

'TIP OF THE ICEBERG' THE INJUSTICE OF FALSE CONFESSIONS

It was a bright morning on Friday, 25 May 1979 when six-year-old Etan Patz left his SoHo apartment in New York City (NYC) to head to school. It was the first time that Etan would make the two-block walk to the bus stop by himself. Horrifically, it would also be his last. An intense search began in the evening for the boy and continued for weeks but to no avail. His disappearance sparked the missing children's movement, including new legislation and various methods for tracking down missing children, such as the milk carton campaigns of the mid-1980s. He was the first-ever missing child to be pictured on the side of a carton of milk advertising his absence; his innocent eyes were quickly recognisable by every New Yorker.¹

On 25 May 2012, NYC Police Commissioner Raymond W. Kelly announced that they had arrested a man, Pedro Hernandez, who subsequently confessed to the murder of young Etan.² These revelations come a day short of the 33rd anniversary of his disappearance, and a day short of what is now known as National Missing Children's Day.

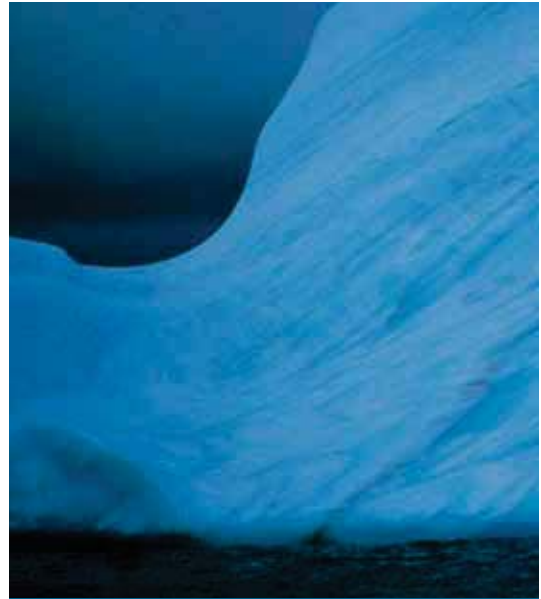
Hernandez told investigators that, with the promise of a soda, he lured Etan to the basement of a supermarket where he worked at the time. Etan was then choked to death and stuffed in a bag only to be dumped in the trash blocks away.³ Commissioner Kelly is confident that Hernandez provided the detectives with intimate details about the case that only the real killer could have known.⁴

Despite seeming to be an open-and-shut case, certain peculiarities and inconsistencies have arisen prompting FBI officials to doubt the veracity of Hernandez's confession.⁵ While Mr Kelly is adamant that there is probable cause, sceptics point to fact that at this stage no other physical evidence exists to corroborate Hernandez's account.

Hernandez has had a long history of mental health problems reportedly suffering from bipolar disorder, schizophrenia and hallucinogenic episodes. Most stunning of all is the allegation that he had twice tried to confess to the murder in the past but was dismissed by police as crazy. No motive, no criminal background and a three-and-a-half hour interrogation also contribute to the uncertainty.⁶

This intriguing twist in the horrific tale of Etan Patz's disappearance raises the question of confessional evidence and its place within the law. More particularly, it highlights the importance of recognising false confessions as a prevalent and real issue that compromises the integrity, accuracy and honour of the justice system.

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completely counterintuitive to the basic principles of self-preservation. False confessions and their subsequent convictions represent a type of miscarriage of justice that is plaguing legal systems. Not only does it consume scarce

resources to immorally imprison innocents, but it also allows the true perpetrators to roam free remain free and re-offend.

In spite of debate surrounding the frequency of false confessions, anecdotal case evidence and research suggests that it is a reality. The Innocence Project is an initiative dedicated to freeing wrongfully convicted people. The organisation has exonerated 209 individuals so far and of these approximately 25 per cent were convicted by false confessions,⁷ a staggering proportion by any standard.

Background

Despite calls for in-depth investigation into the phenomenon more than a century ago,⁸ it was widely believed amongst psychologists and legal professionals, that false confessions were extremely rare, largely irrelevant, and did not warrant further study. Typically, due to the limited technology available and the difficulty of proving innocence after the fact, appeals and protests challenging their false confession were ignored at all tiers of the legal system.

This ignorance was challenged in the 1990s when two significant events resulted in an explosion of psychological research and policy reform. The first occurred in the case of the *Birmingham Six*, a highly publicised wrongful conviction case that gripped international media and exposed the fallibility of forensic evidence. Second, the innovative developments in DNA testing provided an independent and rigorous means of demonstrating that some admissions were factually wrong and that these people were factually innocent.

Subsequently, the overturning of high profile cases such as the Central Park Jogger Rape, the Texas Pizza Hut murder and the trial of Australia's own Andrew Mallard, have brought false confessions and their plausibility into the professional consciousness. But many Psychological experts claim that the current spate of DNA exonerations are only 'the tip of the iceberg'⁹ when it comes to the issue of false confessions because they only concern murder and rape crime. The true frequency of false

confessions is still unknown because current samples and estimates do not include situations where no DNA evidence is available to prove the contrary, or in cases that don't receive full scrutiny because there was either an early guilty plea or it involved a minor crime.¹⁰

Research

Early research into the phenomenon spawned a nomenclature that distinguished between three types of false confession:

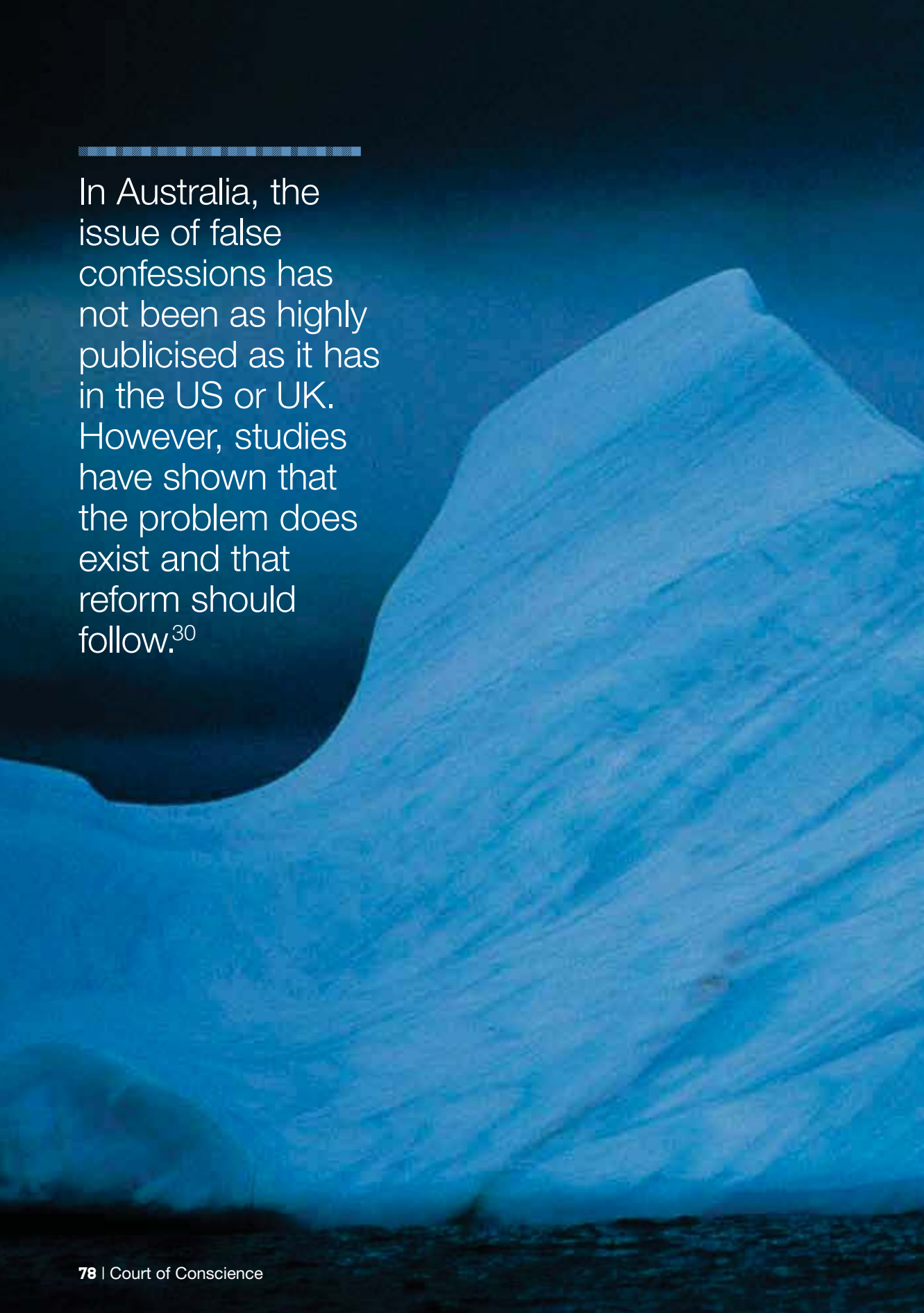
- **Voluntary** – people who come forward without pressure and claim responsibility for a crime, sometimes to protect the actual perpetrator or to satisfy desires for notoriety.
- **Coerced-compliant** – occur when a suspect acquiesces to the pressure for a confession. They are aware of their innocence but stress impedes their judgement, eventually they confess in order to escape the undesirable situation.
- **Coerced-internalised** – an individual capitulates and internalises their involvement in the crime. The pressurised environment causes them to believe that they are guilty for an act they did not commit.¹¹

With the increased media coverage of the anniversary of Etan's disappearance, the pressure of interrogation, and Hernandez's history of episodic hallucinations, his confession could fit into any of the three above categories. Of course, there is also the likelihood that Mr Hernandez did brutally murder young Etan and was making a true confession; only time will tell.

Causes

It is widely accepted that there is no single cause or rationale behind false confessions. They are the product of a complex social process that Psycho-legal specialist Gisli Gudjonsson believes involve numerous factors. His research suggests that the causes of false confessions can be divided into two complementary elements: dispositional factors and situational factors.¹²

Dispositional Factors – Research has identified individuals who particularly at risk.



In Australia, the issue of false confessions has not been as highly publicised as it has in the US or UK. However, studies have shown that the problem does exist and that reform should follow.³⁰

Juveniles and persons with a mental impairment are the two groups frequently referred to as being the most vulnerable in discussions of false confessions due to their gross over-representation.¹³ Attributes such as suggestibility, heightened obedience to authority, immature decision-making abilities, and impulsivity have been regarded as the factors that cause members of these populations to be particularly at risk.¹⁴

Most shocking of all however, is the premise that ‘innocence puts innocents at risk.’¹⁵ It appears that innocent people are somewhat disillusioned with the belief that justice will prevail and protect them. As a result they give up all rights to silence and put their risk of falsely incriminating themselves.

Situational factors – The biggest hurdle to creating greater awareness of the frequency of false confessions is the self-belief along the lines of: ‘that would never happen to me!’ However, a large number of laboratory experiments have displayed that even regular people can fall victim to false confessions under certain and subtle contextual conditions.¹⁶ These conditions include the length or nature of the interrogation¹⁷ and the presence of a lawyer.¹⁸ Above all, though, the most ‘common element in many, if not all, false confessions is implicit promises of leniency or threats of punishment.’¹⁹

A prime example of the interplay of these factors and how they can lead to the most egregious miscarriages of justice can be seen in the Australian case of Andrew Mallard. It was a saga that continued over 11 years and divided opinion across the country. Bearing a concerning resemblance to Hernandez’s situation, Mallard was convicted despite having no history of violence, and the prosecution providing no DNA or physical evidence whatsoever. The prime evidence relied upon was confessions purportedly given during unrecorded interviews and a short video of Mallard confessing on camera after eleven hours of interrogation.²⁰

Furthermore, Andrew Mallard had a helpful, innocent and highly suggestible personality that disadvantaged him in the face of the incessant pressure by the Western Australian police investigators.²¹ The confession video shows Mallard speculating as to how the murderer might have killed the victim, Pamela Lawrence. In his mind he was helping the investigation but Police claimed that, although it was given in third-person, it was a confession.²²

Interview style and procedure

The style of the interview or interrogation is always a factor in the production of false confessions and is a point of conflict between academics and practitioners. Currently in Australia we have a style of investigative interviewing that was adopted in the late 1990s and is broadly comparable to that used in England and Wales.²³ Although investigative interviewing is based on a philosophy of fact-finding rather than merely obtaining a confession, law professor Russell Hogg identifies significant problems resulting from the dual roles expected of our police force. They are given contradictory objectives; being required to conduct investigations objectively on the one hand, whilst on the other committed to a predetermined outcome against the ‘guilty’ party. Hogg believes that these conflicting roles heighten the chances of convicting innocent suspects and will not be apparent until an official inquiry is held – well after the devastating consequences have occurred.²⁴

Already in Australia, the NSW Police Service has adopted the Electronic Recording of Interviews with Suspected Persons (ERISP) programme to eliminate disputes surrounding confession evidence. Introduced in 1991, the ERISP system is a hybrid video and audio interview recorder. Adding accountability to the interview process is a positive step in tackling issues of coercion and false confessions, but it has been reported that the opportunity for persuasive tactics still remains. Professor and Dean of Faculty of Law UNSW David Dixon showed that, in spite of NSW code of practice, up to 74 per cent of suspects were questioned prior to formal recording.²⁵ Although the nature of questioning

was not specified, it is clear that loopholes remain. Once again, education and training is the key. Officers need to know that guilt-assumptive and confession-driven investigations may produce counterproductive consequences.

Despite widespread and almost unanimous recognition of the need to videotape interviews,²⁶ criticisms have arisen. Researchers caution against investing too much hope in any recording system, citing that it may be more limited in its protection of the innocent than hoped. Video recording in interviews and interrogations have been likened to an airplane's 'black box' that can only help determine what caused a disaster after the fact, rather than prevent them from happening.²⁷

There seems to be an exaggerated confidence in the ability of video recording to capture reality in the justice system. A recorded false confession may cause the court to overestimate the transparency of the process. Furthermore, it may create an image of objectivity that dramatically weakens the accused grounds to contest the confession evidence in the future.²⁸ Although designed to protect the innocent, in some cases it may make it impossible to prove just that. Given that, as in the case of Andrew Mallard, confession evidence alone has been sufficient to support a conviction in criminal cases in Australia,²⁹ it is extremely important that the police and courts improve their vigilance in response to confession evidence.

Recommendations

In Australia, the issue of false confessions has not been as highly publicised as it has in the US or UK. However, studies have shown that the problem does exist and that reform should follow.³⁰ At the 2011 National Conference of the Australian Psychological Society College of Forensic Psychologists, Professor Paul Wilson pointed to conservative estimates putting the rate of wrongful conviction at one per cent of all crimes. Based on national court figures this equates to 327 miscarriages for serious crimes throughout Australia and over 8500 for all crimes each year.³¹



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Professor Wilson is a listed expert in Psychology and Criminology to the International Criminal Court in The Hague. In his keynote address for the conference he emphasises that education is the key: 'Police, in particular, need training so they can detect people who may be confessing falsely and to ensure that their interrogation techniques don't inadvertently promote false confessions.'³²

He said that forensic psychology and law enforcement must work together to identify false confessions as the costs of wrongful convictions to victims, the falsely accused and the community are high.

Unless scepticism is removed the status quo will persist. Professionals must become fully aware that their actions could be a subversion of justice and extremely counterproductive to their ultimate aims: 'no one benefits when the wrong person goes to jail.'³³

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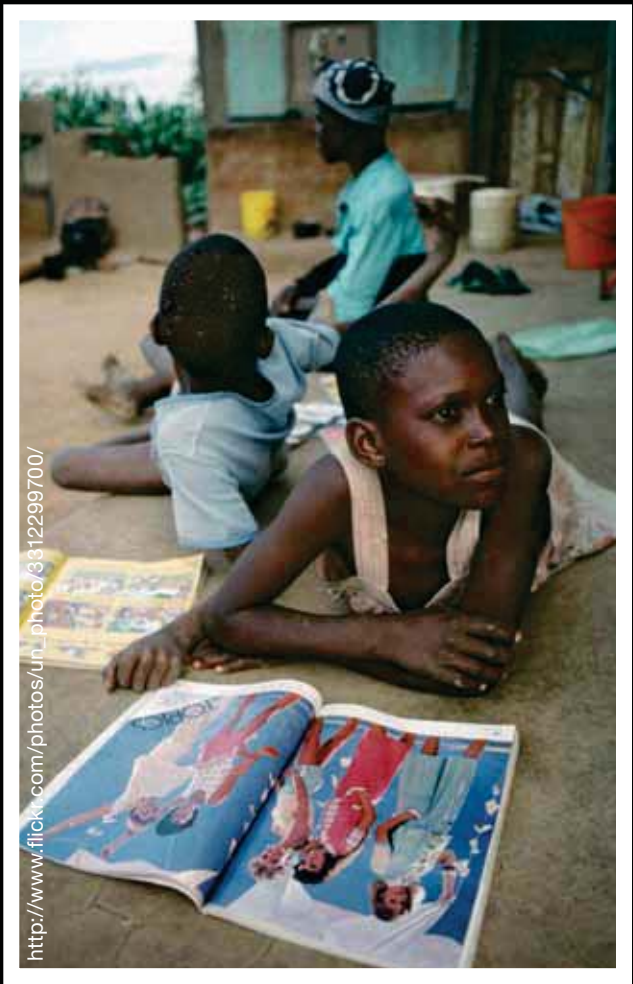
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