be received with caution, though free, deliberate, and voluntary confessions of guilt are entitled to great weight. But they are inadmissible if made under any threat, promise, or encouragement of any hope or favor.”<sup>26</sup> The admissibility test set forth by *Wilson* provides a guideline for courts evaluating confessions over the next several decades.

*Bram v. United States* is decided by the court in 1897.<sup>27</sup> *Bram* furthers the test set out in *Wilson*.<sup>28</sup> The court relies on legal texts to determine whether the confession of the accused should be admissible stating, “a confession, in order to be admissible, must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any

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<sup>22</sup> *Id.* at 622.

<sup>23</sup> *Id.* quoting *Hopt v. Utah*, 110 U.S. 574, 584 (1884).

<sup>24</sup> *Id.* 621-622.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Bram v. United States*, 168 U.S. 532 (1897).

<sup>28</sup> *Id.* at 542.

direct or implied promises, however slight, nor by the exertion of any improper influence.”<sup>29</sup> In *Bram*, police convinced Bram to confess based on promises that he would not be punished as severely if he confessed to the crime and having an accomplice.<sup>30</sup> Since *Bram*, the court has continued to use the voluntariness test expressed while ignoring the outlaw of police promises.<sup>31</sup> *Bram* sets up the continued use of the *Wilson* test, while seeming to set a limit on just how much police can push a suspect with promises.<sup>32</sup> Although the issue of police promises goes largely ignored for the next 100 years, the court demonstrated their willingness to say not all promises by police are acceptable.

The final case in the trilogy leading up to *Wickersham* is *Ziang Sung Wan v. United States*.<sup>33</sup> Wan was taken into Washington D.C. police custody while in New York on the suspicion that he was involved in the murder of three men in Washington.<sup>34</sup> After being taken into custody, Wan was taken to Washington, placed in a secluded room, and held continuously for over a week.<sup>35</sup> During his time in custody, Wan suffered from Spanish influenza and requested to see his brother.<sup>36</sup> Washington police refused Wan’s request and held him incommunicado until his arrest.<sup>37</sup> Through his entire time in custody, Wan was in the presence of

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<sup>29</sup> *Id.* at 542-543.

<sup>30</sup> Saul M. Kassin et al., Police-induced confessions: Risk factors and recommendations., 34 *Law and Human Behavior* 3, 12 (2010).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

While *Bram* seems to push back on police promises to suspects, the court doesn’t continue to use this reasoning in later cases. Instead, the court goes on to simply ignore this portion of the decision. The question of police promises does not get an answer until 1997 when *White* is decided.

<sup>33</sup> *Ziang Sung Wan v. United States*, 266 U.S. 1 (1924).

<sup>34</sup> *Id.* at 10.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 11.

a police officer whose sole job was to continuously interrogate and keep Wan in conversation.<sup>38</sup> After 8 days in custody, Wan was taken to the scene of the murder and forced to walk the scene of the crime continuously for 10 hours answering questions about the crime and explaining bullet holes, blood spatter, the type of gun used, etc.<sup>39</sup> Wan was taken back to his secluded room and questioned from 7pm to 5am without any breaks or sleep.<sup>40</sup> On his 9th day in custody, Wan was formally arrested, interrogated, and forced to sign a confession report while sleep deprived and suffering from the flu.<sup>41</sup> The Supreme Court, relying on *Bram*, ruled Wan's confession involuntary.<sup>42</sup> Confessions can be made involuntary through other means than promises or threats by police.<sup>43</sup> The court determined that compulsion was applied and that Wan's confession was not voluntarily made.<sup>44</sup>

This trilogy of cases leading up to the Wickersham Report provide a baseline limit on interrogation tactics. A confession must be given freely, voluntarily, and without compulsion or inducement of any sort.<sup>45</sup> Compulsion and inducement can come from promises or threats as well as other types of compulsion including being held for days on end, unending questioning, or sleep deprivation.<sup>46</sup> This test by the court provides the rule for how police should be acting within the interrogation room. However, as we'll see in the Wickersham Report and the resulting cases, police were not following the tests set out in *Wilson*, *Bram*, and *Wan*.

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 12.

<sup>41</sup> *Id.* at 13.

<sup>42</sup> *Id.* at 15.

<sup>43</sup> *Id.* at 14.

<sup>44</sup> *Id.*

<sup>45</sup> *Wilson*, 162 U.S. at 623.

<sup>46</sup> *Bram*, 168 U.S. at 542-543; *Wan*, 266 U.S. at 14.

## B. Wickersham Opens the Eyes of the Public to Police Brutality

In 1931, the National Commission on Law Observance and Enforcement, unofficially referred to as the Wickersham Commission, published a series of reports on law enforcement.<sup>47</sup> The Commission, chaired by Attorney General George Wickersham, was commissioned by President Hoover to report on and evaluate the current state of law enforcement throughout the United States.<sup>48</sup> One of the Commission's reports, Report on Lawlessness in Law Enforcement (Report), has been quoted by the court and used to describe the type of interrogation a suspect would likely endure in most police stations up to and through the 1930s.<sup>49</sup> The first section of the report, "The Third Degree," explains the conditions and treatment that suspects face during an interrogation with the police. The Report explains that the third degree means "the employment of methods which inflict suffering, physical or mental, upon a person in order to obtain information about a crime."<sup>50</sup> At this time many commentators believed that the third degree only occurred when physical force was used against a suspect.<sup>51</sup> The Report clearly disagrees with this contention; "the third degree is sometimes denied in cities where suspects are subjected by the officials to many hours of continuous questioning causing severe fatigue, which may be accompanied by deprivation of sleep and of food. Where no force is employed, some commentators would say that there is no third degree; but the methods used would fall within our

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<sup>47</sup> Zechariah Chafee, Walter H. Pollak & Carl S. Stern, National Commission on Law Observance and Enforcement - Report on Lawlessness in Law Enforcement (1931).

<sup>48</sup> Richard Leo. From Coercion to Deception: the Changing Nature of Police Interrogation in America, 18 Crime Law Soc Change Crime, Law and Social Change 35–59, 35-59 (1992).

<sup>49</sup> *Miranda v. Arizona*, 86 S.Ct. 1602, 1613 (1966).

The Wickersham Report has been referred to in *Chambers* and most notably *Miranda*. It has been examined by scholars and is largely referred to as one of the milestone moments in interrogation law. The report is viewed to mark the shift in public perception and legal regulation of the use of physical force in interrogations.

<sup>50</sup> Chafee, *supra* at 19.

<sup>51</sup> *Id.*

definition.”<sup>52</sup> The Wickersham Report seeks to draw a clear line regarding the legality of third degree tactics used in an interrogation and the court agrees with that line.<sup>53</sup>

The Report determined that the third degree can be divided into two kinds of suspect abuse that include physical or mental suffering.<sup>54</sup> At the time of the Report threats with weapons, beating with fists, constant awakening at night, deprivation of food, beatings with a rubber hose, use of blinding lights during questioning, prolonged questioning, grilling, and other tactics were reported to be in use throughout the country.<sup>55</sup> Although these tactics were in widespread use across the country, it is important to note that some localities started to turn away from third degree tactics by placing bans on both physical and mental third degree tactics through legislation.<sup>56</sup> Third degree tactics banned in some localities at the time of the report include threats by word or act, use of a club or weapon, slapping or kicking a suspect, threats of or acts of torture, placing a suspect in great duress, deprivation of food or sleep, frightening or attempting to frighten a suspect, refusing permission to contact a friend or attorney, and numerous others.<sup>57</sup> Although some bans existed at the time of the report, third degree tactics were still the primary set of tactics in use across the country. In order to understand the widespread use of third degree tactics and determine the type of tactics used, the Commission studied criminal appellate court decisions from 1920-1930 to determine if the third degree was an issue and if it was, which third degree tactics were in use.<sup>58</sup> From the case analysis, 106 cases were identified where third degree tactics may be an issue. The tactics from those cases are

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<sup>52</sup> *Id.*

<sup>53</sup> *Miranda*, 384 U.S. at 447.

<sup>54</sup> *Id.* at 164.

<sup>55</sup> *Id.* at 164-165.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 22; *The Third Degree*, 43 *Harvard Law Review* 617, 618 (1930).

described in Figure 1.<sup>59</sup> The Commission discovered that in 106 cases various types of physical and mental violence were used against suspects. These are third degree tactics that were used

against the suspect whether or not a ban was in place. In 44 cases, grilling was used.

Grilling is generally known as prolonged and intense questioning of a suspect. In 6 cases, incommunicado questioning took place.

Incommunicado questioning is when the suspect is kept alone during questioning and is unable

to get in touch with their attorney, family, or friends throughout questioning or while in holding.<sup>60</sup> Mental and physical third degree tactics, similar to non-third degree tactics, are typically used in conjunction with one another.<sup>61</sup> It would be common to see an interrogation that is incommunicado and contains threats of physical violence, sleep deprivation, and an intimidating room layout. Interrogators can use one tactic consistently or switch tactics throughout the interrogation as they see fit. The combination of physical and mental third degree tactics and non-third degree tactics is used to get the desired outcome. Although the Report has the tactics in the chart listed as purely physical, many of the tactics can be both mental and

Figure 1 - Types of Physical Abuse

**TABLE 4.—Types of physical abuse**

NOTE.—In some cases more than one method was used, so that the total would be more than the total number of cases. In this table it is not considered important to make date distinctions.

Types	Number of cases in which these practices were used
1. In these cases the only description was "physical violence".....	52
2. Grilling.....	44
3. Threats of bodily injury or death.....	24
4. Deprivation of food.....	14
5. Deprivation of sleep.....	12
6. Viewing corpse.....	8
7. Mob action or fear thereof.....	7
8. Questioning, maltreating accused when ill.....	7
9. Incommunicado.....	6
10. General discomfiture (filthy surroundings, no bed, no chair, etc.).....	5
11. Solitary confinement.....	4
12. Rubber hose.....	4
13. Teeth knocked out or loosened.....	3
14. Blinding light in eyes.....	2
15. Water cure.....	2
16. Chaining.....	2
17. "Coercion".....	2
18. Threats of prosecution on other charges.....	2
19. Verbal abuse.....	2
20. Duress in signing.....	2
21. Threats of imprisonment.....	1
22. Unjustified imprisonment.....	1
23. Threats of prosecution of relatives.....	1
24. Intoxicating defendant.....	1
25. Refusing drug to addict.....	1

<sup>59</sup> Chafee, *supra* at 206. See Figure 1.

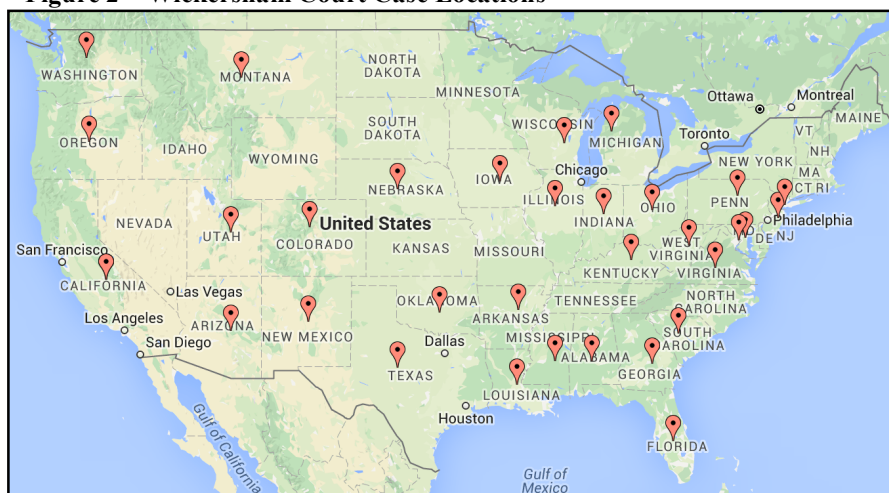
<sup>60</sup> *Id.* at 154

<sup>61</sup> *Id.* at 206.

physical. Deprivation of food and sleep, viewing a corpse, threats, grilling, and many others can have a strong impact on the suspect's mental state during the interrogation. Whether the tactic is mental or physical the Commission believes the tactics listed in the chart to be third degree tactics.

In addition to determining the two categories of third degree tactics, the Report concluded that third degree tactics were in widespread use.<sup>62</sup> The 106 cases that were studied came from

**Figure 2 – Wickersham Court Case Locations**



various locations across the United States (see Figure 2).<sup>63</sup> Although the Report is often quoted and referenced as the authority on the third degree, prior to being published, other journals

began reporting on the widespread use and problematic nature of the third degree.<sup>64</sup> The significance of the Report is in the fact that a Presidential Commission strongly and clearly argued that the third degree was illegal and in widespread use.<sup>65</sup>

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<sup>62</sup> *Id.* at 153.

<sup>63</sup> *Id.* at 203.

Figure 2 is a map generated using the locations of the 106 cases used in the Report. Each pin represents at least one court case from that state. States with multiple court cases are only notated with one pin.

<sup>64</sup> The Third Degree, *supra* at 618.

<sup>65</sup> Chafee, *supra* at 153.



To support the claim of widespread use, the Wickersham Commission studied 15 cities to explore how and if the third degree was being used by police and prosecutors within the city.<sup>66</sup> The Commission studied New York City, Buffalo, Boston, Newark, Philadelphia, Cincinnati, Cleveland, Detroit, Chicago, Dallas (Texas), El Paso, Denver, Los Angeles, San Francisco, and Seattle.<sup>67</sup> For each city the Commission interviewed public defenders, prosecutors, police officers, community officials, bar associates, legal aid workers, American Civil Liberties Union representatives, correction workers, prisoners, ex-prisoners, news reporters, and other individuals who may have information on police practices within the community.<sup>68</sup> Additionally, the Commission reviewed court cases and local regulations relating to interrogation practices.<sup>69</sup> In every city studied there were some traces of third degree tactics used by the police.<sup>70</sup> Eleven of the 15 cities were using some form of third degree tactics at the time of the study.<sup>71</sup> The most common third degree tactic used by police was keeping suspects in incommunicado holding cells or conducting incommunicado interrogations.<sup>72</sup> The length of the incommunicado holding lasted anywhere from the traditional 48-hours in Newark to a very common 14 days of holding in Denver.<sup>73</sup> The Report highlights that not every city has an outrageous issue with third degree tactics. In Boston, use of the third degree is relatively low and when beatings do occur they

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<sup>66</sup> *Id.* at 24.

The methods section of the Report outlines the types of interviews conducted in each city as well as the individuals that were interviewed. An outline of the questionnaire used as well as the questions asked can be found in Appendix I of the Report (see p.193).

<sup>67</sup> *Id.* at 83.

<sup>68</sup> *Id.* at 24.

<sup>69</sup> *Id.* at 83.

<sup>70</sup> *Id.* at 88-152.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 85, 103, 111, 114, 116, 120, 122, 127, 138, 141, 144, and 150.

<sup>73</sup> *Id.* at 112 and 141.

aren't with the purpose of obtaining a confession.<sup>74</sup> There is a stark contrast between Boston, a city with low third degree use, and Newark, a city that prides itself on obtaining a confession by whatever means necessary including violating the constitution.<sup>75</sup> Of the 15 cities, 9 do not have third degree specific statutes, 3 cities have statutes that outlaw the use of the third degree, and there is no statute information for 3 cities.<sup>76</sup> Although many cities do not have third degree regulation statutes, almost every city looked at has a statute about taking the arrestee before a magistrate promptly.<sup>77</sup> The report also points out that statutes and regulations do not always regulate police behavior. In Denver, police using the third degree can be convicted of a felony and fined if caught.<sup>78</sup> Denver regulates the entire pre-trial process with requirements how an arrested individual is treated to the amount of time in between arrest and first appearance.<sup>79</sup> In Denver, attorneys who participate in the third degree are also subject to removal from office and a fine.<sup>80</sup> Even with extensive regulation, Denver had a horrible issue with suspect treatment and use of the third degree. From Seattle to Denver to New York, the third degree is in use whether or not regulations are in place.

The Wickersham Commission highlighted some large issues with the interrogation process. Across the country violent physical and mental third degree tactics were being used.

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<sup>74</sup> *Id.* at 104.

<sup>75</sup> *Id.* at 103.

The Buffalo Police Department Commissioner stated, "If I have to violate the Constitution or my oath of office, I'll violate the Constitution. ...A policeman should be free as a fireman to protect his community. Nobody ever thinks of hedging a fireman about with a lot of laws that favor fire. ...Shysters have turned the Constitution into a refuge for the criminal. ...I'm going to protect the community. If in so doing I make a mistake and trespass on somebody's rights, let him sue."

<sup>76</sup> *Id.* at 88-152.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 141.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

Even when extensive regulations were enacted, those regulations failed to stop police and prosecutors from continuing to use the third degree on people in custody. The report declared unequivocally that “the third degree is a secret and illegal practice.”<sup>81</sup> The third degree tactics explained within the Report set a baseline as to what should be considered out of bounds for police and prosecutors. In the years following 1931, the court appeared to take the Wickersham Report into consideration and began setting a baseline for acceptable police conduct in the interrogation room.

### **1. Third Degree Tactics on Trial**

In the decade following Wickersham, a series of cases are decided that draw from the Report and begin to regulate police action in the interrogation room. The cases following Wickersham begin to regulate third degree police actions and attempt to prohibit the use of many of the third degree tactics outlined in the Report.

In 1936, *Brown v. State of Mississippi* is decided after a group of men convicted of murder challenge the admissibility of their confessions which were given as a result of physical torture.<sup>82</sup> Throughout the pre-trial process the defendants were subjected to different types of physical abuse and torture.<sup>83</sup> One defendant was asked to meet a deputy at the home of the deceased where he was seized by the deputy and a mob after denying any involvement in the crime.<sup>84</sup> The seized defendant was repeatedly hung by a rope from a tree only to be let down to answer questions about his involvement in the crime.<sup>85</sup> After denying any involvement the

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<sup>81</sup> *Id.* at 21.

<sup>82</sup> *Brown v. State of Mississippi*, 56 S.Ct. 461, 462 (1936)

<sup>83</sup> *Id.* at 462.

<sup>84</sup> *Id.* at 463.

<sup>85</sup> *Id.*

defendant was once again hung from the tree and whipped repeatedly by the deputy.<sup>86</sup> The same defendant was later driven by the deputy into a nearby state where he was whipped repeatedly by the deputy until he agreed to confess to the specific statement wanted by the deputy.<sup>87</sup> Following arrest, the other two defendants were forced to strip naked and were beaten bloody with leather straps with buckles until they confessed to the murder.<sup>88</sup> The defendants were continuously beaten until their statements matched what officers wanted.

The police in this case are very clearly using third degree tactics in order to gain a confession from the defendants. In response to this use of tactics and the treatment of the defendants the Court made some clear rules for police trying to get a confession. Relying on *Moore v. Dempsey*, the court said that the state may not permit an accused to be hurried to conviction under mob domination and the rack and torture chamber may not be substituted for the witness stand.<sup>89</sup> Additionally, the state may not deny the aid of counsel to the accused.<sup>90</sup> The Court determined that it would be difficult to conceive of methods more revolting than the ones used against the accused in this case.<sup>91</sup> The Court also provides an important guideline for lower courts to remember when considering both police actions in the interrogation room and the rights of the accused at trial; “the duty of maintaining constitutional rights of a person on trial for his life rises above mere rules of procedure, and wherever the court is clearly satisfied that such violations exist, it will refuse to sanction such violations and will apply the corrective.”<sup>92</sup>

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

“The last two named defendants were made to strip and they were laid over chairs and their backs were cut to pieces with a leather strap with buckles on it.”

<sup>89</sup> *Id.* at 464 quoting *Moore v. Dempsey*, 261 U.S. 86, 91 (1923).

<sup>90</sup> *Id.* quoting *Powell v. Alabama*, 287 U.S. 45 (1932).

<sup>91</sup> *Id.* at 464.

<sup>92</sup> *Id.* at 465 quoting *Fisher v. State*, 145 Miss. 116, 134 (1926).

Physical torture and beating tactics at the heart of the third degree. *Brown* makes it clear that these tactics are not only prohibited but that lower courts should take care to not endorse these actions by allowing these forced confessions at trial without corrective measures.

In 1940, the court decides *Chambers v. State of Florida* saying that the confessions of the defendants were a result of compulsion.<sup>93</sup> Following the murder of an elderly white man, 30-40 black men living in the surrounding community were all arrested without warrants and taken to the local jail.<sup>94</sup> The day after their arrest, many of the accused were taken to a different jail under the possible threat of mob violence at the first jail.<sup>95</sup> For the next 8 days, the 30-40 accused men were subjected to questioning and cross questioning by police.<sup>96</sup> At the end of the 8 days of questioning, the defendants in *Chambers* were subjected to persistent, repeated, non-stop, incommunicado questioning by police.<sup>97</sup> Following an all-night questioning session where the defendants only received short breaks for food; one of the defendants confessed to the crime.<sup>98</sup> However, police and prosecutors rejected the confession because it was not what they wanted it to be and the defendant was subjected to further questioning until his confession matched what police wanted.<sup>99</sup> Relying on the results of the Wickersham Report and the decision in *Brown*, the Court determined that the confessions were a result of compulsion.<sup>100</sup> In *Chambers*, the extreme

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<sup>93</sup> *Chambers v. State of Florida*, 09 U.S. 227, 239 (1940).

<sup>94</sup> *Id.* at 229.

<sup>95</sup> *Id.* at 230.

<sup>96</sup> *Id.*

Cross questioning is the practice questioning someone with the intent of a cross-examiner. Cross questioning has a higher level of intensity than standard questioning.

<sup>97</sup> *Id.* at 231.

<sup>98</sup> *Id.* at 234.

<sup>99</sup> *Id.* at 235.

<sup>100</sup> *Id.* at 239.

length of the questioning and the incommunicado nature of the questioning ultimately led the court to rule that the confessions were compelled and not admissible.

In 1940, the court also decides the case of *White v. State of Texas*.<sup>101</sup> The defendant in *White* was convicted of rape and sentenced to death for the crime. Before trial the defendant was arrested without a warrant and held for 6-7 days in jail.<sup>102</sup> Every night while in custody, Texas Rangers handcuffed the defendant, took him into the nearby woods, and whipped him while asking him about the crime.<sup>103</sup> Defendant's time in custody was incommunicado and he was not provided with an attorney during questioning.<sup>104</sup> Additionally, defendant was told to tell no one of his nightly beatings in the woods. When it came time for prosecutors to take defendant's confession, the Texas Rangers who took him into the woods visited the room where defendant was making his confession.<sup>105</sup> Relying on *Chambers*, the court denies the state's petition for a rehearing and finds that the defendant's confession was compelled.<sup>106</sup>

In 1942, the court decides *Ward v. State of Texas*.<sup>107</sup> Following the murder of a white man, the defendant was arrested without a warrant and driven from county to country throughout his time in police custody.<sup>108</sup> During these drives the defendant was taken over 100 miles from his home and was told about the mob violence that he might experience at different county jails he was visiting.<sup>109</sup> In addition to constantly moving the defendant, police questioned the defendant continuously throughout his time in custody until he was willing to make any

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<sup>101</sup> *White v. State of Texas*, 310 U.S. 530 (1940).

<sup>102</sup> *Id.* at 532.

<sup>103</sup> *Id.* at 533.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 533 n.3.

<sup>107</sup> *Ward v. State of Texas*, 316 U.S. 547 (1941).

<sup>108</sup> *Id.* at 551.

<sup>109</sup> *Id.*

statement the police wanted.<sup>110</sup> The court determined that the defendant's confession was "not free and voluntary but was the product of coercion and duress, that petitioner was no longer able freely to admit or to deny or to refuse to answer."<sup>111</sup> The Supreme Court outlines some clear limits on police action saying that persistent and protracted questioning, threats of mob violence, unlawful incommunicado holdings, and being taken at night to isolated and lonely environments can result in a coerced confession and reversal of a conviction by the court.<sup>112</sup> These outlines by the court provide police with specific limits on which tactics and actions are within the bounds of the law.

In 1944, the court decides *Ashcraft v. State of Tennessee* and continues to set out clear guidelines for police to follow when questioning suspects.<sup>113</sup> Defendant Ashcraft was taken into police custody and subjected to nearly two solid days of constant, un-ending, incommunicado questioning by police.<sup>114</sup> Throughout questioning, Ashcraft was not allowed to leave the interrogation room, he was not permitted to sleep, and he was subjected to relay questioning, which occurs when one officer will ask questions for hours and then hand off questioning to another officer so the first officer can rest.<sup>115</sup> The court concludes that any confession given by Ashcraft was compelled and not voluntary.<sup>116</sup> Suspects held incommunicado and questioned for hours on end with no break from rest or sleep cannot give a voluntary confession.<sup>117</sup>

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 555.

<sup>112</sup> *Id.*

<sup>113</sup> *Ashcraft v. State of Tennessee*, 322 U.S. 143 (1944).

<sup>114</sup> *Id.* at 148.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 154.

<sup>117</sup> *Id.*

The court continued to hold third degree tactics as a violation of the law. In 1945, the court held that “if all the attendant circumstances indicate that the confession was coerced or compelled, it may not be used to convict a defendant.”<sup>118</sup> In *Malinski*, the defendant was arrested, taken to a hotel, stripped naked by police, and was not allowed to be fully clothed until after he confessed to the crime.<sup>119</sup> The defendant was held for an additional three days after his confession and during that time his request to see his attorney was denied as well as access to any friends except his co-defendant.<sup>120</sup> By keeping the defendant naked and partially clothed, the police intimidate the defendant into confessing in order to get his clothes back.<sup>121</sup> In addition to domination, police continue to use an incommunicado interrogation, which as seen by the last series of cases is extremely problematic for the police. The length of the interrogation, keeping the defendant naked for part of the interrogation, denying the defendant access to his attorney, and the incommunicado nature of the interrogation all contribute to the defendant’s confession being coerced and compelled.<sup>122</sup>

In 1951, the court puts an additional limit on third degree tactics.<sup>123</sup> The question before the court in *Williams* is whether or not a special police officer can be prosecuted under the criminal code if in the course of his work he subjects a person to force and violence in order to obtain a confession.<sup>124</sup> The section of the criminal code in question is §20 of 18 U.S.C. (1946

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<sup>118</sup> *Malinski v. People of the State of New York*, 324 U.S. 401, 404 (1945).

Here, the court is relying on the decision in *Ashcraft v. State of Tennessee* when saying that a coerced or compelled statement cannot be used to convict the accused.

<sup>119</sup> *Id.* at 403.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 405.

<sup>122</sup> *Id.*

<sup>123</sup> *Williams v. United States*, 341 U.S. 97 (1951).

<sup>124</sup> *Id.* at 98.



ed.) §52.<sup>125</sup> This section of the code allows for a person who “under color of any law” subjects any person to the deprivation of their rights to be fined or imprisoned for no more than a year.<sup>126</sup> The *Williams* defendant was a special officer working for a lumber company trying to determine the cause of recent thefts against the lumber company.<sup>127</sup> Defendant seized a number of individuals and subjected each to intense third degree tactics in order to obtain a confession or statement about the thefts.<sup>128</sup> Defendant used a rubber hose, a pistol, a cord, and other objects throughout his interrogations of the men he interrogated.<sup>129</sup> In addition to forcing men to stare into bright lights to blind them, the defendant beat the men with various objects as well as his fists and feet.<sup>130</sup> The court determined that as a special police officer, who was given a badge and authority by local police, the defendant was acting as an officer of the law and he was subject to the criminal code.<sup>131</sup> This decision by the court places a new sense of accountability on the police. While some states did have regulations similar to §20 of the criminal code, the *Williams* decision puts all police on notice that the punishments under §20 will be upheld.

The final post-Wickersham case is *Leyra v. Denno*.<sup>132</sup> The defendant was taken into police custody after the murder of his parents.<sup>133</sup> He was held for at least four days by police and questioned almost constantly during that time in relay by police.<sup>134</sup> Defendant’s only break during his time in custody happened when police took him to his parent’s funeral and allowed his

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<sup>125</sup> *Id.* 18 U.S.C. (1946 ed.) §52, §20 is now 18 U.S.C.A. §242.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 99.

<sup>131</sup> *Id.*

<sup>132</sup> *Leyra v. Denno*, 347 U.S. 556 (1954).

<sup>133</sup> *Id.* at 559.

<sup>134</sup> *Id.*

to rest one hour before taking him back to the interrogation room.<sup>135</sup> Up until this point, the defendant has denied all involvement in the murder of his parents.<sup>136</sup> During the interrogation, the defendant asked to see a medical doctor for his serious sinus problem.<sup>137</sup> Police told the defendant a medical doctor would be brought in but instead brought in a psychologist who was trained in hypnosis.<sup>138</sup> Tired from constant questioning by police, defendant spoke with the psychologist and eventually confessed to killing his parents.<sup>139</sup> In audio recordings of the interrogation by the psychologist, the court says the defendant's answers to questions were nearly inaudible and that the defendant's answers show how dazed and bewildered the defendant was during questioning.<sup>140</sup> The court held the defendant was physically and emotionally exhausted as a result of police questioning and that the defendant's ability to resist the interrogation tactics used by police and the psychologist was broken.<sup>141</sup> Once again, the length of questioning by police, the refusal of access to an attorney, and the highly coercive and suggestive tactics used by the psychologist cause the confession to be inadmissible.

The series of cases following the Wickersham Report show that numerous physical third degree tactics are being outlawed. Physical torture including beatings and whippings and the threat of mob violence are not within the bounds of the law. Lengthy interrogations that include almost no breaks for the defendant as well as incommunicado interrogations are also outside the bounds of the law. The post-Wickersham cases put police on notice that third degree tactics will not be tolerated. These decisions by the court also mark the start of a shift in police interrogation

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<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 560.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 561.

practices. Over the next decade the court will continue to hear interrogation cases that deal with third degree tactics as well as hearing non-third degree interrogation cases. In 1968, the court will effectively outlaw the remainder of third degree tactics with the decision of *Miranda v. Arizona*.<sup>142</sup> *Miranda* will officially mark the end of third degree tactics and will demonstrate the already shifting world of police interrogation tactics by discussing the use of non-third degree tactics and the legality of those tactics.

### **C. *Miranda* Protections & the Shift Away from the Physical Third Degree**

Following the Wickersham Commission's Report and the resulting case law, interrogation practices began to shift from physical to psychological.<sup>143</sup> In *Miranda*, the court plainly states this evolution saying, "we stress that the modern practice of in-custody interrogation is psychologically rather than physically oriented."<sup>144</sup> At the same time the court recognizes this shift, one interrogation manual that focuses on psychological tactics begins to gain popularity among police.<sup>145</sup> *Miranda* recognizes Inbau and Reid's Criminal Interrogation and Confessions as one of the manuals at the forefront of training officers to use psychological interrogation tactics.<sup>146</sup> The Reid Technique will be discussed more in the following section. *Miranda* serves as a turning point for interrogation practices by outlawing certain extreme practices and setting out protections for those facing the police in the interrogation room.

As one of the most well-known U.S. Supreme Court cases in history, *Miranda* is known by the warnings it requires police give to suspects. Heard and decided in 1966, *Miranda* is four

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<sup>142</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>143</sup> *Id.* at 448.

<sup>144</sup> *Id.*

<sup>145</sup> Fred E. Inbau et al., *Criminal Interrogation and Confessions* (5th ed. 2013).

The first version of Inbau and Reid's manual was published in 1962 and a revised version came out in 1967 following the *Miranda* decision. The manual is now on its fifth edition.

<sup>146</sup> *Miranda*, 384 U.S. at 449.

cases that have been combined before the Supreme Court.<sup>147</sup> The central question before the court deals with the admissibility of statements obtained from an individual who is subjected to custodial police interrogation and the necessity for procedures which assure that the individual is accorded his privilege under the Fifth Amendment of the Constitution not be compelled to incriminate himself.<sup>148</sup> On these questions, the court determines that “the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.”<sup>149</sup> After walking through the history of police interrogation cases in the United States, the court provides case examples for tactics that are not permissible under the law.<sup>150</sup> In *Townsend v. Sain*, the defendant was a 19-year old heroin addict who had significant mental problems.<sup>151</sup> In *Lynumn v. State of Illinois*, defendant was a mother who was told she must cooperate in order to prevent her children from being taken by authorities.<sup>152</sup> Finally in *Haynes v. State of Washington*, the defendant’s frequent requests to call his wife or attorney were consistently denied by police.<sup>153</sup> In each of these examples the tactics used by police overwhelmed the suspect because of the incommunicado interrogation they were experiencing.<sup>154</sup>

After walking through the history of interrogation case law and police manuals the court notes that the interrogation environment is set up to subject the will of the police onto the

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<sup>147</sup> *Id.* at 436.

<sup>148</sup> *Id.* at 439.

<sup>149</sup> *Id.* at 444.

<sup>150</sup> *Id.* at 456.

<sup>151</sup> *Id.* discussing *Townsend v. Sain*, 372 U.S. 293 (1963).

<sup>152</sup> *Id.* discussing *Lynumn v. State of Illinois*, 372 U.S. 528 (1963).

<sup>153</sup> *Id.* discussing *Haynes v. State of Washington*, 373 U.S. 503 (1963).

<sup>154</sup> *Id.* at 456.

suspect.<sup>155</sup> The current practice of incommunicado interrogations, which requires little contact outside of police for the suspect, is “at odds with one of our Nation’s most cherished principles - that the individual may not be compelled to incriminate himself.”<sup>156</sup> Additionally, the current process of in-custody interrogation of suspects contains inherently compelling pressures which work to undermine the suspect’s will to resist and compel him to speak when he normally would choose not to.<sup>157</sup> In order to protect the suspect, protections need to be in place to lessen the compulsion that is inherent in custodial interrogations.<sup>158</sup> Those protections come in the form of a warning to the suspect given by police.<sup>159</sup> Police must inform the suspect in clear and unequivocal terms that the suspect has the right to remain silent.<sup>160</sup> Additionally, prior to any questioning the suspect has the right to consult with an attorney.<sup>161</sup> The court determines that in order to protect each suspect in an interrogation room, he needs to be clearly reminded of his rights.<sup>162</sup> The suspect must be warned that he has a right to remain silent, that any statement he does make may be used against him in court, and that he has the right to see an attorney even if he cannot afford one.<sup>163</sup> The suspect can waive these rights if he wishes but if he indicates in “any manner and at any stage of the process” that he wishes to consult an attorney before speaking then questioning must stop.<sup>164</sup> Similarly, if the suspect clearly indicates that he wishes

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<sup>155</sup> *Id.* at 457.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 467.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 469.

<sup>162</sup> *Id.* at 444-445.

<sup>163</sup> *Id.*

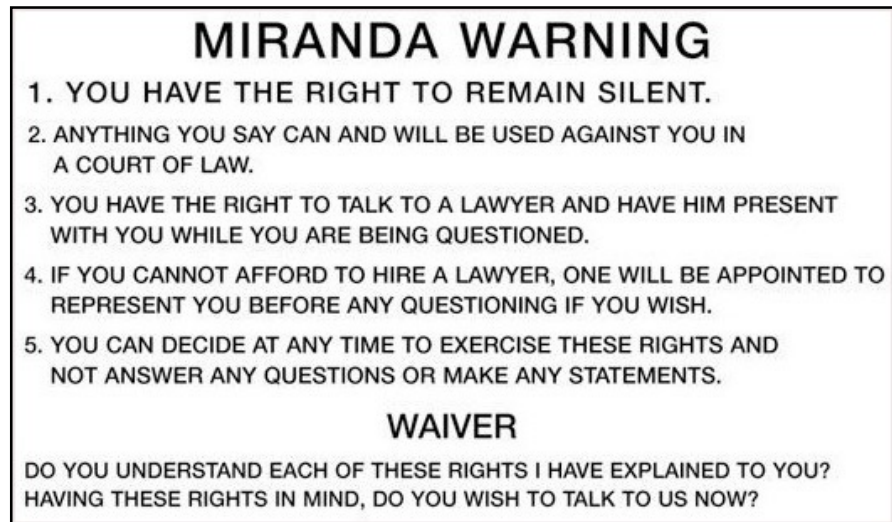
<sup>164</sup> *Id.*

to remain silent, the police may not question him.<sup>165</sup> Even if the suspect has answered some questions by police, once the suspect invokes his rights all questioning must stop.<sup>166</sup>

*Miranda* requires that specific and clear warnings be given by police to the suspect.<sup>167</sup>

The warnings are clear and the same throughout the United States. As seen in Figure 3, the traditional *Miranda* warnings are the following, “You have the right to remain silent.

Figure 3 – Miranda Warnings



Anything you say can and will be used against you a court of law. You have the right to talk to a lawyer and have him present with you while you are being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you at no expense. You can decide at any time to exercise these rights and not answer any questions. Do you understand your rights?

Understanding your rights, are you still willing to talk to me?”<sup>168</sup> *Miranda* requires some form of this warning be given to all suspects in custody who are faced with police questioning. The warnings are meant to protect and counteract the compulsive nature of the interrogation room.<sup>169</sup>

The protections set out in *Miranda* are a type of fail safe. The protections are one last warning for the suspect of their rights. Following *Miranda*, police will have to ensure that these

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<sup>165</sup> *Id.* at 445.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 457.

warnings are read. If the warnings are not read, the likelihood of the court finding the confession or statements to be involuntary and compelled significantly increases.

#### **D. 50 Years of The Reid Technique**

Following *Miranda* and the new regulations against extreme third degree tactics many police departments began to study and use the Reid Technique.<sup>170</sup> First published in 1962, the technique is outlined in Criminal Interrogation and Confessions by Fred Inbau and John Reid.<sup>171</sup> Inbau and Reid were officers at the Chicago Police Scientific Crime Detection Laboratory and had extensive experience with interrogations.<sup>172</sup> The Reid Technique was described to the court as the most effective psychological stratagems to employ during interrogations.<sup>173</sup> On its whole Criminal Interrogation and Confessions outlines everything an investigator would need to know and do in order to secure a confession or witness testimony. Police are instructed on how to behave before an interrogation begins by learning what the difference between an interrogation and an interview is, how to develop case facts, how to evaluate suspect motives, ways to protect innocent suspects, how to set up the interrogation room, and how to behave as the interrogator.<sup>174</sup> After learning pre-interrogation procedures, police are taught how to conduct an interrogation.<sup>175</sup> Conducting an interrogation includes understanding the differences between formal and informal interviews, how to formulate questions, understanding suspect behavior, and understanding how to use the 9-steps of the Reid Technique.<sup>176</sup> The Reid Technique outlined in the book have shaped the last 50 years of interrogation methods by serving as the cornerstone of interrogation

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<sup>170</sup> Fred E. Inbau et al., *Criminal Interrogation and Confessions* (5th ed. 2013).

<sup>171</sup> *Miranda*, 384 U.S. at 449 n.9.

<sup>172</sup> *Id.*

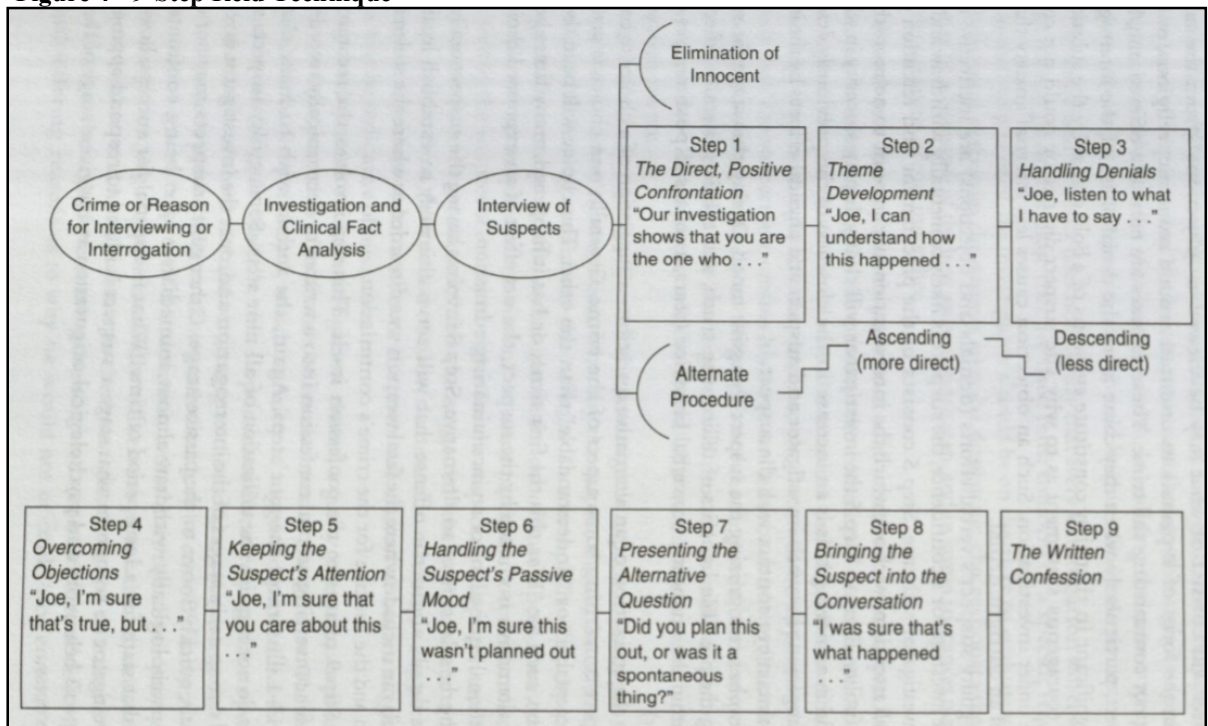
<sup>173</sup> *Id.*

<sup>174</sup> Inbau, *supra* at 3-64.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 71-333.

**Figure 4 - 9-Step Reid Technique**



education. Criminal Interrogation and Confessions is a complex and long manual that can easily be covered as its own topic in a research paper. Without delving too deeply into the book, this paper will only cover the 9-step Reid Technique.

The 9-steps of the Reid Technique, outlined in Figure 4, are used to persuade a guilty person to tell the truth without causing an innocent person to wrongfully confess.<sup>177</sup> Before the interrogation even begins the Reid Technique prepares investigators on how to act around the suspect.<sup>178</sup> Prior to step 1, suspects should be left in the interrogation room alone in order to have a time of introspection and in order to increase the suspect's anxiety and stress about being questioned by police.<sup>179</sup> At every stage of the interrogation, including this pre-interrogation

<sup>177</sup> *Id.* at 187 and 190.

Figure 4 comes from Criminal Interrogation and Confessions and can be found on page 190 of the text.

<sup>178</sup> *Id.* at 191.

<sup>179</sup> *Id.*



phase, behavioral cues should be studied by the interrogator in order to determine the suspect's level of dishonesty.<sup>180</sup> One of the key tactics recommended for use in the pre-interrogation phase is the use of the evidence folder.<sup>181</sup> An evidence folder should be brought into the interrogation room in order to be referenced later.<sup>182</sup> This evidence folder, real or fake, should be used to make the suspect think the evidence against him is more significant than it might be and to increase the suspect's anxiety.<sup>183</sup> The pre-interrogation phase is important for the interrogator; this phase is the suspect's first impression of the interrogator and the interrogation process.

The first two steps of the technique are direct, positive confrontation of the suspect and theme development.<sup>184</sup> The interrogation begins with the interrogator confronting the suspect with the interrogator's firm belief that the suspect is guilty of the crime accused.<sup>185</sup> Following the direct positive confrontation a transition statement is used to tell the suspect that the purpose of the interrogation is to determine why he committed the crime.<sup>186</sup> Even at this early stage the interrogator should be employing psychological tactics by confronting a seated suspect while standing, using the evidence folder to bolster his case, and failing to use professional titles to strip the suspect of his psychological advantage.<sup>187</sup> Additionally, the suspect should feel as if the only unanswered question in the investigation is why he committed the crime, not how or when the crime was committed.<sup>188</sup> Throughout steps one and two the suspect's behavior should be

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<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 192-255.

<sup>185</sup> *Id.* at 192-193.

<sup>186</sup> *Id.* at 193.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 197.

studied as this is the investigator's first opportunity to challenge the suspect's innocence.<sup>189</sup> Directly following the confrontation interrogator's should begin to develop a theme.<sup>190</sup> Themes provide a "moral excuse" for the suspect to lean on when confessing.<sup>191</sup> Often, themes help interrogators connect with suspects and allow the suspect to feel as if the police are on their side.<sup>192</sup> Some common themes used are sympathizing with the suspect, minimizing the moral seriousness of the crime, providing a less serious moral alternative reason for the crime, appealing to the suspect's pride, pointing out the possibility of the accuser's exaggerations, pointing out the serious consequences of criminal behavior.<sup>193</sup> Often sympathizing with the suspect can mean saying anyone in his shoes would have done the exact same thing or condemning the victim, accomplices, or anyone else who might have been responsible for the crime.<sup>194</sup> Depending on the suspect, the crime, the investigation, and the interrogator different themes may be used. A suspect will reject a theme that does not resonate with him and will thrive under a theme that is relatable.<sup>195</sup> Any relatable themes should continue to be used throughout the remainder of the interrogation.

Steps three and four are similar and deal with handling denials and overcoming objects.<sup>196</sup> After the theme has been developed the interrogator should anticipate denials before they are made, discourage weak denials from being voiced, and evaluate denial that are voiced.<sup>197</sup> Police should watch for verbal and non-verbal cues that indicate a denial is about to be

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<sup>189</sup> *Id.* at 195.

<sup>190</sup> *Id.* at 202.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 203-204.

<sup>193</sup> *Id.* at 210-245.

<sup>194</sup> *Id.* at 220.

<sup>195</sup> *Id.* at 207-208.

<sup>196</sup> *Id.* at 255-281.

<sup>197</sup> *Id.* at 258.

voiced.<sup>198</sup> Interrogators will have to evaluate each denial and respond accordingly by sticking with the theme and recognizing if the denial is strong, weak, apologetic, or from an innocent person.<sup>199</sup> Often denials will be followed by objections. Interrogators must recognize the difference between objections and denials and use objections to further the interrogation by asking questions of the suspect.<sup>200</sup> If the suspect says he could not have possibly committed the crime, the interrogator can ask why couldn't the suspect have committed the crime.<sup>201</sup> Objections allow the interrogator to ask questions of the suspect and further the interrogation by allowing the interrogator to answer those questions when the suspect expresses denial.<sup>202</sup>

Steps five and six are procurement and retention of a suspect's attention and handling a suspect's passive mood.<sup>203</sup> At this point in the interrogation the police have multiple roles. The interrogator must continue to show sympathy to the suspect, continue his theme development, stay within the bounds of the law regarding promises for leniency all while maintaining the suspect's attention.<sup>204</sup> A guilty suspect at this time may become withdrawn and the interrogator will have to respond with clear statements about the crime, the theme, and possible alternative questions.<sup>205</sup> Throughout these two steps the interrogator should remain aware of the suspect's body language that shows signs of guilt, disinterest, or agreement.<sup>206</sup>

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<sup>198</sup> *Id.* at 259.

<sup>199</sup> *Id.* at 267.

<sup>200</sup> *Id.* at 279.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 279-280.

<sup>203</sup> *Id.* at 281-293.

<sup>204</sup> *Id.* at 287-288.

<sup>205</sup> *Id.* at 288.

<sup>206</sup> *Id.* at 291.

Step seven is when the interrogator can present an alternative question to the suspect.<sup>207</sup> An alternative question allows the suspect a choice between two possible explanations for how the crime was committed.<sup>208</sup> One of the main goals of the alternative question is to allow the suspect to save-face.<sup>209</sup> The alternative question should not mention charges against the suspect, threaten the suspect with inevitable consequences, or promise leniency; all of which could cause an involuntary confession.<sup>210</sup> The alternative question should use the theme as a guideline.<sup>211</sup> To demonstrate an appropriate alternative question consider the hypothetical suspect Joe who is being investigated for theft.<sup>212</sup> Interrogators may ask Joe the following alternative question, “Joe, was this money used to take care of some bills at home, or was it used to gamble?”<sup>213</sup> Different variations of the question may be presented to the suspect but all will signal a shift in the interrogation.<sup>214</sup> At this point in the interrogation, theme has been completely developed, alternatives have been provided, and the suspect will likely be in a place to tell the truth about the crime.<sup>215</sup> At this point if the suspect is at a point of confessing that steps eight and nine must be used.

Steps eight and nine involve having the suspect orally relate details of the crime and converting an oral confession into a written confession.<sup>216</sup> If the suspect has accepted the alternative question and admitted to committing the crime because of an alternative, the

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<sup>207</sup> *Id.* at 293.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 295.

<sup>211</sup> *Id.* at 296.

<sup>212</sup> *Id.* at 299.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 302.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 303-325.

interrogator needs to start gathering details of the crime.<sup>217</sup> Once the suspect as admitted a detail about the crime the interrogator can begin to ask short follow up questions that allow the suspect to elaborate on those details.<sup>218</sup> Details provided by the suspect can lead to new evidence being discovered that can corroborate the suspect's confession.<sup>219</sup> At this point in the interrogation new alternative questions can be presented in order to get a full confession from the suspect.<sup>220</sup> After getting a full oral confession, and having it witnessed, the interrogator should have the confession documented in writing.<sup>221</sup> A written confession serves as a safe guard for police by showing that the suspect was aware of his rights at the time of his confession, that he voluntarily confessed to the crime, and that the interrogation was conducted properly.<sup>222</sup>

At its core the Reid Technique is a psychological game between interrogators and suspects. Interrogators do everything in their power to maintain and control the interrogation while working to get a confession from the suspect. The Reid Technique encourages the use of a variety of tactics and can be used in conjunction with nearly any tactic. On its face, the Reid Technique does not violate any of the existing precedent set by the court regarding tactics that violate the law. However, police using the Reid Technique should be cautious when using the technique with certain tactics. One example is being sympathetic to the suspect. Sympathy for the suspect can be shown by having one cop who provides an alternative question for the suspect or through overt statements by all police. However, sympathy for the suspect can lead the

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<sup>217</sup> *Id.* at 303-304.

<sup>218</sup> *Id.* at 305-306.

<sup>219</sup> *Id.* at 306.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at 310.

<sup>222</sup> *Id.* at 311-312.

suspect to believe lenient punishment is available if he accepts the sympathetic alternative.<sup>223</sup>

Certain tactics, regardless of the technique they are used with, may violate the law. The Reid Technique, even if it is not referred to by that name, is in widespread use across the United States.<sup>224</sup> This widespread use and the psychological nature of the technique will require certain safeguards in order to protect the rights of suspects in the interrogation room.

### **III. RECOMMENDATIONS FOR THE NEW LANDSCAPE OF INTERROGATION REGULATION**

Throughout the history of interrogations in the United States a wide variety of tactics have been used. American police interrogations use a mix-and-match approach to determine which tactics to use in any particular interrogation session. Police have incredible flexibility and discretion when determining which tactics to use. This discretion and flexibility has made it difficult for the federal government, state governments, localities, and courts to regulate the interrogation room. As new techniques and tactics are developed police simply incorporate those new additions into their interrogation toolbox. The court has drawn a line regarding tactics that involve physical abuse, absolute denial of access to an attorney, the two-step interrogation, and some specific assurances by the police to a suspect. However, regulating interrogation tactics is difficult because the court has to look at the interrogation as a whole before determining if any of the tactics used could have rendered the confession involuntary.

After taking a look back on the history of interrogation history and regulation the next logical question is how will the regulation of interrogation tactics happen in the future. No one knows the answer to this question. With academics, lawyers, law enforcement, and courts all

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<sup>223</sup> Timothy E. Moore, Brian L. Cutler & David Shulman, Shaping Eyewitness and Alibi Testimony with Coercive Interview Practices, 38 *The Champion* 2 (2014).

<sup>224</sup> Charles D. Weisselberg, Mourning Miranda, 96 *California Law Review* 1521 (2008).

arguing for different levels of regulation in the interrogation room it is hard to predict what interrogation room tactics will look like in 50 or 100 years. Regulation is currently a mix of local, state, and court determined regulations. For most tactics, it is hard to know whether or not that tactic can lead to the court saying a confession was involuntary. As we move into the next phase of interrogation regulation I propose we follow 8 guidelines.

### **1. Clear Regulations**

Police, the public, lawyers, judges, and the court would all benefit from clear regulations on interrogation tactics. Following the Wickersham Report the court made clear statements about how physical abuse was outside the confines of the law. These clear statements put all law enforcement on notice that physically abusing a suspect was a violation of the constitution. Clear regulations also allowed lower courts to rule against physical abuse in the interrogation room. Whether it is at the local or state level or through a court decision, clear regulations allow all parties in the interrogation room to know what is and is not acceptable.

### **2. Increased Community Involvement with the Police**

Community involvement with the police is beneficial to both the community and to the police. A community that is involved with their local police department has a better idea of what is going on in the police department. Each side can work to better their community while building a relationship based off of trust and respect instead of fear and dishonesty.

### **3. Strict Local Regulations**

Federal regulation of interrogations is limited. Beyond Supreme Court cases that have outlawed certain tactics and set out protections suspects in the interrogation room, there is not much federal regulation of interrogation tactics. Having local regulations be the main source of interrogation regulation can work if the local community is involved with their police

department. Local regulation would allow the community to tailor regulation to the areas of weakness their local police have.

#### **4. Keep the Courthouse Doors Open**

When suspects from the interrogation room raise alleged issues against police the court should hear those allegations. Public trust in the court system and police diminishes when allegations of police misconduct are not heard by the court. Keeping the courthouse doors open to possible constitutional violations coming from the interrogation room allows the court to continue to set clear regulations and help both the police and the public be aware of what is within the confines of the law.

#### **5. Public Knowledge of Rights**

The public needs to be aware of their constitutional rights. Although police read *Miranda* warnings during an interrogation, reading those rights does not equal an understanding of those rights. The public should be aware of their right to request an attorney and not be questioned until their attorney is present. Additionally, remaining silent cannot be used against a suspect as a sign of guilt. Public knowledge of their constitutional rights would attempt the level the power imbalance that currently exists in the interrogation room.

#### **6. Increased Police Training**

Highly trained police make for better police departments. Providing police with the resources to train officers in multiple styles of interrogation as well as different types of communication ensures that officers are skilled and knowledgeable about the regulations and limits of the interrogation room.



## **7. Better Access to Attorneys**

A suspect in an interrogation room should not fear getting an attorney. Making sure that competent, well paid attorneys are available for criminal suspects should be a priority moving forward. No suspect should feel as if having no attorney would be the same as having a public defense attorney.

## **8. Record All Interrogations**

Every interrogation should be recorded from start to finish. Recording every minute of an interrogation protects the public and police. Having recordings of the entire interrogation allows for court review if a misconduct claim is raised and will also discourage false misconduct claims from being brought. By recording every interrogation, it also ensures that all suspects are read their Miranda rights at the appropriate time.

At the beginning of this paper I asked how interrogation tactics have evolved over the past 150 years and how have those tactics been regulated. A brief history of interrogation tactics is seen above. It is a long history that involves an evolution of police investigations and the complex reality of regulation by the court. Regulating interrogation tactics is not easy. The current landscape of regulation is a hodgepodge of local, state, and court regulation. Moving forward with regulation will not be easy. The 8 recommendations listed above do not guarantee that every suspect in an interrogation room will be treated correctly. The 8 recommendations do provide a starting point for how we can move forward when regulating the interrogation room and the tactics used by police. Since 1850, the interrogation room has changed quite a bit. From beatings, whippings, and hangings to incommunicado interrogations to the rise of psychological tactics the interrogation room is changing landscape. The past 150 years in the interrogation room is full of evolution and growth and the next 150 years is likely to have just as much growth.

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