Brendan Dassey: A True Story of False Confession

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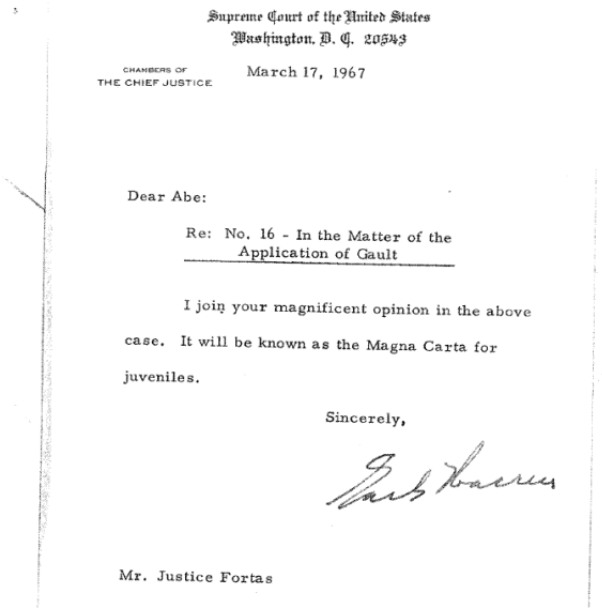
Gerald Gault, Meet Brendan Dassey: Preventing Juvenile False and Coerced Confessions in the Twenty-First Century

By Laura Nirider, Megan Crane, and Steven Drizin

In 1964, fifteen-year-old Gerald Gault was taken into custody by the Sheriff of Gila County, a rural jurisdiction about eighty miles east of Phoenix, after a neighbor accused him of making prank telephone calls of the "irritatingly offensive, adolescent, sex variety." Over the course of the following week, Gerald appeared twice in the chambers of a juvenile court judge, accompanied by his mother, older brother, and two probation officers. Though the hearings were untranscribed, later testimony indicated that the judge questioned Gerald both times about whether he had in fact made the calls. Gerald's mother recalled that he told the judge only that he dialed his neighbor's phone number and handed the phone to his friend Ronald; one probation officer recalled that he admitted making the lewd calls and later recanted; and the judge himself recalled that Gerald had admitted making some of the lewd statements – but only the less "serious" ones. Based on these statements, Gerald was taken from his parents and held in detention. It is not known whether his uncorroborated, uncounseled confession – or, if there was more than one, which version – was true or false. In many respects, it didn't matter; the authorities believed that Gerald had done something wrong and were free to act accordingly.

Two and a half years later, in 1967, the U.S. Supreme Court ordered Gerald's release in an opinion that was nothing less than a reckoning for the nation's juvenile court system. Blinded by "neither sentiment nor folklore," Justice Abe Fortas, writing for the Court, laid bare the gulf between juvenile court's rhetoric – characterized by speeches about "kindly" judges, informality, and the therapeutic treatment and rehabilitation of youthful offenders – and its reality. Juvenile courts, according to the Justice, too often operated as "kangaroo courts" prone to inaccurate fact-finding, unchecked abuses of discretion, and arbitrary punishments. His prescription was a healthy dose of due process, including most prominently the right to counsel. To Justice Fortas, only a child aided by a lawyer's "guiding hand" could both "ascertain a defense" and "prepare and submit it."

Gault revolutionized juvenile court process by not only requiring counsel for kids, but also granting them other basic ingredients of due process: the right to notice of the charges, the rights to confrontation and cross-examination, and the right against self-incrimination. Perhaps for these reasons, Chief Justice Earl Warren, upon receiving a draft of the *Gault* opinion, sent his colleague Justice Fortas a personal note: "I join your magnificent opinion in the above case. It will be known as the Magna Carta for juveniles."



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 17, 1967

Dear Abe:

Re: No. 16 - In the Matter of the
Application of Gault

I join your magnificent opinion in the above case. It will be known as the Magna Carta for juveniles.

Sincerely,

Mr. Justice Fortas

In 2017, which is the 50th anniversary of the *Gault* decision, the opinion's discussion of the right to counsel is rightfully being feted across the country. But tucked among the decision's later pages is an equally important discussion: one concerning a child's right against compelled self-incrimination. This fifty-year-old discussion still resonates today precisely because the problem it describes still exists: the problem of unreliable confessions from juveniles. These are the pages we wish to celebrate in this essay.

"Authoritative opinion has cast formidable doubt upon the reliability and trustworthiness of 'confessions' by children," decreed Justice Fortas, wrapping the word *confession* in ever-so-slightly acerbic quotation marks to underscore just how formidable the Court's doubts were. In an era when DNA testing was not known or thought of, and when the notion of a false confession was hard to imagine and even harder to prove, the Court pointed out that a child subject to police interrogation might admit "whatever he thought was expected so that he could get out of the immediate situation." And Justice Fortas turned his searching gaze on pressure-filled interrogation techniques, finding that false confessions could occur "wherever the innocent person is placed in such a situation that the untrue acknowledgement of guilt is at the time the more promising of two alternatives between which he is obliged to choose." These words inspired the undersigned authors to create and develop the Center on Wrongful Convictions of Youth nearly ten years ago – the first and only organization dedicated in large part to representing children who falsely confessed to crimes they never committed.

Gault's bold words should have resounded as a clarion call for interrogation reform – but the need for such a Center persists to this day. Perhaps no more widely recognized proof exists than the uncounseled, uncorroborated confession of our client: sixteen-year-old, mentally limited Brendan Dassey, whose videotaped confession to murder was publicized in the 2015 Netflix Global docuseries *Making a Murderer*. Brendan was interrogated alone on video camera by Wisconsin police in 2005 until he gave a confession to the rape and murder of a young woman named Teresa Halbach. Watched by audiences worldwide, the series has generated a worldwide groundswell of support for Brendan because many believe him to be innocent and his confession to be false.

Viewers watched as police used a series of misguided techniques to elicit a confession: they told the impressionable Brendan that everything would be "okay" as long as he told them what they already believed he had done; they fed him crucial non-public details about the murder, like the fact that Halbach had been shot in the head; and they falsely led him to believe that he would be returned to school in time to finish a project – even after he confessed to rape and murder. The series serves as a vivid reminder that the concerns articulated in Gerald's case haven't gone away. Even in the new millennium, a child subject to uncounseled interrogation might agree to "whatever he thought was expected" in order to go back home – or, in Brendan's case, back to school. And by putting a heartbreaking face on the problem of juvenile false confessions, the series has reminded us of the fierce urgency of the task at hand: working to reform juvenile interrogation techniques before we lock up more Brendan Dasseys.

To be sure, the legal terrain has not gone completely unchanged since the era of Gerald Gault. After decades of dormancy, the high Court revivified *Gault*'s concern about the unreliability of juvenile confessions in 2011's *J.D.B. v. North Carolina*. There, the Court noted that empirical studies undertaken in the era of DNA-proven exonerations have shown that the problem of false confessions is indeed "all the more acute" when the subject of custodial interrogation is a juvenile. Building on a decade of reinvigorated juvenile jurisprudence, the Court explained that juveniles are vulnerable during interrogation precisely because they "are more vulnerable or susceptible to…outside pressures" and "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."

Recognition of the problem has spread beyond the courts, too. While many police interrogation training firms have been loathe to reform their techniques, some law enforcement agencies have agreed on the need for reform, including the International Association of Chiefs of Police. In 2012, that Association issued a juvenile interrogation manual specifically geared at preventing false confessions that recommended, among other things, the use of different and more child-sensitive interrogation techniques. Hearkening back to *Gault*'s warning that children might admit to anything if they think they will get to go home, the Association cautioned officers to avoid "even…indirect promises of leniency" that imply that confession will result in help or that silence will result in negative consequences. Similarly, it warned against using deception with children, including the use of false evidence during interrogation, and insisted that officers refrain from disclosing crime-scene facts during the interrogation. To be sure, this manual binds not a single officer, but it stands as a reform-minded template for departmental interrogation policies around the country.

Many state legislatures have also taken basic steps to improve the conditions surrounding juvenile interrogation. Indeed, Brendan's case is emblematic of one of the most significant reforms that has swept the nation in the past ten years: the videotaping of interrogations. To date, about twenty states have adopted rules requiring the recording of interrogations from start to finish. This reform has been crucial, shining a spotlight into the hitherto secret confines of the interrogation room; but it does not directly alter interrogation techniques themselves. And reforms beyond videotaping have been scattershot. A few states have adopted simplified juvenile *Miranda* warnings, while a few others, including Illinois in 2016, have mandated counsel in the interrogation room for children under the age of fifteen in highly limited circumstances. These reforms are unquestionably important, giving heft to important Fifth and Sixth Amendment protections for juveniles – but again, they leave untouched interrogation techniques themselves.

The bottom line? After decades of recognition that juvenile interrogation techniques must be fixed, the time is finally right to reform them. In the wake of *Making a Murderer*, front-line defenders and others concerned with making interrogations less coercive and more reliable have an unprecedented opportunity to pursue change. Now more than ever, a global outcry about juvenile interrogation techniques is incentivizing judges, politicians, and law enforcement officers to change the way interrogation works in order to ensure confessions' reliability. And the best places to start are the very tactics used on Brendan Dassey, including false promises of leniency, lies about the evidence, and fact-feeding. That toxic bundle of techniques is used around the country – not just in Wisconsin – and each has long been identified as a risk factor for false confession, especially when used on juveniles. Those techniques should have been discarded in the days of *In re Gault*. It is time to rid ourselves of them now.

False Promises of Leniency

"If you did some things…it's OK. As long as you can be honest with us, it's OK. If you lie about it that's gonna be problems." – Interrogation of Brendan Dassey (Wisconsin, 2006)

"All everyone's waiting for today is for you to admit to what you did so that we can start the process of getting you some help." – Interrogation of Nga Truong (Massachusetts, 2008)

"You need to start thinking about what you are going to do for yourself because I know you got a couple of kids out there and I'd to see the kids miss their daddy for a long time because you didn't want to talk about what's going on." – Interrogation of Anthony Polk (Iowa, 2008)

Any defender who has had a case involving a recorded interrogation will recognize these refrains or variants thereon. Taught to officers during interrogation trainings that are held at police departments nationwide, such statements are dangled in front of suspects to provide them a reason to confess. This is standard practice. It should be obvious that confession is a profoundly self-damaging act, the likes of which few rational persons would do. In a legal system characterized by public stigma, lengthy sentences, and harsh prison conditions, most people would rationally conclude that the physical costs of confessing to a serious crime outweigh the benefits of a relieved mind. To convince someone to confess who is not already predisposed to do so, therefore, officers are regularly trained to obfuscate the harm, to trick a suspect into believing that his self-interest actually lies with confession, not with silence. In this sense, the task of interrogation is to make the irrational choice – confessing – seem rational.

That said, courts often look askance at direct promises of leniency, like "if you confess, you will go home." Such obvious lies are too much for many courts to stomach in light of a Fifth Amendment that insists that any self-incrimination must be done voluntarily after a suspect freely weighs the costs and benefits of confessing. The Seventh Circuit put a fine point on this in *U.S. v. Villalpando*: "The reason we treat a false promise differently than other somewhat deceptive police tactics (such as cajoling and duplicity) is that a false promise has the unique potential to make a decision to speak irrational and the resulting confession unreliable."[1] In reaching this conclusion, the court recognized that "[p]olice conduct that influences a rational person who is innocent to view a false confession as more beneficial than being honest is necessarily coercive, because of the way it realigns a suspect's incentives during interrogation."

[1] *U.S. v. Villalpando*, 588 F.3d 1124, 1128 (7th Cir. 2009) (internal citation omitted).

Against this legal landscape, officers are trained to dance around the issue: to suggest leniency without ever saying it outright, using language that clearly telegraphs the message without crossing the line. Many interrogators, thus, tell suspects that if they confess, the prosecutor will "understand" and "work with" them; that everything will be "all right"; that the suspect will receive "help," such as counseling; and that the suspect's future will remain bright. Some interrogators even explicitly say "I can't promise you anything," only to follow, a sentence or two later, with an assurance that everything will be okay if the suspect confesses. While common sense tells us that that these types of statements communicate leniency as clearly as a direct promise – particularly to the ears and mind of a child – such common sense has yet to take hold in some courtrooms. Indeed, trial courts are often blinded by the content of a confession and thus bend over backward to find the confession voluntary, resulting in a jurisprudence that purports to prohibit "if you confess, you will go home" but may tolerate "if you cooperate, everything will be okay."

But should this repackaging – in which the thinnest of veils are drawn over unmistakable promises of leniency – insulate such interrogation tactics from judicial scrutiny? The answer is a clear no. In a White Paper summarizing the position of its membership, the American Psychological Association identified even *implied* promises of leniency as risk factors for false confession and warned that interrogation tactics that imply leniency "may well lead innocent people who feel trapped to confess."[2]

This is particularly true when the person being interrogated is a juvenile. When asked, children who falsely confessed to crimes that they did not commit frequently offer the same explanation: I confessed because I thought I would go home. The consistency of this refrain is remarkable, and it demonstrates that children hear these promises loud and clear. And the U.S. Supreme Court has acknowledged the reasons for this clear pattern: children and teenagers are indeed more susceptible to the pressures of interrogation precisely because their still-developing brains render them ill-equipped to weigh long-term costs and benefits – which, in turn, makes them easy marks for interrogation tactics that distort the consequences of confessing. In short, it simply takes a lot less to realign the interrogation room incentives for a juvenile than for an adult – even when the juvenile is factually innocent. It is up to defenders to point this reality out.

PRACTICE TIPS:

- Challenge courts' tolerance of implied promises of leniency in motions to suppress
- Rely on the scientific foundation provided by the American Psychological Association's White Paper on false confessions
- Cite cases including *Dassey, Truong, Polk*

Lies About Evidence

"They pointed you out. They gave me your name! They gave me your last name. I had your first name. 'Who's this? Do you recognize anybody in this picture?' 'Yeah, that's Trevon Yates.'" -- Falsehood During Interrogation of Trevon Yates (Illinois, 2013)

"[We need to figure out] why you feel like you want to touch a three-year-old little girl. Okay? Cause it did happen. She explained it perfectly." – Falsehood During Interrogation of Elias V. (California, 2013)

[2] http://web.williams.edu/Psychology/Faculty/Kassin/files/White%20Paper%20-%20LHB%20(2010).pdf

"There's an item that you touched, all right, that left some [DNA] particles on it that did some damage to somebody... The evidence shows you were there. The evidence shows it. I can't lie about the evidence." – Falsehood During Interrogation of Robert Davis (Virginia, 2003)

Lies about the evidence – known in the false confession literature as "false evidence ploys" – are prohibited in the United Kingdom and most other European countries. But courts across the United States have blessed police lies about the evidence, even when the person being interrogated is a child – albeit in a series of outdated opinions that are ripe for refreshing. In 1969, in *Frazier v. Cupp*, the U.S. Supreme Court affirmed the legality of deceptive interrogation tactics.[3] The *Cupp* court held that a police falsehood about the evidence will not render a confession involuntary on its own; instead, the use of such a tactic is just one factor to consider in the totality of the circumstances. Lower courts read *Cupp* as a virtual green light for police deception and now regularly sign off on a wide range of police lies, from generalized assertions like "we already know what you did" to highly specific claims like "we found your fingerprints on the gun" and even lies about whether police are permitted to lie.

But the reality is that lies about the evidence are another risk factor for false and unreliable confessions. In its White Paper, the American Psychological Association noted that "[a]t times, American police will overcome a suspect's denials by presenting supposedly incontrovertible evidence of his or her guilt . . . even if that evidence does not exist." Outrageously, it noted, such a tactic is even recommended in some police training manuals. But the APA warned that "outright lies can put innocents at risk to confess by leading them to feel trapped by the inevitability of the evidence against them." Indeed, an evidentiary lie often tips the scales by convincing a suspect that the odds are so stacked against him that nothing can be done but mitigate the damage by admitting guilt. In other words, lies about the evidence can help make the irrational choice to confess look rational.

Some courts have placed limits on police deception during interrogation; courts in both Florida and New Jersey, for instance, have drawn the line at actually manufacturing fake evidence.[4] And the Seventh Circuit Court of Appeals has taken a different tactic by prohibiting lies about specialized forms of medical evidence that a suspect is not able to contradict.[5] But such limits are incomplete guards against false confessions. For this reason, the APA recommends a complete ban on police lies about the evidence but, in the alternative, proposes criterion for case-by-case evaluation including "the extent that a suspect is vulnerable (*e.g.*, by virtue of his or her youth, naiveté, intellectual deficiency, or acute emotional state) and to the extent that the alleged evidence is presented as incontrovertible, sufficient as a basis for prosecution, and impossible to overcome." Indeed, as the APA recognizes, youthful suspects are particularly ill-equipped to push back against false assertions by authority figures. Many juveniles do not have the basic knowledge or life experience to question or suspect that the police are allowed to lie, nor do many have the maturity or confidence to challenge a lying officer. More likely, the juvenile will simply throw up his hands, admit defeat in the face of apparently inculpatory evidence that he cannot challenge or explain, and yield to the demand for a confession – whether guilty or not.

Pursuant to the APA's recommendation, defense attorneys should advocate for significant limits on police deception, particularly when the subject of interrogation is a juvenile. This has already been successful in some courts. For example, in a 2015 California Court of Appeals case, an appellate court

[3] 349 U.S. 731 (1969).
[4] *State v. Patton*, 362 N.J. Super. 16 (N.J. 1993); *State v. Cayward*, 552 So. 2d 921 (Fla. 1989).
[5] 662 F.3d 897, 906 (7th Cir. 2011).

found a thirteen-year-old boy's confession to be involuntary, noting among other reasons that "[t]he use of deceptive techniques is significantly more indicative of involuntariness where, as here the, the subject is a 13-year-old adolescent."[6] It is high time for other courts to catch up – and it is up to front-line defense attorneys to make sure that they do.

PRACTICE TIPS:

- Argue for a ban – or at least a limit – on false evidence ploys with juvenile suspects
- Cite the many juvenile false confession cases that involved lies about the evidence; use resources like the National Registry of Exonerations to find such cases
- Cite the American Psychological Association White Paper
- Cite cases like *In re Elias V* and *Aleman v. Village of Hanover Park*
- Cite the developmental and social science proving both that children are especially vulnerable to deception and psychological manipulation, and that they are ill-equipped to confront such lies from authority figures
- Remember that the U.S. Supreme Court has recognized in cases like *Haley v. Ohio* that tactics which may leave an adult criminal suspect "cold and unimpressed" may "overwhelm and overawe" a youthful suspect. In other words, tactics which may not render an adult's confession involuntary may require suppression of a juvenile confession.

Contamination

"We are really going out on a limb here with you. Would it make you feel better if we told you exactly who was with you?" – Interrogation of Robert Davis (Virginia, 2003)

"I know Kenzell wasn't up at the door because there was only two people. Okay, so the only two people that did the robbery was you and Devan, right?" – Interrogation of Trevon Yates (Illinois, 2013)

"I'm just gonna come out and ask you. Who shot her in the head?" – Interrogation of Brendan Dassey (Wisconsin, 2006)

Perhaps no problem in the sordid realm of false confessions is more pernicious than the problem of contamination. As a California court noted, police too often disclose specific facts regarding the crime during the interrogation process, thus enabling the suspect to adopt those facts and weave them together into a detailed narrative of guilt – even if he or she is innocent – that virtually seals his or her fate because of its plausibility. Indeed, Brendan Dassey's case provides a disturbing example of the power of a contaminated confession. Brendan's videotaped interrogation shows the officers feeding him nonpublic information about the crime when he was unable to produce it, including the whereabouts of the victim's personal effects, the disabling of the victim's car, and – most crucially – the method by which the victim was murdered ("I'm just going to come out and ask you. Who shot her in the head?"). At closing argument, however, the State suggested that Brendan's confession should be believed precisely because he gave accurate information about these nonpublic details – while glossing over the reality that his "knowledge" of those facts was based on contamination. Like the overwhelming majority of other false confessors who take their cases to trial, Brendan was convicted and sentenced to

[6] *In re Elias V.,* 237 Cal. App. 4th 568, 586, 587, 591, 593-95 (1st Dist. June 9, 2015).

life in prison based on a confession that ended up including accurate-sounding details but that still misled the jury about his guilt.

Even law enforcement interrogation trainers recognize the danger of contaminating a confession. In its training manual, John E. Reid & Associates emphatically warns officers against intentionally or inadvertently providing suspects with key facts of the crime. Interrogators are instructed that when reviewing a confession that appears to be corroborated, "the investigator should be certain that the details were not somehow revealed to the suspect through the questioning process, news media, or the viewing of crime scene photographs." The manual stresses that "[i]t is highly important . . . that the investigator let the confessor supply the details of the occurrence, and to this end, the investigator should avoid or at least minimize the use of leading questions."

Despite these warnings, fact-feeding still occurs too often – but because some defenders are not trained to think of fact-feeding as cognizable during a traditional motion to suppress, many are left unsure how to combat it. But the trick to challenging contamination in a motion to suppress is to cast fact-feeding – appropriately, we believe – as part of an interrogator's arsenal of coercion and manipulation. Indeed, many defenders who have argued that contamination or fact-feeding is itself a form of coercion have succeeded. The notion that contamination was constitutionally problematic was first introduced in the *Miranda* decision itself, where the Court spoke critically of police tactics that cause a suspect to "merely confirm[] the preconceived story the police seek to have him describe."[7] Since then, many lower courts have followed suit. Just this past year, a federal court suppressed an eighteen-year-old's confession where the police "asked him the same questions over and over until he finally assented and adopted the details that the officers posited."[8] Similarly, courts have suppressed confessions in cases where "there is not a single inculpatory fact in defendant's confession that was not suggested to him"[9]; where "the majority of [suspect's] final confession was comprised of details that [suspect] had adopted from the officers' suggestions"[10]; and where the confession "contains little information that was not first provided or suggested by the interrogating officers."[11] Clearly, it is possible – and indeed wise – to argue that contamination itself is, in essence, coercive.

PRACTICE TIPS:

- Litigate contamination as a form of police coercion that violates constitutional guarantees of due process
- Persuade more judges to apply heightened scrutiny to juvenile confessions, like in *Elias V*
- Cite cases like *In re Elias V*, *U.S. v. Preston*, and *State v. Rettenberger*

In short: the time is ripe for wholesale reform of the ways in which our police interrogate our youth. While piecemeal progress is being made in law enforcement-driven reforms and a few state legislatures, the most effective vehicle for change can be made by front-line defense attorneys who can bring to life not only *Gault*'s call for zealous advocacy but also its concern for the unreliability of youthful confessions. Now more than ever, those concerned about the reliability of children's confessions should act to break through the legal fictions that can insulate such confessions from rigorous scrutiny –

[7] *Miranda*, 384 U.S. at 455.
[8] *Preston*, 751 F.3d at 1023-24.
[9] *Thomas*, 8 N.E.3d at 316.
[10] *In re J.F.,* 987 A.2d 1168 (D.C. 2010).
[11] *State v. Rettenberger*, 984 P.2d 20 1009, 1020 ¶ 40 (Utah 1999).

drawing on the time-honored lessons of *In re Gault* to insist that after fifty years, our system can no longer tolerate interrogation tactics that imperil children. With dedication, creativity, and perseverance, the wise words of *Gault* can finally be turned from a rhetorical mandate into legal reality.