QUESTIONING POLICE INTERROGATION METHODS: A COMPARATIVE STUDY

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书名：**Questioning Police Interrogation Methods: A Comparative Study**

Introduction

By Ira Belkin

This book is the product of a multi-year project undertaken by the U.S.-Asia Law Institute at New York University School of Law to work with Chinese and global experts on criminal justice reform challenges suggested by China's 2012 amendments to its Criminal Procedure Law. This volume focuses on the topic of police interrogation, one of the primary concerns addressed by the amendments.

Every country's criminal justice system has struggled with the challenge of how to regulate police interrogation to eliminate police torture, coercion and false confessions, on the one hand, while still giving police sufficient leeway to investigate criminal offenses, on the other. As we demonstrate in the body of this volume, the United States and the United Kingdom, as well as the People's Republic of China, have all experienced scandals involving police torture and all have taken some steps to reform how police conduct interrogations.

In China, the Reform Era, which began in 1979, came about itself, in part, to address the abuses of the previous period, the Cultural Revolution. Those abuses included the use of torture to extort false confessions. In fact, the notorious Gang of Four were convicted of the crime of "coercing false confessions," among other things.[1] The public trials of the Gang of Four led to the Reform Era and a new Criminal Law and Criminal Procedure Law ("CPL"), first promulgated in 1979 and since amended several times. Both laws explicitly prohibit extorting confessions by torture.[2]

In addition to promulgating domestic legal reforms to outlaw police torture,

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[1] A Great Trial in Chinese History, New World Press, 1981

[2] See Article 136 of the 1979 Criminal Law and Article 32 of the 1979 Criminal Procedure Law, as well as Article 247 of the current Criminal Law and Article 50 of the current Criminal Procedure Law.

China also became one of the first nations to sign and ratify the U.N. Convention Against Torture, having done so in 1986.

Despite these impressive legislative achievements, China's struggle to eradicate police torture, coercion and false confessions continues. Passing a law prohibiting a practice and ratifying a convention outlawing that practice do not, in and of themselves, guarantee eradication of that practice. In China, a confession has traditionally been considered the "king of evidence." China is not alone in this regard and, as demonstrated in this book, both the United States and the United Kingdom, despite progress in legal reform, still struggle to address this challenge.[3]

Every law enforcement agency relies upon interrogation as one of its most effective tools to investigate crime and to discover evidence to prove the guilt of a suspect. At the same time, in virtually every society, police have, from time to time, used coercive methods, including physical torture and psychological pressure, or some combination of both, to induce individuals to provide information and statements. Most criminal justice systems, including the Chinese and Anglo-American systems, started out as confession-based systems. In a confession-based criminal investigation, once the police begin to suspect that a particular individual might be guilty, they interrogate him until he confesses. Then they investigate the details to see if they corroborate the confession. While this primitive approach has certainly yielded many convictions, there have also been many cases where this method has led to torture, coercion and false confessions.

History is replete with examples of false confessions obtained by overzealous police leading to innocent people being wrongly convicted of crimes and sometimes even executed. False confessions have been documented in countries all over the world, including Canada, Norway, Finland, Germany, Iceland, Ireland, the Netherlands, Australia, New Zealand, China, Japan, England and the United States.[4] This universal experience demonstrates the risk common to all societies that over-reliance upon

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[3] This is not so different from the West, where a confession has sometimes been referred to as the "gold standard of evidence." Chapter 3, infra, at 93.

[4] See infra, Chapter 3 at 96.

confessions can lead to disastrous injustices.

In China, the recent cases of Zhao Zuohai and She Xianglin shocked society as each was convicted, based upon their confessions, of the supposed murder of a person who turned out not to have been murdered at all but was still alive. Western countries have experienced similar embarrassments. In 17th century England, there was *Perrys' Case*, in which a mother and two brothers were convicted and executed based upon their confession to a murder that was later discovered to be false when the supposed murder victim turned up alive.[5] In 19th century America, two brothers, Steven and Jesse Brown, were convicted and sentenced to death in Manchester, Vermont for the murder of their brother-in-law, Russell Colvin. They had both confessed to the murder but fortunately for them their lawyers located Colvin, who was still alive, before the execution could be carried out.[6]

Inevitably, the public scandal that follows the disclosure that an innocent person has been convicted and punished for a crime he did not commit leads to public outrage and demands for criminal justice reforms. No society wants to accept the gross injustice of convicting and punishing innocent people. Of course, even when it turns out that the suspect was guilty and his confession was accurate, the use of torture and coercion is still inhumane and a violation of the suspect's fundamental human rights.

The question for legal reformers then becomes how to strike the right balance between giving police an opportunity to interrogate a suspect and learn valuable information on the one hand, but restraining themselves from conduct that overcomes the will of the suspect, violates his right to fundamental human dignity and possibly leads to a false confession and wrongful conviction, on the other. Is it enough to simply leave it to the police to figure out how best to do this? That approach has been tried but has yielded deeply unsatisfying results.

As Professor Stephen Schulhofer wrote in his article, *Some Kind Words for the*

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[5] Id., at 105.

[6] Id.

Privilege against Self-Incrimination, reproduced in this volume as Chapter 1, about American police during the period before the 1966 *Miranda v. Arizona* decision:

> Unfortunately, when we asked a conscientious law-abiding officer to question a stubborn defendant suspected of a brutal crime, and also asked the officer to use only fair means and not apply too much pressure, we were really asking the impossible . . . It should not be surprising that decent officers charged with solving brutal crimes sometimes gave in to fatigue or frustration and lost their tempers.

In other words, simply leaving it to the police to figure it out is not a workable solution; nor is it fair to the police. Every criminal justice system must develop its own solutions to guide police investigators to properly draw the line between acceptable interrogation methods and unlawful and unacceptable ones.

The 2012 reforms to the CPL are designed to address this challenge. The reforms with regard to police interrogation came about in response to the public outcry over repeated scandals of innocent people being convicted of the most serious crimes: Zhao Zuohai, Nie Shubin, She Xianglin and others. These wrongly convicted innocents have become household names in China. As noted above, in the Zhao Zuohai and She Xianglin cases, the defendants were convicted of murdering individuals who had disappeared and were presumed to have been murdered. Years later, the "victims" who had been missing re-appeared in their home villages, leaving no question that Zhao Zuohai and She Xianglin were innocent and had been dealt a terrible injustice. In the Nie Shubin case, long after Nie was executed, another person came forward and claimed responsibility for the murder that sent Nie to his death. In each of these wrongful conviction cases, the defendant's false confession played a pivotal role in the proof that led to his unjust conviction. These and other scandals spurred efforts to reform the CPL in 2012 to address police torture and false confessions.

In response to these wrongful convictions of innocents and the public's understandable demands for reform, China amended its CPL in 2012 to include three types of reforms to prevent and deter the use of torture and coercion and to protect the rights of individuals subjected to interrogation: a) a privilege against compelled self-

incrimination; b) an exclusionary rule for unlawfully obtained confessions; and 3) a requirement that interrogations be electronically recorded from beginning to end in serious criminal cases.

The goal of our project was to promote an exchange of knowledge and experience about the types of laws and practices that have proven effective in addressing police torture, coercion and false confessions. We hope to stimulate a rich and meaningful discussion among Chinese and global experts and practitioners about how best to implement the 2012 reforms to the Chinese CPL and to ensure that their purpose is met, that is, that police torture, coercion and false confessions will be substantially reduced and, eventually, eradicated.

Before turning to the foreign experiences documented and explained in detail in the chapters of this book, it is worthwhile to say a few words about the 2012 CPL reforms and clarify what they did and did not do. What questions did they answer and what questions did they leave open?

First, what is the meaning of the CPL's privilege against compelled self-incrimination? Is it similar in meaning and scope to the current understanding of the 5th Amendment to the Constitution of the United States which employs similar language? Throughout the history of criminal justice in the United States, the 5th amendment privilege has generated controversy. Its basic meaning, as interpreted by United States courts, is that in the trial phase, an accused has an absolute right to decline to testify or say anything at trial. The purpose of the trial is to determine whether the prosecution has sufficient evidence to prove his guilt beyond a reasonable doubt and the defendant is under no obligation to assist the prosecution by testifying and subjecting himself to cross-examination. In the investigation phase, the 5th Amendment also gives a suspect an absolute right to assert the privilege and if he does so, he has a right to refuse to answer any police questions during interrogation.

As noted, Chinese CPL Article 50 appears to adopt, for the first time in China, an explicit "privilege against compelled self-incrimination:"

Judges, procuratorial personnel and investigators . . . are strictly

> prohibited from extorting confessions by torture, collecting evidence through threats, enticement, deception or other unlawful means, or *forcing anyone to provide evidence proving his/her own guilt . . .* (emphasis added)

When the CPL was amended in March 2012, the National People's Congress, China's national legislature, issued a press release announcing that the law marked a milestone that China had established a doctrine against compelled self-incrimination. Although Article 50's language seems to create such a privilege, the amended Criminal Procedure Law, in Article 118, preserved a provision that seems, on its face, to contradict Article 50. Article 188 provides:

> *The suspect shall truthfully answer the questions raised by the investigators*. However, he shall have the right to refuse to answer any question irrelevant to the case.

Thus, it still seems unclear to what extent Article 50 provides criminal suspects in China with the right to refuse to answer questions during interrogation. It is also unclear to what extent criminal defendants at trial can safely refuse to answer any questions from the judge or prosecutor. These questions were left to the implementation of the law. Our project, including the articles in this book, are intended to stimulate thinking about the most effective ways to carry out implementation.

As for the exclusionary rule, the 2012 amendments to the CPL adopted a set of rules that provide, for the first time, a potential remedy for the right to be free from coercion and torture during interrogation. This is critically important, for a right without a remedy is merely an unenforceable statement of principle. CPL Articles 54 through 57 provide for a new procedure giving Chinese courts the authority to exclude from evidence any confession "extorted from a criminal suspect or defendant by illegal means such as torture." Questions remain as to what type of showing a defendant must make to trigger a hearing under the rules and what type of proof is acceptable to a court to demonstrate that the police used unlawful means to obtain a confession. Perhaps most importantly, there is an open question about whether all "fruit of the poisonous tree" will be excluded. In other words, if the police use unlawful means to coerce one confession but then use only lawful means to confirm the substance of that confession

in a second interrogation, should both confessions be excluded? The first confession was coerced and must be excluded. No coercion was used during the second interrogation but isn't that confession a product of the first coercive interrogation? Is it possible to remove the taint of an unlawfully obtained confession simply by re-interrogating the defendant? Can a subsequent interrogation ever be considered untainted by a previous unlawful one? It is only logical that unless all confessions that follow unlawful police conduct are excluded, the police will have an incentive to use unlawful coercion during the first rounds of interrogation. Once a suspect has confessed, albeit under torture, how can he face his interrogators and deny the substance of the confession?

The CPL's third anti-torture reform can be found in Article 121, which provides that when interrogating a criminal suspect, investigators "may record or videotape the interrogation process, and shall do so where the criminal suspect is involved in a crime punishable by life imprisonment or capital punishment or in an otherwise major criminal case." This is an advance that goes beyond the reforms of many jurisdictions in the United States. While the United Kingdom has adopted the requirement that police interrogations be recorded in their entirety, only federal law enforcement authorities and a handful of jurisdictions in the United States have required that interrogations must be recorded in their entirety. In this respect, China's law is more advanced than many jurisdictions in the United States as well as other countries.

Of course, the newly enacted recording requirement also raises many new questions regarding implementation. What is the consequence of failing to record? Must the recording be shown to the defense prior to trial? What consequence, if any, follows if there are gaps in the recording? Should the evidence of the confession be the recording itself or should it be a written and signed statement? The answers to these and other concrete questions will determine how effective the recording requirement is in deterring torture and coercion and in creating a proper record to review the lawfulness and accuracy of the interrogation.

Finally, it is worth noting that the significant reforms of the CPL enacted into law in 2012 did not address some of the issues that Chinese reformers have raised over the course of many years. Under Chinese law, police may, without any approval from a prosecutor or judge, detain a suspect for up to 37 days and subject him to repeated interrogation without a lawyer or third party witness present. In the *Miranda v. Arizona* decision of the United States Supreme Court, the Court determined that all in-custody

interrogation is inherently coercive and that some affirmative action must be taken to dispel the coercive effect of custody. This begs the question of whether, despite the admirable reforms enacted by the Chinese National People's Congress in 2012, they will be sufficient, without more, to overcome the inherently coercive nature of custodial interrogation permitted by the Chinese CPL.

In this regard, we should note that the Supreme People's Court, the Supreme People's Procuratorate and the Political-Legal Committee of the Chinese Communist Party have all issued guidance prohibiting of the use of sleep and food deprivation and other forms of physical coercion to make clear that physical assault is not the only form of coercion prohibited in China.[7] These directives seek to fill a gap in Chinese law concerning how to define unlawful police conduct that constitutes "extorting confessions by torture" but they did not address what *Miranda* called the inherently coercive nature of custodial interrogation.

The question remains: what are the most effective tools for eliminating police torture, coercion and false confessions. To stimulate discussion on this topic, we decided to present information about how the privilege against self-incrimination, the exclusionary rule and the recording requirement work in other criminal justice systems. In our workshops in China, which were held in six cities in China, in addition to expert presentations, we also demonstrated a suppression hearing conducted under U.S. law and screened a film called *The Central Park Five* that describes in detail how five teenagers were induced to confess to a heinous crime they did not commit. We also asked Chinese prosecutors, police, defense attorneys, judges and academics to discuss their perspectives on the regulation of police conduct during interrogation and the most

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[7] For the relevant provisions of the Supreme People's Court judicial interpretation see Articles 8 and 95, respectively, at: http://www.chinacourt.org/article/detail/2013/11/id/1148623.shtml; http://www.chinacourt.org/article/detail/2012/12/id/807049.shtml; For the relevant provisions of the Supreme People's Procuratorate, see Article 3 and 13 at http://www.jianfazhiku.com/ReadNewsAll.asp?newsid=10570; For the relevant provisions of the Political-Legal Committee of the CCP's guidance, see Article 3 and 13 at http://www.360doc.com/content/15/0105/23/19128036_438499196.shtml; For relevant provisions of the Ministry of Public Security, see Article 196 at http://news.china.com.cn/politics/2012-12/27/content_27528419_14.htm.

effective ways to implement China's reforms. The discussions were diverse, rich and productive.

As much as we found the workshops meaningful and productive, they were limited to a particular time, place and audience. We decided that to be more effective, it would be best to present some of the key information in written form, with the hope of stimulating thinking and discussion among an even wider audience of individuals and institutions interested in criminal justice reform. To that end we have produced this volume of essays which we believe present some of the most recent and best analyses of the questions surrounding police interrogation from different jurisdictions outside of China, specifically, the United States and the United Kingdom.

In this book, we include seven articles from the English language literature on police interrogations and the problems of torture, coercion and false confessions. As described in more detail below, these articles reflect the struggle other societies have had finding the right balance between regulating police conduct and allowing the police sufficient leeway to investigate crime. Out of those struggles has emerged a steady stream of new ideas and practices for the best ways to eradicate police torture and coercion and to give investigators the best possible chance of obtaining truthful confessions while avoiding false ones.

We begin with some of the historic struggle in the United States and two articles from our NYU colleague, Professor Stephen Schulhofer. In *Some Kind Words for the Privilege Against Self-Incrimination,* Professor Schulhofer noted back in 1991 that even within the United States, the privilege had long been the subject of controversy. The privilege, the right to refuse to answer questions whether at the police station or in court, appears to be, as its critics charge, an obstacle to the truth-seeking function of the police and the courts. After all, the person who should be in the best position to provide information about whether the defendant committed the crime, the defendant, himself, is shielded by the privilege from making any statement.

As Professor Schulhofer powerfully argues, however, the privilege not only protects the fundamental rights of the accused but also enhances the truth-seeking function of both the police and the courts by seeking to ensure that only "voluntary" statements of the accused may be admitted into evidence. In other words, as noted

above, to protect the rights of the individual and to enhance the reliability of the statements a defendant chooses to make, the United States Constitution demands that the statements must be voluntary and not coerced. Schulhofer's article carefully describes the American debate over the value of the privilege, traces it to its historical roots and clarifies its rationale. Despite the large number and variety of criticisms there is almost a universal consensus among American legal experts that the privilege is absolutely necessary during the pre-trial investigative stage to prevent coercion during interrogation. As Professor Schulhofer so eloquently argues, the rationale for the privilege is that it is "essential to fundamental fairness" and a safeguard to protect the innocent from unjust conviction.

As for the rationale justifying the privilege during trial, there is perhaps less consensus. What is clear, however, is that by asserting the privilege a defendant calls upon the prosecution to fulfill its obligation, to present evidence to prove the defendant's guilt beyond a reasonable doubt and that the defendant has no obligation to make the prosecution's job easier by testifying. With the privilege, a defendant may testify if he chooses but if he remains silent neither the jury nor the judge may draw the inference that because he is silent he must be guilty.

In his second article on the privilege, *Miranda v. Arizona, A Modest but Important Legacy*, Professor Schulhofer focuses on perhaps the most famous and, certainly one of the most controversial, U. S. Supreme Court decisions interpreting the privilege against self-incrimination, *Miranda v. Arizona*. As Professor Schulhofer points out, *Miranda* was one of a series of Supreme Court decisions handed down in the 1960's that was intended to rein in police misconduct in the United States:

> [Before *Miranda*] the interrogation cases posed a distinctive set of problems. The effort to separate legitimate police questioning from illegal abuse was framed by the "voluntariness" test. But in nearly three decades of experience using this test, its practical problems had become impossible to ignore. The voluntariness standard left police without essential guidance in what they were permitted to do. . . The test . . . allowed considerable interrogation pressure that many considered inherently incompatible with "voluntary" choice. Minority suspects, the unsophisticated and the psychologically vulnerable were especially susceptible to manipulation and abuse. That factor in turn was not only troubling in itself, but it also posed a major risk of eliciting false

> confessions. Meanwhile hardened criminals were left at a relative advantage. And extreme physical brutality, while clearly illegal, was not adequately checked by the test and in some ways was indirectly encouraged.

One of the great contributions of the Court that decided *Miranda* was its explicit recognition that custodial interrogation is inherently coercive. In other words, any time a suspect is being held by the police and is not free to leave there is pressure on the suspect to tell the police what they want to know. The now-famous *Miranda* warnings were the Supreme Court's suggestion of one way the police might dispel the inherent pressure of interrogation while in custody. In fact, at the time the Supreme Court decided *Miranda*, the Federal Bureau of Investigation and several police departments around the country were already using similar warnings before they began interrogating suspects. The effect of the *Miranda* decision was to require all police to do so or the statements they obtained would be excluded from evidence.

The recognition of what seems like a common sense conclusion had the legal effect that courts need not make a case-by-case decision based upon the "totality of the circumstances" as to whether the suspect's statements were voluntary. Moreover, the police were given a clear road map to follow in protecting the rights of the accused while fulfilling their responsibility to question the suspect. As long as they advised a suspect of his rights and he waived them, the interrogation could proceed and the resulting statements would be admissible.

The second innovation provided by the *Miranda* Court was to give some power over the interrogation process to the accused. He could stop the interrogation at any time by simply saying he did not want to answer any questions or by requesting the presence of an attorney during interrogation. If he was willing to answer questions, however, the Court required that he make an explicit statement acknowledging that he understood his rights and agreed to waive them.

Professor Schulhofer makes the case that the Court was deferential to the legitimate needs of law enforcement and crafted user-friendly, bright line rules to guide the police in how to conduct a lawful interrogation while simultaneously protecting the rights of the suspect. The Court still left open the possibility of individual police

departments and legislatures developing alternatives that provided equivalent assurances that the rights of the suspect under interrogation would be protected.

It should be noted that under U.S. constitutional law, another protection afforded suspects during interrogation is that the time period for interrogation is limited to the period before the suspect is represented by counsel. Once counsel is involved the police must obtain the consent of counsel before proceeding with interrogation. Secondly, counsel must be provided at the initial court appearance of an arrested person, which must take place promptly after arrest,[8] usually within 24 hours. In other words, the police have a limited window of time, generally less than 24 hours, within which they may subject an unrepresented suspect to interrogation. They can only do so after advising the suspect of his rights and obtaining a waiver of those rights. The suspect can terminate the interrogation at any time. If the police obtain a statement in violation of the rules, and the legality of the interrogation is challenged in court, the court must exclude the confession from evidence.

Of course, this is a uniquely American solution to this universal problem, based upon the text of the United States Constitution and its common law tradition of judicial interpretation. As is demonstrated elsewhere in this book and in other materials, other societies have made other choices. In the United Kingdom, for example, all interrogations are recorded in their entirety and the suspect has a right to have an attorney present during interrogation.

As Professor Schulhofer wrote on the occasion of the 40th anniversary of the decision, the *Miranda* Court left a modest but important legacy, that is, in order to assure that statements made in response to custodial interrogation are voluntary, some affirmative steps need to be taken to give the suspect some power over the process. As

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[8] The concept of "arrest" under U.S. constitutional law, is very different from "daibu" under Chinese law, even though "daibu" is the most common way to translate "arrest." Under American constitutional law, a person is under "arrest" whenever a reasonable person under the circumstances would believe that he is not free to leave. This is in contrast to "daibu," which is a formal procedure in which the police request the prosecutor to approve "daibu" for a criminal suspect, confirming that there is sufficient evidence to charge the person with a serious crime and that the person should be detained pending trial.

he points out, *Miranda* has not significantly changed the rate at which suspects provide incriminating statements while in custody. Only 20% to 25% of suspects invoke their right to silence and 55% to 65% provide some incriminating statement. *Miranda*'s primary effects were a) to legitimize the professionalism of the police and their commitment to fairness in the criminal process; and b) to cause police to internalize constitutional ideals into their value system. Thus, although *Miranda* did not take away the control of the police over the interrogation process and did not reduce the number of confessions obtained by the police it did represent important progress in how police interrogations are conducted in the United States. In the decades since the Supreme Court decided *Miranda,* the police use of physical force during interrogation has become quite rare.

While *Miranda* represents significant progress in the protection of the rights of individuals subject to custodial interrogation there is irrefutable empirical evidence that proves that *Miranda,* and the exclusionary rule that enforces it, do not guarantee that all admissible confessions are accurate. The United States still has a serious problem with false confessions.

According to the Innocence Project, since 1989, 342 innocent individuals have been convicted of serious crimes and later exonerated by DNA evidence.[9] Of those, 25% provided false confessions to the police.[10] According to the National Registry of Exonerations in the United States, since 1989, the total number of people exonerated is over 1600 and 13% of those made a false confession during police interrogation. [11]

It is common for American prosecutors to argue to juries in criminal cases that a defendant who has confessed must be guilty because why else would he confess? Why would an innocent person confess to a crime he did not commit? This argument has common sense appeal yet we now know that there are some innocent people who do confess to crimes they did not commit despite the protections that *Miranda* and the

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[9] http://www.innocenceproject.org/causes/false-confessions-admissions/ (last checked July 12, 2016)

[10] Id.

[11] The First 1600 Exonerations, The National Registry of Exonerations, http://www.law.umich.edu/special/exoneration/Documents/1600_Exonerations.pdf,, see Table 5 at 11.

United States Constitution afford individuals suspected of a crime.

How is it that in a post-*Miranda* American criminal justice system there are still so many false confessions? The next three chapters of this book, chapters 3, 4 and 5 begin to provide answers to that question. As China adopts more effective legal reforms to curb police abuse during interrogation, this question will become more and more relevant to the Chinese criminal justice system as well. The conclusions of the seven authors of these three articles, each of whom is a leading expert in the field of psychiatry or criminal justice, are based upon an aggregation and analyses of all the relevant studies in the field and appear to have universal application.

Modern criminologists have the benefit of hundreds of psychological and social science studies of interrogation methods and their effectiveness in both the laboratory and in the field. They also have the benefit of being able to study all of the recorded cases of false confessions leading to wrongful convictions. These studies provide important answers to the question of how and why an individual would confess to a crime he did not commit. They also help us to understand which interrogation methods are likely to produce a true confession and which are more likely to produce a false confession.

As these three articles make clear, there are two categories of reasons why some interrogations lead to false confessions. First, some common interrogation techniques, while effective at obtaining true confessions also have a high risk of eliciting false confessions. Second, some individuals, because of their age, mental ability or personality have characteristics that make them particularly vulnerable to manipulation, especially by authority figures, and those traits make them more likely to tell interrogators what they believe the interrogators want to know, regardless of whether it is true or not.

These findings challenge the common sense conclusion that no innocent person would ever confess to a crime they did not commit. Because we know that that apparent common sense principle is simply not true for every case, we owe it to ourselves to understand as best we can how an innocent person may come to confess to a crime he did not commit.

As to interrogation methods, the most widely taught method of interrogation in the United States is commonly known as the Reid technique, named for John Reid, a Chicago detective who, along with Fred Inbau, developed the method in the 1950's. Over the more than sixty years since Reid and Inbau first developed the technique, psychologists, sociologists and criminologists who have studied the technique have found several features of it to be troubling. These concerns are fully described in Chapters 3 and 4.

First, the purpose of the interrogation under the Reid technique is not to find out what happened or what the person interrogated knows about what happened. The Reid technique is taught as a method to obtain a confession from the suspect that can be used in court as evidence of guilt. Because this is the goal of interrogation it is intended to be used only on suspects that the interrogator believes is guilty. Herein lies the first problem with his method.

How can the investigators know that the suspect is, in fact, guilty, when the investigation has not been completed? As it turns out, multiple case studies and laboratory experiments demonstrate that the basis for the investigator's initial determination of guilt can range from: a) an unsubstantiated hunch; b) unscientific methods of assessing the suspect's credibility; or c) an analysis of the evidence already collected. Numerous studies have determined that individuals, even experienced police, judges and prosecutors, are no better at determining whether someone is telling the truth than a coin toss. Facial movements, sweating, failure to make eye contact, may all correlate with nervousness and anxiety but an innocent person may feel just as anxious as a guilty one when being subjected to police interrogation. In sum, the premise of the interrogation, that the suspect is certainly guilty, is problematic at best.

Second, the Reid technique taught to police interrogators is intended to apply psychological pressure to someone placed in a vulnerable position. These methods include placing the suspect in an environment designed to maximize isolation, helplessness and psychological pressure; asserting that the interrogators already know what happened and just need the suspect to confirm it, sometimes even using false statements about evidence in the possession of the police like fingerprints or DNA falsely connecting the suspect to the crime; controlling the interrogation to minimize protestations of innocence and maximize admissions of guilt; minimizing the moral

culpability of the criminal offense, offering the suspect excuses like acting in self-defense or with other justification or inducing the suspect to place primary blame on an accomplice while minimizing his own role; and suggesting implicitly that the defendant will be treated more leniently if he confesses and more severely if he refuses.

The Reid technique has proven to be remarkably effective in helping police obtain confessions and its ethical compromises have been justified on the ground that it should only be used against the guilty, a demonstrably dubious supposition. Unfortunately, the Reid technique seems to work as well on the innocent as it does on the guilty and if we accept the premise that it is not possible, pre-investigation, to know whether the suspect is guilty, then the moral justification for Reid's accusatory approach falls away.

Another contribution made by social scientists is the now well accepted principle that some individuals – because of their age, mental or physical disability, personality traits and other factors – are even more susceptible to being manipulated by people in positions of authority than the adult of average intelligence. As the authors suggest, special care must be given to ensure that such individuals are not misled into falsely confessing to a crime they did not commit. That said, studies are replete with examples of adults of average or above average intelligence who have also been manipulated into falsely confessing to crimes they did not commit. In other words, psychologically coercive methods should not be used at all but special care needs to be taken when questioning a member of a particularly vulnerable group.

Finally, as Chapters 3, 4 and 5 make clear, the consequences of a confession are profound. Once given, it is extremely difficult to persuade the police, prosecutor, judges or jury that the confession was the product of coercion or deception. It is simply too counterintuitive for the average person to accept that an innocent person would admit to participation in a heinous offense unless he was, in fact, guilty. Moreover, confessions have even been shown to taint other, supposedly objective, scientific evidence, such as fingerprint comparisons. In experiments, fingerprint examiners have been shown to be influenced by the knowledge that the suspect has already confessed, making it much more likely that they will find a match, even contradicting their previous testimony.

In our workshops in China, we screened a documentary film called *The Central Park Five*, which tells the story of how five teenagers confessed to a violent sexual assault that took place in Central Park in New York City even though each of them was innocent. How could this happen? With their confessions as the primary evidence against them, each of the five was convicted and served prison sentences of five to twelve years before the true perpetrator came forward and admitted that he alone committed the sexual assault. DNA evidence preserved from the scene of the crime confirmed that individual's guilt and exonerated the other five, although unfortunately, it was not until after they had served their entire sentences.

In Chapter 5, John Jay College Professor Saul Kassin explains how the defendants in the Central Park Five case came to confess to their participation in a brutal crime even though they were completely innocent. Professor Kassin explains how innocent people can be manipulated by clever interrogators into admitting to participation in a criminal offense that, in fact, they did not commit.

Reading Chapters 3, 4 and 5 can certainly cast doubt on one's confidence in any criminal justice system to achieve the correct balance between allowing the police to use non-coercive, non-manipulative methods to obtain confessions while, at the same time, preventing abuses of authority and false confessions.

Fortunately, in Chapters 6 and 7, we have a real life model, drawn from the experience of police in the United Kingdom, as to how a proper balance may be achieved. Since 1992, when the United Kingdom began training police officers in a new method of interrogation, <u>there has not been a single reported case of a false confession</u>.

As noted above, The United Kingdom has had its own struggles with regulating police conduct during interrogation. In Chapter 6, Dr. Andy Griffiths, former Detective Superintendent, Sussex Police, United Kingdom, now Consultant & Lecturer & Research Fellow at Portsmouth University, and one of the primary trainers of interrogation methods for the United Kingdom police, traces the history of police interrogation in the United Kingdom. In the 1970's and 1980's, the United Kingdom experienced a series of high profile wrongful conviction cases, two of which were related to terrorist bombings. In 1976, in the Guildford Four case, four innocent men spent over fourteen years in jail for a crime they did not commit, and their confessions were critical to their convictions. Their convictions were overturned in 1989. In 1975, six men were convicted of setting off two bombs in Birmingham that killed 21 people

and injured 182 more. In 1991, their convictions were overturned, in part, because their confessions were found to be false.

These high-profile wrongful conviction cases and the public campaigns to overturn them led the United Kingdom to convene a reform commission in 1981 and to adopt significant changes to its criminal procedure law. The result was the promulgation of the Police and Criminal Evidence Act of 1984 (PACE). Among the key provisions of the PACE Act were:

1. A 96-hour time limit on police detention (with reviews at 6 hour intervals);
2. Set periods for rest and meals;
3. Free access to an independent legal advisor;
4. The right to be accompanied by a legal advisor during the interrogation;
5. All detention to be overseen by an independent police officer;
6. Free access to a medical practitioner;
7. A requirement that all interrogations be audio recorded in their entirety;
8. Interrogations must be conducted after "cautions" (similar but not identical to *Miranda* warnings) are given.

As it turned out, these reforms were necessary but not sufficient to curb abuses during police interrogation. Because police interrogations were recorded, it made it easier for researchers, as well as defense attorneys and judges, to see how interrogations were actually carried out. In several early cases, police interrogators used techniques that were similar to aspects of the Reid technique. For example, in October 1992, in the case of Thomas Heron, a 23-year old man who had confessed to the murder of a 7-year old girl, the police had overstated the evidence, repeatedly asserted their belief that Heron was guilty and misleadingly suggested that it was in his interest to confess. The court found these techniques were coercive and excluded the confession. As a result, Heron was acquitted. In other cases, British courts found that the following police conduct was coercive and excluded confessions where a) the police misled the suspect to believe that they had identified his voice on an incriminating recording; b) or misled the suspect into believing they had found his fingerprints on incriminating evidence; or c) had merely shouted at the suspect and accused him of lying. From the police perspective, these cases underscored the lack of appropriate training for police officers in how to conduct ethical and effective suspect interviews. In addition, court decisions were being made on a case-by-case basis and police interrogators lacked clear guidance

about how to conduct interrogations.

After more research and study, the Association of Chief Police Officers developed a new interrogation technique which they called PEACE, which stands for the following stages of an open-minded, evidence gathering interview process:

1. Planning and preparation;
2. Engage and explain;
3. Account;
4. Closure;
5. Evaluation.

The fundamental approach of this model is different than the Reid technique. Whereas Reid pre-supposes that the defendant is guilty and that the goal of interrogation is to obtain a confession that can be used as evidence in court, the PEACE method does not presume guilt but rather is an open-minded, evidence gathering model. The goal is to obtain as much information as possible and to use known evidence to test the veracity of the account provided by the suspect. Reid is sometimes called method an "accusatory interrogation" whereas PEACE is sometimes called "evidence-gathering" interrogation method.

The breakthrough suggested by Dr. Griffiths and the British experience is that changing the culture of the police requires more than changing the law. One must change the very nature of interrogation and train police interrogators in methods that are both ethical and effective. In Chapters 6 and 7, Dr. Griffiths and his co-author, Dr. Rebecca Milne, explain in detail the process of training police interrogators in the United Kingdom and the iterations of research and reforms adopted by the United Kingdom to maintain their record of effectively eliciting accurate confessions while avoiding false confessions.

Taken together, the seven chapters presented in this book reflect the most current thinking in the United States and the United Kingdom on how to achieve ethical and effective police interrogation, respecting the fundamental dignity of the individuals under suspicion, while at the same time, enhancing the truth-seeking function of interrogations. This learning is the product of many decades of experience, much of it based upon the mistakes of earlier generations. If the many lessons of these chapters can be summed up in a few words it would be that there must be a holistic approach to reform. The promulgation of legal provisions that set clear guidelines on what is and is not acceptable is critically important. As noted at the outset of this Introduction,

however, just passing new laws cannot solve the problem. There must also be effective processes, such as audio and video taping and the presence of counsel, to ensure that the rules are followed. There must also be effective remedies in the event that the police did not follow the rules. In addition, we must give our police interrogators the tools they need, through training, to do their job more ethically and more effectively. We must set aside coercive strategies designed to elicit confessions, regardless of their reliability or truthfulness. Rather, we must develop a culture and a skill set that teaches police interrogators to use evidence and fair processes to elicit as much information as possible from every suspect and every witness while, at the same time, respecting their fundamental right to dignity. Moreover, we must continue to use empirical research methods to understand what works and what doesn't and enact reforms accordingly. This will not only lead to more accurate investigative outcomes but will enhance the public's trust in the police and the government that employs them.

Preface

Foreign Guides on Interrogation Methods and the Prevention of Coerced Confessions

By Fan Chongyi

Upholding and promoting the concept of due process of law is a fundamental requirement of criminal justice. Conflicts between the prosecution and defense are most concentrated during the investigation stage of a criminal case for it is during the investigation that the rights and interests of the suspect are most vulnerable. For that reason, the imperative to uphold the due process of law is greatest during the investigation of a criminal case. Investigation practices and theories and such as interrogation methods and procedures and ways to prevent extracting confessions through torture are important subjects when it comes to ensuring due process in the conduct of investigative procedures. Research scholars, Ms. Amy (Yuan) GAO and Ms. Chao LIU, at the U.S.-Asia Law Institute at NYU School of Law, have collected and translated seven classic English language articles, covering the issues of police interrogation, police torture during interrogation, coercion and false confessions in the United States and the United Kingdom. These are, without a doubt, important translated works on how to employ investigative procedures in a proper and legitimate manner. This book may contribute to the current criminal justice reforms and criminal justice practices in China by serving as important reference material. Since New York University Professor Ira Belkin has discussed the contents and structure of the book in great detail in his introduction, the author will not further elaborate.

The origin of the concept of due process of law can be traced back to England. The Magna Carta, signed in 1215, was the first to gave an unforgettable articulation of the concept: “No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.” The Magna Carta, however, did not clearly articulate the concept of “due process” of law. The United States Constitution established for the first time that the concept of due process of law is a fundamental doctrine. The fifth amendment of 1791 and the fourteenth amendment of 1868 both provide that “No person shall …, be deprived of life, liberty, or property, without due process of law.” This is the “Due Process Clause” which is now well known throughout China and the rest of the world. Professor Martin Golding, an American legal philosopher, has relied upon two fundamental notions of “natural law” to expand the definition of due process of law to include nine parts: 1. No man should be judge in his

own cause; 2. The dispute settler should have no private interest in the outcome; 3. The dispute settler should not be biased in favor of or against a party; 4. Each party should be given fair notice of the proceedings; 5. The dispute settler should hear the argument and evidence of both sides; 6. The dispute settler should hear a party only in the presence of the other party; 7. Each party should be given a fair opportunity to respond to the arguments and evidence of the other party; 8. The terms of settlement should be supportable by reasons; 9. The reasons should refer to the arguments and evidence presented.

Interrogation of a suspect for the purpose of a criminal investigation is an important procedure in a criminal case. Interrogation refers to the process investigators use to question a suspect in a criminal case by following a particular order, and a particular set of procedures and steps. Interrogation involves a combination of principles, rules and methods for questioning suspects. Adherence to the concept of due process of law in interrogation means that in order for an interrogation to be proper and lawful the interrogation procedure must follow the core principles of fundamental procedural justice. In other words, a legitimate interrogation process must emphasize the protection of human rights, the vindication of procedural rights, follow a transparent process, and demonstrate all of the characteristics of justice and the fundamental concepts of due process. At the investigation stage, the tension between the power of the state and the rights of the individual is most intense. Therefore, there is an even greater need to regard procedural due process as a fundamental and core concept. The pursuit of due process during investigation should be a value that permeates the process from beginning to end. Based on the earlier discussion of the importance of the universal application of due process of law, combining the intrinsic characteristics of the interrogation processes, the author believes that the minimal standards of proper interrogation procedure should include the following three aspects: First, the prosecution and the defense should enjoy an “equality of arms.” The investigation stage is where deterring crime and protecting human rights, the two goals of the criminal process, are most in conflict with each other. Therefore, this is when the suspect’s rights are most at risk and there is an even greater need to carry out and follow the procedural principle that “the prosecution and the defense are equal before the law and the judge is impartial.” In doing so, the process empowers the defense and the prosecution to fully play their adversarial roles, ensures that the balance of the adversarial structure does not tilt toward the government, and that justice is achieved. To realize the goal that the defense and the prosecution are armed equally at the investigation stage, we need to safeguard the suspect’s right to be informed and make sure that third parties such as lawyers are able to play an effective role during investigation.

Second, there should be robust judicial remedies if violations and abuses occur.

The principle of providing judicial remedies (for official misconduct) during investigation is the guiding principle to regulate investigation and interrogation by bringing it into the ambit of the judicial process. Providing judicial remedies ensures that investigation and interrogation are part of the procedural process in a true sense. This is where we draw the bottom line that investigation and interrogation are not reduced to administrative punishment. It is an important way to oversee the legality and validity of investigation and interrogation and a critical guarantee that a suspect's fundamental procedural rights are not violated and, if they are, there will be a remedy.

Third, there is the privilege against self-incrimination. The doctrine that a person shall not be compelled to incriminate himself is a manifestation of the respect and guarantee for the principle that the suspect has the power to make decisions for himself. Upholding this principle is an important precondition for the legality and truthfulness of a suspect's statement in response to interrogation. The privilege against self-incrimination is inextricably related to the admissibility of a suspect's confession as well as the investigative approach that emphasizes starting with "material evidence before seeking a confession," "the primacy of physical evidence" and "taking objective evidence as the center" of a case. Art. 50 of the Chinese Criminal Procedure Law of 2012 explicitly provides that "[i]t is strictly prohibited to extort confessions by torture or to collect evidence through threats, enticement, deception or other unlawful means, or compelling anyone to incriminate himself." In quite a number of western countries governed by the rule of law, the direct embodiment of the privilege against self-incrimination is the implementation of the right to silence as manifested in the famous Miranda warnings. All the above features should be considered as the minimum due process standards for police interrogations. If any of those elements is missing, the interrogation is improper and a violation of due process. The 2012 Criminal Procedure Law (Amended) successfully shifted the goal of criminal prosecution from a single-minded one to a dual one by explicitly adding the fundamental principle to "respect and protect human rights" through Article 2. The Criminal Procedure Law ("CPL") now emphasizes both fighting crime, and, at the same time, respecting and protecting human rights. The Third Plenary Session of the 18th Chinese Communist Party Central Committee explicitly mandated "improving the judicial system's protection of human rights." (Decision of the Central Committee of the Communist Party of China on Some Major Issues Concerning Comprehensively Deepening the Reform in November 2013). Indeed, the privilege against self-incrimination follows the guiding principle of "respect and protection of human rights," and is a deterrent to the use of torture and other illegal methods to collect evidence, and is a safeguard of the voluntariness and legality of a confession. We can see from the legislative background of the amended CPL and the arrangement of relevant articles of the CPL that the goals of the CPL are to deter the use of coercion and other unlawful means to obtain statements from suspects, defendants, and even witnesses and victims, and to ensure the voluntariness of their

statements, to protect their legal rights and interests and to achieve justice through the judicial system. This doctrine prohibits collecting evidence through coercive methods and protects any person, especially a defendant or a suspect, from being compelled through torture, violence or threats or other unlawful means, to prove his own guilt or to make incriminating confessions or statements. Confessions elicited from suspects and defendants through illegal methods such as torture and witness testimony and victim statements collected through illegal methods such as violence and threats should be excluded. The exclusionary rule is a remedy for a violation of the privilege against self-incrimination and ensures that the doctrine is put into judicial practice in reality and works together with the privilege as a strong fortification to shield suspects and defendants and to protect their rights. With the adoption of an exclusionary rule in recent years, China has created a scientific structure through the new 2012 CPL to provide a cure for the perennial problem of police extracting confessions through torture. This structure is composed of three measures: 1) establishing the privilege against self-incrimination in the CPL; 2) introducing the exclusionary rule; 3) requiring simultaneous audiotaping and videotaping of interrogations in their entirety. In sum, the historical significance of China's establishment and implementation of the exclusionary rule cannot be overstated. It represents a "great leap forward" in the development of criminal evidence rules.

China's 1996 amendments to the Criminal Procedure Law established the basic rights of a suspect during interrogation, including the right to a defense, the right to retain counsel for legal advice, the right to refuse to answer questions unrelated to the case under investigation, the right to raise complaints, the right to ask the investigators to recuse themselves, the right to verify the interrogation transcripts, and the right of a juvenile to request the presence of a legal guardian during interrogation. While retaining all of these rights, the 2012 amendments to the Criminal Procedure Law also set out some new provisions which demonstrate increased concern for the rights of suspects and defendants, including: 1) Permitting defense attorneys to enter a case and represent the suspect at an earlier stage of the case. The 2012 CPL made significant changes to the rules concerning defense counsel. The most significant change is that defense attorneys are now allowed to enter a case at an earlier stage as a suspect's advocate. Specifically, as a result of the 2012 amendments, a suspect now has a right to retain a defense attorney after the first session of interrogation or on the first day when he is subjected to a compulsory measure, such as detention. 2. The law provides further regulation as to when and where interrogations are to be conducted. The 2012 CPL provides that "after a criminal suspect is transferred to a detention center for custody, the investigators shall conduct the interrogation of the criminal suspect inside the detention center." "If it is necessary to detain or formally arrest a criminal suspect involved in an extraordinarily significant or complicated case, the duration of interrogation by summons or forced appearance may not exceed 24 hours." "During the

period of interrogation by summons or forced appearance, the meals and necessary rest time of the criminal suspect shall be ensured."[1] 3. Establishing the requirement of audiotaping and videotaping of interrogations in their entirety. In November, 2005, the Supreme People's Procuratorate issued the "Provisions on Audiotaping and Videotaping of Interrogations in Their Entirety During the Interrogations of Criminal Suspects Conducted by the Procuratorates (provisional)" and in December, 2011, the Supreme People's Procuratorate issued a second directive specifically requiring electronic recording of interrogations in all cases, in their entirety, in all aspects, with no exception. The 2012 CPL further made it clear in Article 121: When interrogating a criminal suspect, the investigators may audiotape or videotape the interrogation process; for cases involving a crime punishable by life imprisonment or death penalty or any other significant crimes, investigators shall audiotape or videotape the interrogation process. Investigators should audiotape or videotape the interrogations in their entirety and ensure the integrity of the video tape and audio tape. 4. New developments in the rules of evidence and the system of evidentiary rules. Under the influence of the confession-based model of investigation, which emphasizes "first obtain a confession then gather evidence," criminal investigators have long considered eliciting a confession to be the breakthrough point to solve a case. Thus, it was common practice for investigators to obtain confessions through illegal methods such as torture. To eliminate this persistent abuse in the administration of justice, the new CPL explicitly provides that no person shall be compelled to incriminate himself and confessions obtained from suspects and defendants in criminal cases through illegal methods such as torture should be excluded. On Oct. 9, 2013, the Supreme People's Court issued an "Opinion on Establishing and Improving the Working Mechanism for the Prevention of Miscarriages of Justice." Article 8 reiterates that "confessions obtained from defendants through illegal methods such as the use of torture, freezing, starving, excessive exposure to the sun, or conducting interrogation when the suspect is exhausted, all should be excluded." As far as the development of democracy and rule of law in China is concerned, the establishment of the exclusionary rule has historical and practical significance. The public is concerned with the practice of extorting confessions through torture, which is prohibited by the law but which remains a persistent problem and which sometimes results in wrongful convictions. From the Du Peiwu Case in Yunnan to the Zhao Zuohai Case in He'nan and the She Xianglin Case in Hubei, the root cause for wrongful convictions in the recent decade is the persistent abuse of extorting confessions through torture. If we are not determined to solve this problem, public confidence in the ministry of public security, judicial institutions and the governing party will be compromised. 5. There is more protection for the suspect's right to be informed. The 2012 CPL provides that the investigation authorities should inform a

[1] Translator's note: interrogation may continue after the first 24 hours if the defendant is held pursuant to criminal detention.

criminal suspect of his right to retain legal counsel at the time of the first session of interrogation or when he is first subjected to a compulsory measure such as detention. The investigators should also inform a criminal suspect during interrogation that according to the law he will receive lenient treatment if he truthfully confesses to his crime. Article 82 of the Supreme People' Court's judicial interpretation on the application of the CPL provides that if the transcripts for the first session of interrogation failed to record that the subject of the interrogation had been advised of his rights and relevant legal requirements, the transcripts are only admissible when amended or a reasonable explanation has been given. Otherwise, the confession cannot be used as a basis for conviction. The People's Procuratorates Criminal Prosecution Rules (provisional)2 issued by the Supreme People's Procuratorate in 2012 stipulates that during interrogations, a criminal suspect should be informed that the interrogations will be audiotaped and videotaped contemporaneously in their entirety. This should also be reflected in the audiotape and videotape and memorialized in the transcripts. When conducting an interrogation, investigators should advise a criminal suspect of his rights and obligations and allow him to make admissions and explanations. If investigators do not follow the legal requirements to advise suspects of their rights, to the extent that it has affected the suspects' exercise of his rights, a people's procuratorate should exercise its oversight power and correct such practices. The Provisions on the Procedures for Handling Criminal Cases by Public Security Organs issued by the Ministry of Public Security in 2012 has similar provisions.

This book has several distinctive features and offers many benefits. It is expected that the publication of this book will have significance for current practices in criminal justice as well as for future judicial reforms in China in at least the following respects. First, it helps us understand and learn from the successful experience from the United States and the United Kingdom regarding how the police there conduct interrogations and how they prevent and deter the practice of extorting confessions through torture as well as the origin and development of those processes. As a valuable reference book of foreign experience, it expands our horizons and provides a broader perspective on the global experience. Second, the selections included in the book are both classic and authoritative articles in the field. The original authors come from a

[2] Editor's note: In China, the Supreme People's Court, the Supreme People's Procuratorate and the Ministry of Public Security all have the authority to issue interpretations on the CPL. The People's Procuratorates Criminal Prosecution Rules (provisional) issued by the Supreme People's Procuratorate is the SPP's interpretation of the 2012 CPL which has a binding effect on the procuratorates. The Ministry of Public Security issued their own interpretation of the 2012 CPL, the Provisions on the Procedures for Handling Criminal Cases by Public Security Organs which has a binding effect on the police.

wide range of backgrounds, including prominent professors, expert practitioners, legal scholars, and psychiatrists. The articles include materials from the United States and the United Kingdom, representing the most current and authoritative product of their research. Third, the book comes at a timely moment since China has, in recent years, discovered several cases of innocent defendants who had been wrongly convicted. The the root cause of those wrongful convictions was that the police used interrogation procedures that were improper and unlawful. Police often resorted to extorting confessions through torture. At this moment, the goal of judicial reform in China is to "ensure fairness and justice for litigants in every judicial case." Therefore, it is critical to draw on foreign theories and experience as a reference for China.

The project undertaken by the U.S.-Asia Law Institute at New York University School of Law has great significance. It is a successful cooperation between Chinese and foreign academic institutions. The two researchers at the USALI, Ms. Yuan GAO and Ms. Chao LIU, have revised the translations several times and worked very hard to complete this project. I would like to express my appreciation for their effort in contributing to the flourishing of Chinese and foreign law studies. I hope they can share more academic achievements with us in their future academic careers.

FAN Chongyi

August 15, 2016

Preface

By Jerome A. Cohen

Ira Belkin's learned and comprehensive Introduction to this important volume appropriately emphasizes that the official interrogation of suspected offenders is a universal problem. In seeking to strike the right balance between the state's need for effective criminal investigation and its need to protect the rights and individual dignity of criminal suspects, every country can benefit from the experience of others. The problems confronting official investigators tend to be increasingly similar. The same can be said about the legal standards that are to guide and restrict their search for solutions to their problems, whether those standards are articulated in national constitutional and legislative prescriptions or in the international human rights treaties that have come to bind even the world's most powerful governments. The United Nations Convention Against Torture is the most prominent example of the emerging consensus concerning restrictions on the process of interrogation, restrictions that China, the United States and most other governments have agreed to accept in the exercise of national sovereignty.

The challenge is no longer so much one of principle but of practice. How can the relevant commonly-accepted principles of the world community be effectively implemented? The sharing of different national experiences has long been a stimulus to further progress in this field. Indeed, as long ago as the 16th century, a Portuguese religious missionary who was among the early Western visitors to China was favorably impressed by the interrogation of suspects conducted by local magistrates. To be sure, those local representatives of imperial power often resorted to torture when questioning accused and witnesses. Yet what impressed the foreign visitor, whose familiarity with criminal justice in his own country was marked by the infamous Inquisition, was that the Chinese interrogation process took place not in secret, unregulated torture chambers, but in the public quarters of the magistrate's "yamen" (court) and in accordance with detailed norms that had been legislated to restrict the application of physical coercion.

By the start of the 19th century, however, the situation in the West had begun to evolve under the influence of the two 17th century English revolutions and the 18th century American and French revolutions, with their celebrations of the "rights of man". Thus, at a time when Sino-Western trade had begun to expand, leading inevitably to occasional disputes and Chinese prosecution of English, American and other sailors and traders, criminal justice as dispensed by the Central Realm, which had not yet

undergone changes corresponding to those in the West and continued to authorize torture of suspects, no longer appeared to be comparatively humane in Western eyes. Indeed, in the years before the Opium War of 1839, incidents of Chinese torture of defendants as well as other unfair judicial practices provided grist for the mills of those Englishmen who were seeking to justify the use of military force to compel the opening of China to freer foreign trade. To be sure, Western nations had not succeeded in abolishing torture of suspects, but some progress was being made, and Western legal ideology had begun to condemn the practice.

Fortunately, China also came to feel the winds of reform, and in the years before the Revolution of 1911 the imperial government took steps to terminate its traditional authorization of torture. Ever since then, for over a century, succeeding Chinese governments have struggled to vindicate the promise of this major reform in practice. As Professor Belkin points out, the People's Republic of China joined this historic quest when in 1979 it promulgated its first codes of criminal law and criminal procedure and formally banned the use of torture.

It is the sincere hope of the US-Asia Law Institute of New York University Law School that our ongoing cooperation with China will help stimulate further progress toward the actual abolition of this heinous abuse in both our countries.

Acknowledgements

In this volume, we address the challenges of regulating police interrogation. Every country's criminal justice system has struggled with the challenge of how to regulate police interrogation to eliminate police torture, coercion and false confessions, on the one hand, while still giving police sufficient leeway to investigate criminal offenses, on the other. During a series of workshops organized in various Chinese cities during 2013 and 2014, the U.S.-Asia Law Institute at New York University School of Law brought together academic experts and practitioners from all over the world to share their experience and expertise about the subject of police interrogation. We believe the conversations that were fostered during those workshops are important and we wanted to share what we learned with a wider audience. To that end, we have produced the volume of materials about police interrogation.

We have selected some of the workshop materials for this volume and also included articles we did not use during our workshops or trainings but recommended later by our experts. It goes without saying that a project of this magnitude was a successful collective effort by those who are truly passionate about the subjects and want to make things better by sharing practical experience and their own research.

We would like to express our sincere gratitude and appreciation to experts who travelled from across the world to join us in China: Hon. Jed Rakoff, United States District Court, Southern District of New York, Professor Jaw-Perng WANG of National Taiwan University, Professor Allison D. Redlich of George Mason University, William Leahy, Director of the New York State Office of Indigent Legal Services, Professor David Dixon, Dean of the University of New South Wales Law, our colleague Professor Andrew Schaffer at NYU School of Law, Hon. Marty Marcus, New York Supreme Court, Bronx County, Dr. Andy Griffiths former Detective Superintendent, Sussex Police, United Kingdom, now Consultant & Lecturer & Research Fellow at Portsmouth University, Carole (Pei-yu) SU, Chief Prosecutor at the Taiwan Shi-Lin District Prosecutors' Office, and Ming-woei CHANG, Associate Professor of Law at Catholic Fu Jen University School of Law. Several experts not only gave outstanding lectures at the workshops, but also played vital roles in the mock suppression hearings that were highlights of our workshops.

We also want to thank the contributing authors for lending us their work and for their support: our colleague Professor Stephen Schulhofer at NYU School of Law,

Professor Saul Kassin at John Jay College, Professor Deborah Davis at University of Nevada, Reno, Professor Richard A. Leo at University of San Francisco.

We owe special thanks to our partners in China. Space does not permit us to name each of the participants in our exchanges but we would be remiss if we did not thank the principal individual and institutional partners without whose support and friendship we could not have carried out this project and produced this volume. We benefitted tremendously from their knowledge, experience: Dr. XIE Pengcheng, Vice Chair of the Institute of Procuratorate Theories of the Supreme People's Procuratorate (SPP); Professors ZHAO Binzhi WANG Xiumei at Beijing Normal University; ZHANG Pinze at China University of Public Security; President JIA Yu and his colleagues at Northwestern University of Political Science and Law; Professor ZUO Weimin at Sichuan University; Professor LIU Fangquan at Fujian Normal University Law School;

We would not have been able to do successfully complete this project this without the leadership, support and active participation of Professor Jerome Cohen, the founder and faculty director at USALI. The research scholars at the USALI have done tremendous work in putting the program together and we are grateful for their contributions: Dr. Yu-Jie CHEN, Ms. Heather HAN, Dr. Ling LI, and Ms. Chao LIU. Ms. Chao LIU and Ms. Yuan GAO worked tirelessly to provide an excellent and accurate translation of all of the articles in this book. We also wish to thank out support staff, including our program managers, Trinh Eng and Eli Blood-Patterson, our program assistants Melissa Lefkowitz and Alexis Sanborn, and our intrepid interns, Jake Clark, Jean Lee, Jason Zhu.

Finally, although we could not include it in this volume we are grateful to Ken Burns, Sarah Burns and David MacMahon, who produced the film Central Park Five, the story of how five innocent teenagers spent their youth in jail because of false confessions extracted during police interrogations. They gave us permission to put Chinese subtitles on the film and screen it for non-commercial purposes in China where it made a deep impression on Chinese audiences. Special thanks to Yusef Salaam, one of the Central Park Five who met with us to share his story. The film and the case inspired us to do what we can to make a difference to prevent similar injustices.

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Credits

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Chapter 1 Some Kind Words for the Privilege against Self-Incrimination

Stephen J. Schulhofer[1]

It is hard to find anyone these days who is willing to justify and defend the privilege against self-incrimination. The Self-Incrimination Clause is probably our most schizophrenic amendment. It has enjoyed more unqualified, reverential praise than any other amendment, the First Amendment included. It has been described as one of the cornerstone "principles of a free government,"[2] as "one of the great landmarks in man's struggle to make himself civilized,"[3] and as "a symbol of America which stirs our hearts."[4] Yet these rhetorical encomia coexist with an academic and scholarly literature which is almost unremittingly critical of the Amendment and filled with calls to amend it or just repeal it.

A long line of eminent critics, from Jeremy Bentham through Wigmore,[5] McCormick[6] and others, have shown that the privilege is a serious obstacle to the truth-seeking process, and that it denies us the opportunity to use an orderly judicial proceeding to question the one person most likely to know the facts of the case.[7] So

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[2] Boyd v. United States, 116 U.S. 616, 632 (1886).

[3] Murphy v. Waterfront Comm'n, 378 U.S. 52,55 (1964), quoting ERWIN N. GRISWOLD, THE FIFTH AMENDMENT TODAY, THREE SPEECHES 7 (1955) [hereinafter GRISWOLD].

[4] GRISWOLD, *supra* note 2, at 73.

[5] John Wigmore, *Nemo Tenetur Seipsum Prodere*, 5 HARV. L. REV. 71, 87 (1891).

[6] Charles T. McCormick, *Some Problems and Developments in the Admissibility of Confessions*, 24 TEX. L. REV. 239, 277 (1946).

[7] 5 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 230-31 (1827) [hereinafter BENTHAM]; 4 JOHN WIGMORE, EVIDENCE § 2251, at 3102 (1st ed. 1905).

before we celebrate the Fifth Amendment, we have to consider whether this great and revered provision of the Bill of Rights serves any legitimate purpose in a modem system of law enforcement and civil liberties.

I will review very briefly the history of the privilege and its contemporary scope. I will then turn to the question of what values it might protect and to the difficulty that so many modern scholars have found in developing a coherent rationale for it. I come to several uncharitable conclusions - not about the privilege itself, but about the academic and judicial criticism, which purports to be rigorous but instead is unrealistic and riddled with inconsistency. The privilege itself is eminently sensible and even essential for elementary fairness. We should keep it and strengthen it.

I. THE HISTORICAL BACKGROUND

The development of the privilege against self-incrimination was complex and, in its earliest phases, quite obscure.[8] One of the important roots of the privilege can be traced to practice in English ecclesiastical courts - the Court of High Commission and the Court of Star Chamber -- down to the mid-seventeenth century. These courts, with increasing frequency toward the end of that period, used the device of the oath *ex officio* to examine clergymen or others suspected of religious and political crimes. The essence of this procedure was that before any evidence of guilt had been obtained against the suspect, he could be required to express opinions on a range of matters and perhaps convict himself, of heresy for example.

Opponents of this procedure invoked the maxim *nemo tenetur seipsum prodere* (no man is bound to accuse himself). The principle was itself of questionable legal force at the time, but at most it meant only that no one should be obliged to make the first accusation against himself. There was seemingly no objection to requiring testimony under oath from someone, once he had been properly accused.

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[8] For a thorough exploration of the topic, see LEONARD LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION (1968); 8 JOHN WIGMORE, EVIDENCE § 2250 (McNaughton, rev. 1961). The capsule discussion in the text is drawn from these sources.

Disputes over the *ex officio* oath were caught up in the larger debates over the jurisdiction of the ecclesiastical courts and the political and religious upheavals of the seventeenth century. When the Courts of High Commission and Star Chamber were abolished in 1641, one provision of the statutes forbade ecclesiastical courts from using the ex officio oath to require answers as to penal matters. By the end of the seventeenth century, this clause came to be interpreted as forbidding the ecclesiastical courts from compelling answers from the accused, even after a proper accusation had been obtained from other sources.

All this had nothing to do with procedure in the common law courts, except that compulsory examination of the accused had acquired a bad name. Down to the early 1600s, there was no indication of a privilege not to be questioned in common law criminal cases. With the growing opposition to the ex officio oath, however, accused persons began asserting the *nemo tenetur* principle in common law trials, and judges increasingly came to acknowledge its validity. By the late 1600s it was generally accepted in common law courts that defendants could not be questioned against their will and that other witnesses could not be compelled to give answers that would incriminate them.

By this time, too, other developments had led the common law courts to disqualify as witnesses not only the accused but all other party litigants and indeed any witness with an interest in the cause. Thus, the accused could not be forced to testify and could not testify even when he or she wished to do so. The privilege against self-incrimination remained important primarily as a barrier to compulsory pretrial examination and to compulsory self-incrimination by nonparty witnesses in both civil and criminal cases. When the absolute disqualification of party witnesses was abolished by American and English statutes in the mid-1800s, the accused regained the *right* to testify, and the privilege against self-incrimination once again became important as a guarantee that the accused could not be *forced* to testify at her own trial.

II. THE SCOPE OF THE MODERN PRINCIPLE

To understand the modern significance of the privilege we have to start with the background principle that applies in its absence. The power of government to compel

testimony has been considered essential to the functioning of courts, essential to orderly dispute resolution. The defendant's right to compulsory process for obtaining witnesses in her favor is itself protected by the Bill of Rights, and compulsory process is equally essential for effective prosecution and for effective pursuit of civil claims, legislative inquiries and the like. So the general rule is that the government can legitimately compel witnesses to say what they know, subject only to narrowly limited privileges and exceptions.

The Fifth Amendment is the most famous of the exceptions. Its terms are narrow: "[N]or shall [any person] be compelled in any criminal case to be a witness against himself. . . ." As written, the Amendment has four built-in limitations -- it protects only against incrimination (use in a criminal case), the incrimination must result from *testimony* (being a witness), the testimony must result from *compulsion*, and the testimony must lead to *self*-incrimination. Let me review the meaning of these limits and some of their applications.

1. Testimony. Suppose the police obtain a valid search warrant and use it to take a murder weapon locked in the defendant's desk drawer. Why haven't they compelled him to incriminate himself? The traditional answer here is that there is no violation of the privilege because the police have not compelled the defendant to be a *witness*; they have not compelled him to give *testimony*. Subject to Fourth Amendment limits, the government can use force to compel a defendant to give up physical evidence (sometimes called "real" evidence). The Fifth Amendment prohibits only the use of compulsion to obtain testimonial evidence.

The distinction between real evidence and testimonial evidence sometimes gets rather subtle. In *Schmerber v. California*,[9] the Supreme Court held, by a five to four vote, that a blood sample could be forcibly extracted from a defendant's body since that kind of evidence was not testimonial.[10] Similarly, defendants can be compelled to

[9] 384 U.S. 757 (1966).

[10] *Id*. at 765.

exhibit their bodies,[11] their handwriting[12] and even their voices. To aid a witness in making an identification, a defendant can be compelled to stand in court and repeat the words he allegedly spoke at the time of the offense. The test apparently is whether the evidence sought involves only the defendant's personal characteristics, or whether he is being compelled to reveal knowledge or information from his own mind. He can be compelled to reveal the personal characteristics, even when they are incriminating, but he cannot be compelled to disclose incriminating knowledge or information.

2. Compulsion. Suppose that among the items seized during a search are letters and other personal papers in which the defendant makes incriminating admissions. This kind of evidence does not simply display a personal characteristic but involves disclosure of the defendant's own thoughts. In other words, it seems a clear case of testimonial rather than real evidence. So it looks like the government should not be able to compel the defendant to turn it over.

A hundred years ago, in *Boyd v. United States*,[13] the Court said that such use of private papers was barred by the Fifth Amendment.[14] The Court explained that "we are unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself."[15] But *Andresen v. Maryland*,[16] decided in 1976, overruled Boyd.[17] The Court reasoned that the Fifth Amendment protects only against compulsion to make a testimonial disclosure. In both *Andresen* and *Boyd* there had been no compulsion at the time the defendant recorded his testimonial statements. The private papers could be taken by force because at the time of seizure the defendant was not being made a witness, and at the time he acted as a witness by expressing his thoughts, he was not being

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[11] United States v. Wade, 388 U.S. 218, 240 (1967).

[12] Gilbert v. California, 388 U.S. 263 (1967).

[13] 116 U.S. 616 (1886).

[14] *Id.*

[15] *Id*. at 633.

[16] 427 U.S. 463 (1976).

[17] *Id.* at 477.

compelled.

The Court's strict analysis of the timing of the compulsion makes sense if the concern is that compulsion at the time of disclosure will affect the reliability of the statements made. But Justice Brennan's dissenting opinion attacked this "simplistic notion of compulsion. "[18] He wrote:

> The door to one's house ... is as much the individual's resistance to the intrusion of outsiders as his personal physical efforts to prevent the same. To refuse recognition to the sanctity of that door and, more generally, to confine the dominion of privacy to the mind... den[ies] to the individual a zone of physical freedom necessary for conducting one's affairs.[19]

3. Incrimination. Suppose that the defendant is compelled to disclose knowledge and information from his own mind. Now the Fifth Amendment surely applies. Right? Wrong again. The privilege comes into play only if the information disclosed is or may be incriminating. A witness in a civil suit or legislative hearing may assert the privilege, but only if she has a plausible claim that the testimony might eventually be used against her in a criminal case. A party in a civil suit has no privilege to withhold non-incriminating testimony, regardless of the importance of the money or property at stake in the case and regardless of how embarrassing the disclosure might be. A witness may even be compelled to reveal her own previous *criminal* activity, if she is first granted immunity from prosecution or immunity from use of the compelled testimony.[20] So long as the government cannot use the testimony against her in a criminal case, the testimony is not considered "incriminating," even if it involves admissions of serious criminal behavior.

4. *Self*-incrimination. Obviously the privilege does not permit a witness to withhold testimony that might incriminate others. But this sensible rule has been given some strict and technical readings. For example, Smith, the treasurer of XYZ

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[18] *Id.* at 486 (Brennan, J., dissenting).

[19] *Id.* at 486-87 (Brennan, J., dissenting).

[20] Kastigar v. United States, 406 U.S. 441 (1972).

Corporation, can be compelled to produce corporate documents that incriminate her.[21] Technically the documents belong to the corporation, so that in effect one party (XYZ) is being compelled (through its treasurer) to incriminate an entirely different party (Smith). If you can't see the difference between Smith and the treasurer, then you just aren't thinking like a lawyer.

The requirement of self-incrimination gets quite important when we reach the doctrine of required records. Here the government, in its regulatory capacity, can require people to keep records of certain transactions. It can require them to turn over the records on demand. The information is testimonial, it may be incriminating and the individual is compelled to disclose it and write it down. Still the Fifth Amendment does not apply.[22] If the government's regulatory goals are legitimate,[23] then the individual who writes down the information is just acting as a government agent. In effect, there is no *self*-incrimination because the records belong to the government all along.

These controversies and loop-holes do not mean that the Fifth Amendment means nothing at all. On the contrary. The privilege has been given some generous readings too. The privilege now restricts police interrogation,[24] it bars comment on a defendant's decision to remain silent at trial,[25] and it bars discharge of public employees who invoke the privilege to block inquiries into their performance.[26] And everyone agrees that the Fifth Amendment stands as an absolute bar to calling the defendant to the stand, against his will, in his own criminal trial. This crucial core issue remains settled. The difficulty lies in explaining why. Why shouldn't the government be able to compel testimony from the person who is most likely to know the facts?

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[21] Wilson v. United States, 221 U.S. 361 (1911).

[22] Shapiro v. United States, 335 U.S. 1 (1948).

[23] *Cf.* Marchetti v. United States, 390 U.S. 39 (1968); Grosso v. United States, 390 U.S. 62 (1968).

[24] Miranda v. Arizona, 384 U.S. 436 (1966).

[25] Griffin v. California, 380 U.S. 609 (1965).

[26] Lefkowitz v. Cunningham, 431 U.S. 801 (1977).

III. REASONS FOR THE PRIVILEGE

A. The Traditional Justifications

Decisions applying the privilege have invoked a wide range of justifications. In a 1964 case, *Murphy v. Waterfront Commission*,[27] the Supreme Court tried to catalogue them.[28] Actually, the Court ignored several possibilities, consolidated some of the others, and still came up with seven major reasons. I am going to reorganize them a bit and add one more. With some further consolidation, I am left with six major concerns. The privilege seems designed to:

1. preserve a fair balance between the state and the accused;

2. prevent prosecution for crimes of belief and association;

3. avoid what has been called the "cruel trilemma": if compelled to testify, a guilty defendant would have three choices: perjury (which would mean jail), self-condemnation (which would mean jail), and contempt of court for silence (which would mean jail);

4. prevent use of inhumane methods to extract testimony;

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[27] 378 U.S. 52 (1964).

[28] The Court summarized the justifications as follows:

> [The privilege] reflects many of our fundamental values and most notable aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load," our respect for the inviolability of the human personality and the right of each individual "to a private enclave where he may lead a private life," our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often a "protection to the innocent."

Id. at 55 (citations omitted).

5. reduce the risk of convicting the innocent; and finally

6. protect privacy.

The six goals sound like plausible justifications for the privilege. But they don't stand up to analysis. Judge Henry Friendly, in an influential lecture series, subjected them to withering criticism.[29] Judge Friendly essentially demolished one by one each of the possible reasons for the privilege.

(1) One key idea, the notion of maintaining a "fair balance" between the state and the accused, turns out to be either conclusory or meaningless. What makes an increase in the State's litigation advantages unfair? The State has enormous power but it also bears special disabilities, such as the requirement of proof beyond a reasonable doubt. To decide whether abolishing the privilege would give the State an *undue* advantage, we have to know just why the use of compelled testimony would be unfair. That kind of inquiry just returns us to the question of what legitimate values the privilege serves.

Besides, why *should there be* a balance of advantage between the state and the accused? The criminal process is not a sporting contest or a fox hunt.[30] Is someone worrying that all the fun will go out of criminal trials if it becomes too easy for one side to win? The criminal process should lead to conviction of the guilty, preferably as quickly and easily as possible, provided of course that other values are not sacrificed. Again, the question is whether other values are in jeopardy, not whether we should maintain some balance of advantage for its own sake.

(2) The second justification is historical. The privilege grew out of a desire to restrain prosecutions for heresy, blasphemy and other crimes of belief. If that is the

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[29] Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change,* 37 U. CIN. L. REV. 671 (1968) [hereinafter FRIENDLY].

[30] *Compare* Abe Fortas, *The Fifth Amendment: Nemo Tenetur Prodere Seipsum*, 25 CLEV. B.A.J. 91, 98-99 (1954): "Equals, meeting in battle, owe no [duty to furnish ammunition to the other side], regardless of the obligations they may be under prior to battle." Rejection of this "fox hunt" conception of the criminal trial goes back to Bentham. *See* BENTHAM, supra note 6, at 238-39.

purpose of the privilege, the best we can say for it is that it is unnecessary, and wildly overbroad. The First Amendment bars prosecution for crimes of religion, speech and association. If some aspects of religion or expression are not adequately protected, that problem should be faced, and can only be faced, in terms of First Amendment principles. Meanwhile prosecution of rape, robbery, burglary and murder should not be impeded hundreds of times each day, just for the sake of the remote possibility of giving marginally more protection for political and religious belief.

(3) The third argument centers on the supposed cruelty of subjecting the accused to the "trilemma" of perjury, self-accusation or contempt. Undoubtedly, without the privilege, the guilty defendant would face a truly tough choice. But why is the choice cruel? Defendants in civil suits face the same trilemma, possibly with much more at stake than in some criminal trials. It does not seem unfair to force civil defendants to choose between perjury, self-accusation and contempt.

The general concern here seems to be that it is cruel to force someone to inflict serious harm on herself. We all understand this concern, but at the same time we know that our legal system often overrides this preference in pursuit of a more important goal - which is to resolve disputes accurately with the best available information.

There is another objection to the trilemma argument. Notice that the innocent defendant faces no trilemma, no dilemma, in fact no problem at all. By simply telling the truth, he avoids self-accusation, and he cannot be held for perjury or contempt. The trilemma arises only for the guilty defendant, only because he is guilty. Put another way, his hard choice is not the result of being compelled to testify but the result of his own prior decision to commit the crime. Generally, we do not permit people to escape hard choices that are a consequence of their own voluntary decisions.

We are half way at this point, and none of the first three justifications - preservation of a fair adversary contest, protection against prosecutions for crimes of belief, and protection from the cruel trilemma - none of these seems valid at all.

This brings us to the core of the debate, the three purposes that really resonate with the intuitive appeal of the Fifth Amendment. These are the concern about using cruel methods to extract testimony, the danger of convicting the innocent, and the need

to safeguard privacy and what the Court in *Murphy* called the "inviolability of the human personality."

(4) With respect to the concern about using inhumane methods, the critics consider the privilege unnecessary and irrelevant. Inhumane methods are already ruled out by due process, and would continue to be, even if the privilege were completely repealed. If police and prosecutors are willing to violate due process, keeping the Fifth Amendment in place will not stop them. On the contrary, repealing the privilege might actually discourage abuses. Police would have a chance to get necessary testimony by cross-examination in court. There would be less need to use extra-legal pressure and truly dangerous abuses to achieve the result.

What the privilege adds to due process restrictions is to bar efforts to extract testimony through the coercive device of the subpoena, in other words formal legal compulsion backed up by a contempt citation, with jail for noncompliance. The contempt process is strong medicine. But what is inherently inhumane about it? We are perfectly willing to use this method to coerce and extract the testimony of witnesses other than the criminal defendant. So critics consider the concern about inhumane methods incoherent.

(5) Next, how does the privilege protect the innocent? The problems with this justification are related to the problems with the previous one. Testimony extracted with the rack and the thumbscrew might be unreliable. But testimony extracted with the threat of a contempt citation is not considered inherently unreliable. We use such testimony all the time. There is a risk, of course, that the defendant's compelled testimony might be unreliable and might lead to the conviction of an innocent person. But this risk, the critics say, is no greater than the risk that the compelled testimony of any other witness called by the prosecution might be unreliable and might lead to the conviction of an innocent person.

(6) This brings me to the last concern, the privacy argument that Justice Brennan so eloquently invoked in the *Andresen* case. The privacy idea seems very appealing and very plausible, but as a justification for the Fifth Amendment, the privacy argument falls flat on its face. Even with the privilege, government can pry into very private matters and can use the threat of a contempt citation to get at them. All it has to do is to give the defendant use immunity. And if you changed the rules about immunity, the privilege would still be miles away from protecting privacy. The privilege is no

barrier to compelling a mother to testify about her accused son's whereabouts on the day of a murder or to testify about the feelings he expressed toward the victim. It is no barrier to compelling a husband in a divorce case to testify about intimate personal details of his extramarital love life. So the privilege protects lots of things only remotely related to privacy and does nothing to protect witnesses who do have strong claims to privacy protection.

All this leaves the privilege without any coherent rationale. And there is a surprising consensus about this. In spite of the many Supreme Court opinions that laud the privilege in reverential terms, the precise purpose it serves has never been adequately explained or defended. Bentham, Wigmore, McCormick and Judge Friendly, among many others, find it utterly lacking any reasoned justification. The few remaining defenders of the privilege admit that their position rests on sheer intuition. But any rule of procedure with such monumental implications for the effectiveness of criminal justice ought to be based on something more substantial than an inarticulate hunch.

B. Some Recent Defenses of the Privilege

I want to mention three recent efforts to give some reasoned support to the intuition, which is still very widely felt, that there must be something after all to the privilege.

Professor Robert Gerstein, in three complex and sophisticated papers,[31] argues in essence that wrongdoing, self-condemnation and feelings of remorse are so intensely personal, what he calls "matter[s] between a man and his conscience or his God,"[32] that each person should have absolute control over revealing these matters.

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[31] Robert S. Gerstein, *The Demise of Boyd: Self-Incrimination and Private Papers in the Burger Court*, 27 UCLA L. REV. 343 (1979); Robert S. Gerstein, *Punishment and Self-Incrimination*, 16 AM. J. JUS. 84 (1971); Robert S. Gerstein, *Privacy and Self-Incrimination*, 80 ETHICS 87 (1970) [hereinafter *Privacy and Self-Incrimination*].

[32] Gerstein, *Privacy and Self-Incrimination*, *supra* note 30, at 90.

This principle seems to me somewhat debatable,[33] but in any event it does not begin to justify the privilege. What interests a prosecutor is not the defendant's admission of wrongdoing, self-condemnation or personal feelings about the crime. What interests her are just the basic facts -- where the defendant was, who he saw, what he did. What the privilege really protects does not seem to qualify as private or personal by Gerstein's test. Meanwhile, the privilege is not needed to protect genuine matters of conscience, because they are almost never relevant at the criminal trial. Where these matters of conscience could be relevant - for example in a civil proceeding and especially in criminal sentencing *after* trial -- the privilege protects them only ineffectively or not at all.[34] Any federal criminal defendant can tell you that his acceptance of responsibility is a matter between him, the probation officer and the U.S. Sentencing Commission,[35] not a matter between him and his God.

Professor Kent Greenawalt attacks the problem from a different perspective.[36] He is most concerned to answer Judge Friendly's basic premisethat the morality underlying the privilege runs counter to principles we follow everywhere else in life. At home, at work, in our personal relationships, Judge Friendly argued, we expect people suspected of wrongdoing to respond to our suspicions, to tell the truth, and we consider ourselves entitled to draw adverse inferences if they refuse to answer.

Greenawalt shows that this view is too simple. He shows that our instincts depend on the nature of the relationship and on the kind of suspicions that exist. Where

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[33] For a thorough critique, see David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?,* 33 UCLA L. REV. 1063, 1122-37 (1986) [hereinafter Dolinko]. *See also* Kent Greenawalt, *Silence as a Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15, 32-34 (1981) [hereinafter Greenawalt].

[34] Technically, the privilege applies at criminal sentencing, in the sense that the defendant cannot be compelled to provide information that will enhance his sentence. *See* Estelle v. Smith, 451 U.S. 454 (1981). But a sentencing judge can take into account a defendant's noncooperation with the probation officer's presentence interview or his failure to express remorse.

[35] *See* United States Sentencing Commission, *Guidelines Manual*, § 3El 1 (two-level reduction of offense seriousness for "affirmative acceptance of personal responsibility").

[36] *See* generally Greenawalt, *supra* note 32.

there is a previous relationship of trust and no concrete basis for suspicion, a request for information often seems improper. The person questioned may be entitled to respond: "That's none of your business." And the questioner who receives this response should not draw adverse inferences from it.

Whether Greenawalt (and Friendly) can fairly build on the morality of private relationships to draw inferences about our moral obligations vis-a-vis the state seems to me highly debatable.[37] But in any event, Greenawalt's approach cannot serve as a descriptive account of the morality underlying the privilege, because the doctrines his approach would generate bear little resemblance to those the privilege requires. Greenawalt would bar fishing expeditions not based on objective suspicions, but the existing privilege permits witnesses not objectively suspected of criminality to be questioned thoroughly in grand jury proceedings or civil depositions. Under current law, they must give an account of their behavior unless *they* can show a substantial risk of self-incrimination. Conversely, where the current privilege does have real importance as a barrier to questioning -- when the defendant is arrested or when the prosecution seeks to call him as a witness at trial - Greenawalt's approach suggests that the government, having probably cause, *is* entitled to a response.

In effect, as Greenawalt himself recognizes, his approach produces only a qualified defense of the privilege, and on the most consequential matters it amounts much more to a critique of it. Indeed, Greenawalt in the end concludes that government should be able to discharge employees who refuse to respond to well-founded suspicions about their conduct and should be able to draw adverse inferences from

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[37] Private citizens do not choose their relationship with or obligations toward the state. Criminal defendants in particular have no reason to trust government, to have confidence that it seeks their welfare, or even to think that it is in any way constrained by concern for their interests. (This was true even when "rehabilitation" was one of the ostensibly important purposes of punishment; it is doubly true in the more punitive penal environment of today). In the context of a criminal proceeding, government is not a partner in an ongoing enterprise or relationship but instead an adversary whose announced objective is to separate the defendant from society and impose consequences intended to be painful. *See* Kenneth I. Winston, *Self-Incrimination in Context: Establishing Procedural Protections In Juvenile and College Disciplinary Proceedings*, 48 So. CAL. L. REV. 813, 815-16, 825-26 (1975). Greenawalt notes most of these distinctions. Greenawalt, supra note 32, at 35-38. But he does not seem fully to appreciate their force. The differences in context so dwarf possible similarities that any argument for or against one's moral obligation to respond to government must be defended on its own terms, not by reference to our intuitions and expectations in private relationships.

silence after arrest or at trial.[38] He does not take the further step (to which much of his own analysis leads) of advocating a power to compel testimony from the defendant at trial, but to support his position on that core issue he is forced to fall back on "the intuitive judgment" that compulsory testimony in this context is "inhumane."[39]

The last of the recent attempts to rehabilitate the privilege is that of Professor William Stuntz.[40] Professor Stuntz suggests that we try to imagine how the substantive criminal law of excuses would have evolved in the absence of a privilege against self-incrimination. He argues that without the privilege, the law would have to recognize a defense, analogous to duress, for the guilty defendant who is compelled to testify and then commits perjury to avoid incriminating himself. The result would be, in effect, a privilege to lie. But then innocent defendants who *wanted* to testify would be worse off: the credibility of their *truthful* testimony would be undercut because the jury would know that they had virtual immunity from prosecution for perjury.

Stuntz has an imaginative argument, but - like previous defenses of the privilege - it is an argument that does not hold up. The advantage he claims for the privilege (compared to a regime of compelled testimony plus a duress defense) seems largely theoretical. With or without the privilege, a perjury prosecution is not a realistic prospect for the criminal defendant who lies his way to an acquittal. And even if a perjury prosecution could succeed, it would seldom deter a defendant who is tempted to offer false testimony, because perjury penalties tend to be much lower than those applicable to serious violent crimes. So the defendant can and will commit perjury anyway, and the jury knows it. Realistically, the credibility of defendants who want to testify would be little different in a regime that added formal immunity to the de facto immunity that already exists.[41]

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[38] Greenawalt, *supra* note 32, at 50-52, 57-68.

[39] *Id*. at 39.

[40] William J. Stuntz, *Self-Incrimination and Excuse*, 88 COLUM. L. REV. 1227 (1988).

[41] The principal formal disincentive to perjury by the defendant at trial is the judge's prerogative to impose a greater sentence if the defendant is convicted. *See* United States v. Grayson, 438 U.S. 41 (1978); United States Sentencing Commission, *Guidelines Manual*, § 31.1 (two-level increase in seriousness of offense for "impeding proceedings" by, inter alia, false testimony at trial).

Stuntz's argument also seems wrong in principle. Even with the privilege, witnesses are often compelled to testify though they face strong pressure to commit perjury. We do not recognize anything comparable to a duress defense for perjury defendants who lied because they faced hard choices. Civil defendants facing personal or financial ruin have no duress defense if they lie to escape it. Witnesses who are threatened or intimidated still must testify truthfully, unless the threat meets strict standards of imminence and serious bodily harm.[42] In all these situations the witness facing a tough choice has to tell the truth even though he is in no way responsible for his dilemma. The guilty defendant has much less of a claim to an excuse, since he created his own predicament by committing the crime in the first place.

So even with three recent and fairly sophisticated attempts to defend the privilege, we still come up empty-handed. Where this leaves us is with no coherent justification for one of the most important and most hallowed features of our system of criminal procedure. Yet the feeling persists that there would be something fundamentally offensive about compelling the criminal defendant to take the stand and testify against himself.

Critics of the privilege rightly question the relevance of this inchoate intuition. Professor David Dolinko, in the most thorough of the recent studies, ridicules (correctly, I think) efforts to support the privilege by "appeal to an unanalyzable intuition."[43] Judge Friendly's lectures included a hilarious catalogue of the pretentious and totally conclusory rhetoric used to defend the privilege. He derided what he called "the lyricism now generally accompanying any reference to the privilege,"[44] and he said that "eloquent phrases have been accepted as a substitute for thorough thought."[45]

Yet the power of the underlying intuition is reflected in what the critics themselves actually propose. Professor Dolinko forcefully concludes that the privilege

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[42] *See* State v. Toscano, 378 A.2d 755 (N.J. 1977).

[43] Dolinko, *supra* note 32, at 1092.

[44] Friendly, *supra* note 28, at 679.

[45] *Id*.

has no justification whatsoever. But he also drops a warning that the privilege might serve some function in what he calls "the legal system as a whole."[46] He then says that none of his analysis implies that the privilege should be modified or abolished.[47]

Judge Friendly was not so cautious. He proposed a specific constitutional amendment to replace the Fifth Amendment privilege.[48] But after his scathing demolition of all the justifications for the privilege, his actual proposal comes as something of a shock. Judge Friendly did not propose a power to call the criminal defendant to the stand. He did not even propose drawing an adverse inference from the defendant's failure to testify. His amendment even endorsed the *Miranda* rules against custodial interrogation -- which were then only two years old and still intensely controversial.

Starting with the freedom of a clean constitutional slate, all that Judge Friendly would permit, beyond the boundaries of existing law, was (1) compulsory production of documents (a result the Court has largely achieved since his lectures),[49] (2) comment at trial on a *previous* decision to remain silent before a grand jury or judicial inquiry (and this provided only that the defendant had counsel at the prior stage), and (3) dismissal or suspension of public employees who refuse to answer relevant questions about their official conduct.[50]

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[46] Dolinko, *supra* note 32, at 1064.

[47] Professor Dolinko mentions two concerns, by way of illustration, to suggest that the privilege possibly should be retained even if it rests on a "shaky conceptual foundation": the need for protection (beyond that afforded by the first amendment) for those called before grand juries and Congressional committees and questioned about their beliefs and affiliations, and the need for limitations on police interrogation. Dolinko, *supra* note 32, at 1064-65. Professor Dolinko apparently assumes that the usefulness of the privilege in such contexts is a matter independent of the validity of its "conceptual foundation."

[48] Friendly, *supra* note 28, at 721-22.

[49] *See* United States v. Doe, 465 U.S. 605 (1984); Andresen v. Maryland, 427 U.S. 463 (1976); Fisher v. United States, 425 U.S. 391 (1976).

[50] Friendly, *supra* note 28, at 722.

Having shown that there is no coherent justification for the privilege, Judge Friendly dismissed the core of the whole issue - the possibility of using the contempt power to compel testimony - by stating, in a nicely conclusory phrase: "almost no one would favor confining a man to jail until he takes the stand to testify to his own crime. "[51] So the upshot is that Judge Friendly would not permit use of the contempt power to compel testimony before the grand jury or in legislative investigations, if the testimony might be incriminating, and he would not permit even the mild pressure of an adverse comment on a decision to remain silent at trial.

Well, why not? I thought there was no legitimate concern about privacy, about conviction of the innocent, about a fair balance of advantage, about inhumane methods or about a cruel trilemma. If there isn't, why *shouldn't* the defendant be compelled to testify?

C. Practical Dynamics and the Privilege

The recent attempts to find a justification for the privilege have been creative but too subtle. I think it is much easier to understand the powerful intuition behind the Fifth Amendment if we just look more closely at the core concerns about inhumane methods and risk to the innocent.

I have already described the critic's argument that two factors render the privilege superfluous as a protection against inhumane methods: inhumane methods are already barred by due process, and the method the privilege distinctively bars -- compulsion by contempt proceedings -- is not considered inhumane. There is a kind of rigorous consistency to this argument. But the argument rests on some artificial logic-

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[51] Friendly, *supra* note 28, at 695. At a later point in his lectures, Judge Friendly provided support for this conclusion by noting that "many criminal defendants 'are uneducated, unfortunate persons, frightened by their predicament - no match for the prosecutor or for the occasional sharp question from the judge.' . . . [T]o force such a man to the stand by use of the contempt power would be cruel." *Id*. at 699, quoting Alfred C. Clapp, *Privilege Against Self-Insemination*, 10 RUTGERS L. REV. 541, 548 (1956). But Judge Friendly did not seem to connect these points to his earlier, emphatic rejection of arguments for the privilege based on prevention of cruelty or protection of the innocent.

chopping that ignores the dynamics of behavior in the real world. In practice, the privilege plays a vital role in restricting illegal abuse.

The important issue here is police interrogation. Under the due process approach that controlled matters before Miranda, physical violence and extreme psychological abuse were prohibited, but other forms of pressure were permissible. In fact, other forms of pressure were considered desirable. Questioning of a reluctant suspect was considered an important law enforcement tactic. Part of the police officer's job was to overcome the suspect's resistance (by fair means, obviously) and to get him to confess.[52]

Unfortunately, when we asked a conscientious, law-abiding officer to question a stubborn defendant suspected of a brutal crime, and also asked the officer to use only fair means and not to apply too much pressure, we were really asking close to the impossible. What if the suspect started to show signs of weakening? Should the investigator keep up the pressure, to get a confession? Or should he ease off so that he would not overbear the suspect's will? The due process approach in effect instructed the officer to do both.[53] It should not have been surprising that decent officers charged with solving brutal crimes sometimes gave in to fatigue or frustration and lost their tempers.

Dean Wigmore wrote over fifty years ago: "The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power. The simple and peaceful process of questioning breeds a readiness to resort to bullying and to physical force and torture."[54]

In the years since *Miranda* we have seen brutal interrogation tactics become much less common, but they still occasionally occur, even though the legal regime forcefully instructs officers to cease questioning as soon as the suspect invokes his right

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[52] *See* Culombe v. Connecticut, 367 U.S. 568, 578-81 (1961) (plurality opinion); Stephen Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 871 (1981) [hereinafter *Confessions and the Court*].

[53] *Confessions and the Court*, *supra* note 51, at 872.

[54] 8 JOHN WIGMORE, EVIDENCE 309 (3d ed. 1940).

to silence.[55] What would happen if there was no right to silence, and if officers were told that it was permissible (and perhaps therefore their duty) to use all pressures short of actually breaking the suspect's will? Realistically, there can be little doubt that more abuses would occur, even though the worst abuses would still be theoretically prohibited by other rules.[56]

It is interesting that what I have said about police interrogation is not seriously challenged by most of the principal critics of the privilege. There is an ironic reversal of history here. For much of the past 200 years, judicial examination under oath was barred by the Fifth Amendment, but the courts did not treat police interrogation as barred by the Fifth Amendment, and for the most part interrogation was not regulated at all. Now many academic critics challenge the core of the Fifth Amendment and argue for judicial examination under oath, but nearly all of them insist that police interrogation should continue to be restrained by something like the *Miranda* rules, or perhaps prohibited completely.[57] The critics never quite explain how that result could be achieved without the Fifth Amendment in place, or why it *should* be achieved if the Fifth Amendment is basically unsound.

But the point here is not to quibble with the critics over details. The important point is that police interrogation is potentially abusive and that it is easy to see the link between a constitutionally protected right to silence and prevention of abusive interrogation.

Let me turn to what is the harder and more controversial question of why

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[55] *E.g.*, People v. Wilson, 506 N.E.2d 571 (111. 1987); *see* Stephen Schulhofer, *The Constitution and the Police: Individual Rights and Law Enforcement*, 66 WASH U. L.Q. 11, 30-32 (1988); Stephen Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435, 448 & n.26 (1987); Welsh S. White, *Defending Miranda: A Reply to Professor Caplan*, 39 VAND. L. REV. 1. 13-14 & n.73 (1986).

[56] *See* Stephen Schulhofer, *The Fifth Amendment at Justice: A Reply*, 54 U. CHI. L. REV. 950, 956 (1987).

[57] *E.g.*, Dolinko, *supra* note 32, at 1065; Donald A. Dripps, *Against Police Interrogation - And the Privilege Against Self-Incrimination*, 78 J. CRIM. L. & CRIMINOLOGY 699 (1988) [hereinafter Dripps]; Friendly, *supra* note 28, at 708-16; Stephen A. Saltzburg, *Miranda v. Arizona Revisited: Constitutional Law or Judicial Fiat*, 26 WASHBURN L.J. 1, 25 (1986).

orderly questioning in a judicial forum should be prohibited. I want to approach this problem primarily in terms of the supposedly indefensible concern about convicting the innocent. Critics of the privilege have subjected this claim to scathing ridicule, and even some of those who have made the claim (including the U.S. Supreme Court) have later retracted it.[58] It is simply amazing to see how quickly and confidently the risk to the innocent is dispatched. This issue is so central that it will be useful to have in mind some of the flavor of the discussions.

A scholar writing in 1906 said he had "never known or heard of a case where an innocent person suffered any disadvantage from [taking the stand] .... Everyone who is speaking the truth can tell in the main a straight story."[59] Another critic, writing 30 years later, challenged supporters of the privilege to find "a single case in all the annals of American jurisprudence where an innocent man has been, or could have been, convicted because compelled to answer .... "[60]

Thirty years after that, Judge Friendly took the same approach. In his 1968 lectures, which occupy fifty-six pages in print, he devoted all of six lines to the claim about protection of the innocent.[61] He observed that "no *proof* for [this claim] has ever been offered,"[62] and said that the privilege "so much more often shelters the guilty and even harms the innocent that its . . . occasional effect in protecting the innocent would be an altogether insufficient reason…"[63]

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[58] *E.g.*, Tehan v. Shott, 382 U.S. 406, 415-16 (1966); Erwin Griswold, *The Right to be Left Alone*, 55 NW. U. L. REV. 216, 233 (1960).

[59] Henry T. Terry, *Constitutional Provisions Against Forcing Self-Incrimination*, 15 YALE L.J. 127 (1906).

[60] Ernest C. Carman, *A Plea for Withdrawal of Constitutional Privilege from the Criminal*, 22 MINN. L. REV. 200, 204 (1938).

[61] Friendly, *supra* note 28, at 686-87. Later in his lectures, Judge Friendly considered, seemingly as a separable issue, some problems faced by the innocent defendant in presenting his story effectively at trial. See supra note 50 and accompanying text.

[62] Friendly, *supra* note 28, at 686 (emphasis added).

[63] *Id*. at 687.

In a footnote, Judge Friendly mentioned an empirical study showing that only twenty-three out of 300 defendants chose to remain silent at trial, and twenty-one of them were convicted anyway.[64] Apparently the privilege helped a mere two out of 300 defendants, and they might have been guilty defendants to boot.

The two most recent discussions are both in the same vein. Professor Dolinko is a standout in this field because he is so cautious. He concedes that "circumstances can be imagined" in which the privilege might help the innocent.[65] But he says that "usually" it will not.[66] He reasons that the jury is so likely to draw an adverse inference from silence that "the innocent defendant is usually better off taking the stand."[67] As support, he cites an empirical study showing that ninety-one percent of defendants without prior records and even seventy-four percent of those *with* prior records, choose to testify.[68]

The last of the recent commentators is even more emphatic. Professor Donald Dripps, in a 1988 article, assures us that the risk to the innocent is "purely hypothetical."[69] He says that there are "real cases in which the privilege denies exculpatory evidence to the accused, and *no real cases* in which the privilege protects an innocent person."[70]

There is so much that is so glaringly wrong in all of this that I am not sure where to begin. It is hard to know what would constitute "proof" of harm to the innocent

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[64] *Id.* at 699 n.127, citing ARTHUR TRAIN, THE PRISONER AT THE BAR 209-12 (1923).

[65] Dolinko, supra note 32, at 1075.

[66] *Id.*

[67] *Id.*

[68] *Id.* citing HARRY KALVIN & HANS ZEISEL, THE AMERICAN JURY 146 (1966).

[69] Dripps, *supra* note 56, at 716.

[70] *Id.* (emphasis added).

or how we could find a "single real case," since the "annals of American jurisprudence" give us no experience with the procedure that these critics think would be workable. Of course, we could look to countries that do not acknowledge a privilege against self-incrimination, but then we find lots of real cases involving harm to the innocent.[71] In any event the fact (if it is a fact) that there have been no real American cases in which the privilege has protected the innocent can hardly show that such real cases *would not* occur here after the privilege was abolished.

There is a similar problem with the claim that defendants usually testify anyway and usually get convicted. Actually, there are two problems here. The first is that weasel word, usually. Professor Dolinko's own data show that twenty-six percent of defendants with prior records choose *not* to testify.[72] That is a lot of defendants. Supporters of the privilege never claim that it is essential for most innocent defendants or that it helps the innocent more than the guilty. The claim is only that the privilege helps many innocent defendants and that acquitting these innocents is more important than convicting an equal or somewhat larger number of guilty defendants. Professor Dolinko's data, and his sense of what "usually" happens, are completely consistent with this claim. His numbers, especially the twenty-six percent figure, even tend to support it.

In any event, these critics are relying on the experience of a system that has the privilege. They seem to assume that the same kinds of cases will be brought and the same numbers of defendants will voluntarily choose to testify *after* the privilege is abolished. This is at best a guess, and an implausible one at that. Once the prosecutor can call the defendant as a witness, he could and presumably should start bringing many kinds of cases that would have been unindictable or unprosecutable before. Defendants in these kinds of cases would choose silence in massive proportions, if they could, but they do not do so now because such cases are simply not brought.

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[71] Most Western European countries grant the criminal defendant some sort of privilege against being compelled to testify, though the contours of the privilege are less generous than in the American system. *See* Mijan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure*, 121 U. PA. L. REV. 506, 526-29 (1973). For illustrations from systems that in practice wholly reject any privilege against self-incrimination, one could turn to cases from the Soviet Union or China.

[72] Dolinko, *supra* note 32, at 1075.

Even if we look only at what happens now, with the privilege in place asa check on the cases that can be brought, the Friendly and Dolinko data do not quite give the whole story. Their statistics on trials in the 1920s and the 1950s suggest that few defendants brought to trial invoke the privilege and that few are helped by doing so. My own research on trials in Philadelphia is less venerable, but it shows a much different picture. In a sample of Philadelphia felony defendants tried in the 1980s, forty-nine percent chose not to testify at trial, and twenty-three percent of this group were acquitted.[73] In a sample of misdemeanor defendants, fifty-seven percent chose not to testify at trial, and thirty-four percent of them were acquitted.[74]

Rather than spend more time on statistics or on the nonsequiturs the critics have used to cloud this issue, I want to discuss in practical terms about what the risk to the innocent really is.

Suppose that you are representing a criminal defendant who persuades you that he is innocent. Can you think of any reason why you might prefer that your client not be called to the stand? Can you think of any reason why you might *not* put your client on the stand if you have the choice? Of course you can. Every lawyer can. Your client might have a highly prejudicial prior record that will become admissible once he takes the stand. There are likely to be suspicious transactions or associations that your innocent client will have to explain. But he may look sleazy. He may be inarticulate, nervous or easily intimidated. His vague memory on some of the details may leave him vulnerable to a clever cross-examination. Most ordinary citizens find that being a witness in any formal proceeding is stressful and confusing. The problems are bound to be heightened when the witness happens to be on trial for his life or his liberty. Some

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[73] *See* Stephen Schulhofer, *Is Plea Bargaining Inevitable*?, 97 HARV. L. REV. 1037, 1080 (1984). Of 162 felony defendants tried by a judge without a jury, seventy-nine did not testify and eighteen of these were acquitted. An additional seventeen defendants (twenty-two percent of those who remained silent) were convicted only on lesser counts. Altogether thirty-five of the seventy-nine defendants who remained silent (forty-four percent) avoided conviction on the principal charge. Though the study does not provide comparable data for defendants in jury trials, the risk to the innocent who testify in that context (and the corresponding incentive to invoke the privilege) is presumably at least as great.

[74] *See* Stephen Schulhofer, *No Job Too Small: Justice Without Bargaining in the Lower Criminal Courts*, 1985 A.B.F. RES. J. 519, 571. Of 272 misdemeanor defendants, 155 did not testify and fifty-two of these (thirty-four percent) were acquitted. An additional eight defendants (five percent of those who remained silent) were convicted only on lesser counts. Altogether thirty-nine percent of those who remained silent avoided conviction on the principal charge.

people can handle this kind of situation, but others, especially if they are poor, poorly educated or inarticulate, cannot. They may handle the trial experience poorly whether or not they are guilty.

A leading trial manual gives ten distinct reasons why a lawyer should consider advising his client not to take the stand.[75] Not one of these reasons applies only to defendants who are guilty. It may be true, as Judge Friendly and others argue, that defendants with a legitimate explanation or excuse will "usually" be better off taking the stand. But usually is not always. Many defendants now choose not to take the stand, even though they are innocent.

There is nothing surprising or original about this. It is an everyday staple of trial practice.[76] The only surprising thing here is that neither critics nor the defensive academic defenders of the privilege seem to have given much thought to what it would mean for our courts to be systematically compelling testimony from innocent defendants who would have made the tactical choice to remain silent.[77]

If an innocent defendant chooses silence, it is because *his* judgment is that testifying will increase the chances of conviction. Unless critics of the privilege are assuming that the prosecution of an innocent person is something that just never happens, they should acknowledge that every day of the week innocent people and their

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[75] ANTHONY G. AMSTERDAM ET AL., TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES § 390 (1967); see Craig M. Bradley, Griffin v. California: *Still Viable After All These Years*, 79 MICH. L. REV. 1290, 1294 (1981).

[76] *See supra* note 50 and accompanying text. See also Wilson v. United States, 149 U.S. 60, 66 (1893): “It is not every one who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character. . . will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. ”

[77] Judge Friendly does advert briefly to these concerns, but without connecting them to his earlier, dismissive treatment of claims about risk to the innocent. *See supra* note 50 and accompanying text. *Cf.* Dorsey D. Ellis, Jr., A Comment on the Testimonial Privilege of the Fifth Amendment, 55 IOWA L. REV. 829, 844-48 (1970), one of the few recent treatments that explicitly defends the privilege in terms of its value as a protection for the innocent.

lawyers are deciding on silence because of their sense that testifying will increase the risk of an erroneous conviction. Unless we can say that we know more about the realities of their cases than they do, it is simply absurd to ignore their judgment that silence will help them win a factually deserved acquittal. The power to their compel testimony would inevitably increase the number of erroneous, unjust convictions.

It is for these reasons, I suggest, that Judge Friendly felt impelled to resist the force of his own logic and to declare it unthinkable to use compulsory process to force the criminal defendant to take the stand.[78] I suggest, in other words, that the core of the Fifth Amendment, the criminal defendant's right not to be forced to testify at trial, has a very straightforward and convincing basis. The right does not rest simply on a vague intuition but on realities of trial practice and risks to the innocent that all lawyers understand.

Because most critics of the privilege have asserted that compelled testimony poses *no* risk to the innocent, they have by-passed a more complex and limited kind objection. A decision to exclude *any* category of evidence helps some innocent defendants avoid conviction. If this result were sufficient to support a rule of exclusion, we would exclude eyewitness identification testimony and perhaps all other oral testimony as well. But we normally do use potentially unreliable evidence provided that on balance it is more reliable than not. Since satisfaction of that standard is sufficient to permit use of most categories of testimony, why should a different standard apply in the case of the criminal defendant?

The argument, in effect, is that the risk to the innocent in compelling the defendant's testimony is no different from that posed by introducing other categories of potentially unreliable evidence. But once we recognize that some criminal defendants who prefer silence may be innocent, a decision to compel their potentially unreliable testimony involves not only the ever-present risk of convicting the innocent, but also a serious problem of fairness. The focus of concern here is not on the cruel trilemma faced by a guilty defendant who does not want to tell the truth. Rather, the concern is with the predicament of an innocent defendant who fears he will be manipulated, intimidated or misunderstood. When life or liberty is at stake, to force such a defendant to run the gauntlet of adversarial cross-examination can fairly be characterized as inhumane or cruel. In other words, the prevalent intuition about the unseemliness of

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[78] *See* Friendly, *supra* note 28, at 699-700.

compulsory examination of the criminal defendant has a perfectly concrete and coherent basis, tied to the serious risks for the innocent that compelled testimony can pose.

These realities of law enforcement and trial practice also make clear why Judge Friendly's seductive analogy to the morality of parent-child, teacher-student and employer-employee relationships is so thoroughly inapt. In such private settings, those who suspect wrongdoing can fairly ask for an explanation, and we often assume that they are entitled to a response. Our intuitions about those settings reflect the fact that in a private relationship, an innocent person can feel free to deny an allegation and, if he wants, provide a brief explanation. We can imagine few reasons, consistent with innocence, for complete silence. But in police interrogation or at trial, the innocent person cannot simply offer a denial or brief explanation and then walk away. His decision to speak opens him up to extended questioning, with probing cross-examination by trained investigators and by advocates skilled at using forensic statemgems to influence a malleable trier of fact. It is easy to imagine why an innocent person might fear the consequences of such a process and regard silence as a preferable course. We would no doubt feel differently about the silence of accused children, students and employees as well, if their decision to offer any denial at all constituted "waiver" and exposed them to the full force of adversarial cross-examination.

This defense of the privilege derives particular force from the prevalent rule that permits virtually unrestricted use of prior convictions for impeachment purposes once a criminal defendant takes the stand. But the privilege is not simply a back-handed way of blunting the effects that rule, and my defense of the privilege would retain its central point even if that rule were substantially limited or repealed. The need for the privilege is a consequence of the total environment of the American trial process and the risks that it can present to the innocent defendant who would prefer not to testify.

A defense of the privilege in these terms may seem unsatisfying to anyone who wants to know whether the privilege is "conceptually" sound or valid "in principle." But to ask such a question in the abstract makes about as much sense as asking whether protection against double jeopardy or the right to confront opposing witnesses is sound "in principle." In all likelihood, a system of procedure could be devised in which compulsory examination of the criminal defendant did not involve cruel pressure or unacceptable risks to the innocent. But what the Supreme Court has said in considering the importance of jury trial is equally apt with regard to the privilege against self-incrimination:

> The recent cases ... have proceeded upon the valid assumption that the state criminal processes are not imaginary and theoretical schemes but actual systems bearing virtually every characteristic of the common-law system that has been developing contemporaneously in England and in this country. The question thus is whether given this kind of system a particular procedure is fundamental. . . . [I]t might well be said that the limitation in question is not necessarily fundamental to fairness in every criminal system that might be imagined but is fundamental in the context of the criminal processes maintained by the American States.[79]

IV. APPLICATIONS OF THE PRIVILEGE

Once we recognize that the right to silence at trial is firmly rooted in concern about not convicting the innocent, we can think more realistically about some of the derivative applications that critics are most serious about challenging. These include:

(1) the rule against comment on the defendant's failure to testify at trial;

(2) the rule against use of compulsory process (or adverse comment) to obtain incriminating testimony in formal pretrial proceedings, such as grand jury hearings, judicial interrogation by magistrates or legislative investigations; and

(3) the rule against discharge or suspension of public employees who refuse to answer questions about their performance.

In all these instances, the crucial issue should be whether an accused person could have plausible grounds for preferring silence even though he was innocent.

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[79] Duncan v. Louisiana, 391 U.S. 145, 149-50 n.14 (1968).

The controversial *Griffin* rule,[80] which prohibits adverse comment on the defendant's silence at trial, makes perfect sense in these terms. If a jury may infer guilt from silence, then a judge presumably should take into account the defendant's decision to remain silent when ruling on a motion for a directed verdict of acquittal at the close of the defense case. Does this mean that a weak case can survive such a motion, and can get to the jury, just because the defendant chose not to testify? If so, then the defendant's silence has in effect become an item of evidence in the prosecution's case-in-chief. At that point the prosecutor is getting something very much like what the privilege was supposed to deny her, the incriminating impressions raised by the hesitations and evasions of a defendant who might be inarticulate and unimpressive rather than simply guilty.

The damage is no less if we put aside any formal evidentiary weight and think solely of some sort of tie-breaker that we mention in our instructions to the jury. To tell the jury that they can infer guilt from silence is to divert them from all the factors *inconsistent* with guilt that they might also infer from silence. If we really believe in truth-in-jury-instructions, we could just give the jury the full picture. We could explain that silence might mean that the defendant is guilty, but that it might also mean only that he is ill-spoken, inarticulate, easily flustered and vague about some of the details of the case. We could say that his silence might mean only that he has a long record of highly prejudicial prior offenses that he does not want to render admissible. Realistically, we cannot give the jury the full picture without creating the very prejudice to innocent defendants from which the privilege should shield them in the first place.

Commentary critical of *Griffin* has tended to focus on the Court's analysis of "compulsion," especially its statement that the comment on silence is a "penalty" that "cuts down on the privilege by making its assertion costly."[81] That passage unfortunately drew attention from a more fundamental problem. Compulsion arises directly from the trial court's willingness to use the defendant's own testimony against him, against his will. The "testimony" is the defendant's communicative act (like a nod or a shrug), his physical response to the implicit question, "How do you explain this evidence against you?" In effect, the defendant's implicit response is placed in evidence to support an inference about his own knowledge and state of mind. As the Court correctly said a bit later in its opinion, "What the jury may infer, given no help from the court is one thing. What it may infer when the court solemnizes the silence of the

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[80] Griffin v. California, 380 U.S. 609 (1965).

[81] *Id*. at 614.

accused into evidence against him is quite another."[82]

I suggest that the Court in *Griffin* got matters exactly right and that the rule against adverse comment on silence at trial is a necessary component of the privilege against self-incrimination.

Compulsory testimony outside the setting of the criminal trial raises somewhat fewer problems of misinterpretation and unfairness. At first blush there may be a plausible case for requiring testimony in these settings or using half-way types of pressure to induce cooperation. A number of thoughtful commentators have proposed compulsory examination in an orderly judicial hearing before trial, particularly as a substitute for the extremely problematic system of informal, incommunicado police interrogation that now flourishes despite of our theoretical commitment to the privilege.[83] In an earlier article, I joined those who have suggested the value of such an approach.[84]

In terms of the concerns we have just discussed, however, such proposals present several difficulties. Are we willing to permit use of such testimony at the criminal trial itself? If so, the risks to the innocent posed by the process of adversarial cross-examination at the jury trial can surface all over again, because the prosecution can exploit any confusion, hesitation or inconsistency in the pretrial statements. The defendant would be obliged either to let the prosecution get away with these tactics or to take the stand to refute them. Either way, the pretrial compulsion of testimony will provide self-incriminating evidence of a potentially misleading nature that places the innocent at risk in the criminal trial itself.

A solution to this problem would be to permit testimonial compulsion in these non-trial settings but then bar use of the testimony at the trial itself, except perhaps for

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[82] *Id*.

[83] *See, e.g*., YALE KAMISAR, POLICE INTERROGATION AND CONFESSIONS 77-94 (1980); WALTER SCHAEFER, THE SUSPECT AND SOCIETY 76-81 (1967); Friendly, *supra* note 28, at 713-16; Paul Kauper, *Judicial Examination of the Accused - A Remedy for the Third Degree*, 30 MICH. L. REV. 1224 (1932).

[84] *Confessions and the Court, supra* note 51, at 884 n.84.

impeachment purposes if the defendant *chooses* to take the stand. That, of course, is very close to what existing Fifth Amendment law already provides, through its rules regulating use immunity.[85]

I will not attempt to go further at this point since the competing considerations become rather finely drawn. If we were writing on a clean slate, close analysis of a number of alternatives would be required. The courts, obviously, are not writing on a clean slate. Given constitutional language and history prohibiting compulsory self-incrimination, the courts have quite properly treated compulsory pretrial examination and questioning by public employers as within the scope of the prohibition. Only a complex scheme of testimonial powers and limitations could replace the regime of the Amendment without doing violence to the values that I have identified, and it is far from clear that a satisfactory scheme could be devised.

I have been concerned here only to show that the self-incrimination clause has a perfectly coherent, and indeed compelling basis. The Fifth Amendment is not a mystery, or an historical anachronism, as almost everyone seems to think, and it does not depend on the subtleties of moral philosophy, as its few defenders seem to believe. In the context of American trial procedure, the privilege is a very practical and very important safeguard. Its core applications are essential to fundamental fairness, and its central policy is one that continues to deserve our unqualified support.

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[85] Under current Fifth Amendment doctrine, however, testimony obtained in violation of the privilege (or under a grant of immunity) is not admissible for impeachment purposes. *See* New Jersey v. Portash, 440 U.S. 450 (1979).

Chapter 2 Miranda v. Arizona: A Modest But Important Legacy

Stephen Schulhofer*

The story of *Miranda*[1] is in large part a doctrinal story centered on the evolution and content of Fourteenth Amendment ''due process'' and the Fifth Amendment's self-incrimination clause. *Miranda* is also, of course, the story of interrogation as an important tool of criminal investigation. More generally, the Miranda story is in microcosm the story of the twentieth-century development of policing as a profession.

But even these large topics are among the narrower facets of the complete Miranda story. Miranda epitomizes the importance and difficulty of outside efforts to regulate law-enforcement behavior. Miranda is the poster child for the Supreme Court's fluctuating commitment to safeguarding the fairness of the criminal justice system as a whole. More broadly yet, it is no exaggeration to say that, more than any other word or phrase in our lexicon, ''*Miranda*'' stands for judicial activism, for the volatile dynamics of crime-control politics, and for the problematic legitimacy and effectiveness of Supreme Court attempts to assure justice in American social arrangements at any or all levels.

The approach of *Miranda*'s fortieth birthday signals more than an interesting anniversary. Today only our most senior judges, lawyers and detectives know at first hand the world before *Miranda*. Soon none of that generation will remain professionally active. Their world, legally and operationally, was very different from the criminal justice world we inhabit today.

I. INTERROGATION AND CONSTITUTIONAL LAW BEFORE 1960

The Fourteenth Amendment, ratified in 1867, imposed on states, for the first time, an obligation to respect ''due process of law.'' But, as interpreted prior to the 1960s, the Fourteenth Amendment did not require states to follow any particular rules of criminal procedure. ''Due process'' meant only that criminal investigations and trials

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* Originally published as *Miranda v. Arizona: A Modest but Important Legacy*, in Carol S. Steiker ed., Criminal Procedure Stories pp.159-179 (New York: Foundation Press, 2006).

[1] Miranda v. Arizona, 384 U.S. 436 (1966).

must comport with fundamental fairness, a loose and highly permissive concept applied on a rough case-by-case basis.[2] States were free, if they wished, to permit searches and seizures without warrants or probable cause, or to prohibit such searches but allow their courts to use evidence illegally obtained.[3] States were free to try felony defendants without a jury.[4] Absent ''shocking'' circumstances, they were not required to provide indigent defendants any assistance of counsel whatever.[5] And states could formally compel a prospective criminal defendant to give testimony under oath, even when the testimony was potentially incriminating.[6]

Police interrogation was governed by the same flexible standard. Over time, certain particularly brutal tactics were ruled impermissible per se. But even in the 1950s, milder physical force—a few slaps and kicks, for example—did not necessarily render a subsequent confession inadmissible.[7] Police legally could—and often did—use almost any methods short of direct physical violence. The resulting confessions were admissible unless they were considered ''involuntary'' in the sense that police tactics had ''overborne'' the particular suspect's will in light of the totality of the circumstances.[8] From the 1930s through the early 1960s, the Supreme Court became progressively less willing to condone intense pressure and psychological abuse. But the Court continued to uphold the admissibility of confessions obtained after long hours of nonstop interrogation and after repeated police refusals to honor a suspect's pleas to be left alone or to be allowed to contact family or counsel.[9]

The tactics deployed in a New York City police investigation of the late 1950s were by no means atypical. *Spano v. New York*[10] involved a young, emotionally unstable foreign-born suspect who had already been indicted. The method of interrogation included continuous custodial questioning for eight hours, from late evening till early

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[2] *E.g*. Palko v. Connecticut, 302 U.S. 319 (1937); *see* Sanford H Kadish, Methodology and Criteria in Due Process Adjudication—A Survey and Criticism, 66 Yale L. J. 319 (1957).

[3] *E.g.* Wolf v. Colorado, 338 U.S. 25 (1949). In *Wolf* the Court suggested that it would violate due process for a state to affirmatively authorize unreasonable searches, but the Court refused to require states to provide any remedy for such searches.

[4] Compare Duncan v. Louisiana, 391 U.S. 145 (1968).

[5] Betts v. Brady, 316 U.S. 455 (1942).

[6] Adamson v. California, 332 U.S. 46 (1947).

[7] Stroble v. California, 343 U.S. 181 (1952).

[8] *E.g*., Watts v. Indiana, 338 U.S. 49 (1949). *See* Yale Kamisar, What is an Involuntary Confession?, 17 Rutgers L. Rev. 728 (1963).

[9] *E.g*., Crooker v. California, 357 U.S. 433 (1958). *See* Catherin Hancock, Due Process Before Miranda, 70 Tul. L. Rev. 2195 (1996).

[10] 360 U.S. 315 (1959).

morning; the use of teams of detectives in relays; repeated denials of Spano's requests to contact the lawyer he had already retained; and deceptive use of a childhood friend, who repeatedly implored Spano to talk, falsely telling him that his refusal to cooperate had placed the friend's job in jeopardy. The Court drew a line of sorts, holding Spano's confession involuntary. But in reversing the conviction, the Court made clear that none of the police tactics was inherently improper in itself. Eight hours of nonstop interrogation of an unwilling, foreign-born suspect, for example, or the deceptive use of a childhood friend, was perfectly permissible, except (perhaps) in combination with some—or all—of the other factors that had made the *Spano* interrogation especially unfair. And that opinion was written—in 1959—by Chief Justice Earl Warren himself.

II. THE CRIMINAL PROCEDURE REVOLUTION

All this changed dramatically, in a breathtakingly short period of time. In 1961, the Court ruled in *Mapp v. Ohio*[11] that states could no longer admit evidence obtained by unreasonable search and seizure. In 1963 *Gideon v. Wainwright*[12] held that indigent felony defendants could no longer be tried without being offered the assistance of counsel. In1964 the Court in *Malloy v. Hogan*[13] required states to respect the privilege against self-incrimination; the compulsion of a formal subpoena could no longer be used to force a criminal defendant to testify against himself in court. In 1966, *Miranda* held that the self-incrimination privilege also applied in police interrogation. Two years later, *Duncan v. Louisiana*[14] required states to provide jury trials in serious criminal cases.

This was a genuine, full-fledged revolution. Scholars still debate the nature and scope of changes on the ground, but there is no doubt that the Court's doctrinal moves amounted to a sea change in the capacity and obligation of federal judges to supervise state police practices and state criminal trials. The Fourth, Fifth and Sixth Amendments, previously irrelevant to criminal justice in the states, became—almost overnight—a comprehensive ''code of criminal procedure.'' And the adoption, elaboration and ultimate responsibility for enforcement of this code was placed entirely in the hands of the U.S. Supreme Court.

Why did this happen? To anyone with a rosy view of American democracy in the Eisenhower and Kennedy years, the development must seem a mixture of the

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[11] Mapp v. Ohio, 367 U.S. 643 (1961). *Mapp* is the subject of a separate chapter in this volume.

[12] 72 U.S. 335 (1963). *Gideon* is the subject of a separate chapter in this volume, along with Strickland v. Washington, 466 U.S. 668 (1984).

[13] 378 U.S. 1 (1964).

[14] 391 U.S. 145 (1968). *Duncan* is the subject of a separate chapter in this volume.

incomprehensible, the illegitimate, the benighted and the outrageous. Yet the Justices who accomplished (or perpetrated) this coup were no ivory-tower academic theorists pushing an abstract ideological agenda. Nor for that matter were they, like most of today's Justices, people who had spent long stretches of their careers in the rarefied atmosphere of the federal appellate courts. Clark (author of *Mapp*), Black (author of *Gideon*), Warren (author of *Miranda*), and White (author of *Duncan*) were sophisticated politicians and intensely practical men, all of them had moved from high political office directly to the Supreme Court, and none had hints of what we would today consider civil-libertarian credentials.[15] Yet they knew at first hand the realities of police behavior, prosecutorial practice, state criminal trials and—above all—the daunting politics of state and federal legislative reform. They knew these matters intimately, in ways that contemporary academic critics of Warren Court activism can at best only imagine.

What concerns preoccupied these Justices? There was, most obviously, the appalling police behavior repeatedly made evident in the Court's cases of the 1940s, 1950s and early 1960s. The problems were acute in the Southern states, especially in cases with racial overtones. But the difficulties were national in scope; several of the Court's most troubling cases of this period involved the police of New York City, Los

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[15] None of them, moreover, had had significant judicial experience prior to their Supreme Court appointments; their credentials lay in the world of politics. Tom Clark was an Assistant Attorney General, Criminal Division (1943–45), and Attorney General (1945–49) immediately before he was appointed to the Supreme Court. *See* R. Kirkendall, Tom C. Clark, in The Justices of the United States Supreme Court 1789–1969, at 2665–67 (L. Friedman & F. Israel, eds., 1969).

Hugo Black, after a brief stint as a police court judge in Birmingham, Alabama (1911–12), had served as a county solicitor (1914–17) and U.S. Senator (1927–37) before being appointed to the Court in 1937. *See* Roger Newman, Hugo Black 29–32, 36–47, 125–36, 237–38 (1997). Black had been a member of the Ku Klux Klan from 1923–26. *Id.*, at 91–92, 103.

Earl Warren had been a District Attorney (1925–38), Attorney General of California (1939–43), Governor of California (1943–53), and Republican candidate for vice-president on the Dewey ticket (1948), prior to his appointment to the Court in 1953. *See* G. Edward White, Earl Warren 27–34, 47–49, 100–07, 137–40 (1982). As Attorney General of California, Warren had played a major role in supporting and implementing the internment of Japanese–Americans during World War II. *See id.*, at 67–78.

Byron White served as Colorado state chairman of the Kennedy presidential campaign (1960) and Deputy Attorney General (1961–62) prior to joining the Court. *See* Dennis Hutchinson, The Man Who Once Was Whizzer White 232–33, 241–63 (1998). At the Justice Department White had played a leading role in law enforcement efforts of the period, including Attorney General Robert Kennedy's initiatives against crime and labor racketeering. *See id.*, at 272–87.

Angeles, and Cleveland.[16] And the existence of a serious problem was not in itself in dispute. Virtually all the Justices agreed that the practices coming to light were egregious and intolerable; the main disagreements within the Court were over the propriety of judicial action to stamp them out.

Beyond these problems of police misconduct in general, the interrogation cases posed a distinctive set of problems. The effort to separate legitimate police questioning from illegal abuse was framed by the ''voluntariness'' test. But in nearly three decades of experience using this test, its practical problems had become impossible to ignore. The voluntariness standard left police without essential guidance in what they were permitted to do. Its vagueness left judges without guidance as well and impaired the forward-looking value of appellate review. Decisions were fatally dependent on resolution of a ''swearing contest'' between police and the suspect, with no reliable way to assess the subtleties of pressure in the interrogation room or even the more straightforward facts about what had occurred. The test endorsed application of a ''suction process'' [17] to unwilling suspects and allowed considerable interrogation pressure that many considered inherently incompatible with ''voluntary'' choice. Minority suspects, the unsophisticated and the psychologically vulnerable were especially susceptible to manipulation and abuse. That factor in turn was not only troubling in itself, but it also posed a major risk of eliciting false confessions. Meanwhile, hardened criminals were left at a relative advantage. And extreme physical brutality, while clearly illegal, was not adequately checked by the test and in some ways was indirectly encouraged by the ''suction process'' it legitimated.

As with the broader problems of police misconduct, the interrogation cases often left strong judicial majorities in agreement that unacceptable methods had been used. Again, the important disagreements within the Court were only over the best way to remedy the consequences and prevent their recurrence.

Here other factors enter the picture, shaping the disagreements as they evolved during the 1950s: the absence, over several decades, of any serious state legislative efforts to rein in such practices; the virtual paralysis of the federal legislative process in matters touching the autonomy of the Southern states in the areas of civil liberties and civil rights; the continuing willingness of state judges to condone or ignore egregious police misconduct; and the persistence of such police behavior even in the face of

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[16] *See, e.g.*, Spano v. New York, 360 U.S. 315 (1959) (New York City); Mapp v. Ohio, 367 U.S. 643 (1961) (Cleveland); Rochin v. California, 342 U.S. 165 (1952) (Los Angeles). An extensive discussion of many such examples appears in Miranda, 384 U.S., at 445–48 & notes 6–7.

[17] Watts v. Indiana, 338 U.S. 49, 53 (1949) (opinion of Frankfurter, J.). For more detailed discussion of these problems posed by the voluntariness test, *see* Stephen J. Schuhofer, Confessions and the Court, 79 Mich. L. Rev. 865, 869–72 (1981) (hereinafter cited as Schulhofer, Confessions).

Supreme Court pronouncements repeatedly and forcefully condemning it.

Political solutions to these problems, through community mobilization on the ground, had begun but were being blocked by distinctly non- democratic processes. Black citizens whose only offense was their effort to register to vote were met with violent intimidation on a wide scale and outright murder, perpetrated with impunity thanks to the connivance of local law-enforcement officials and juries.[18] More distant factors probably played a role as well: the then-recent horrors of Nazi Germany; the resulting sensitivity to police-state tactics, racial injustice, and judicial passivity in the face of them; and the perceived urgency of the Cold War struggle to win third-world hearts and minds that were questioning the justice and fairness of American democracy.[19]

All these concerns drove ''incorporation''—the application to the States of pertinent provisions of the federal Bill of Rights—and especially the three pieces of incorporation that preceded *Miranda*: the exclusionary rule (*Mapp*, 1961), the right to counsel (*Gideon*, 1963), and the privilege against self-incrimination (*Malloy*, 1964). These prior decisions of course are important in their own right and worthy of separate discussion. But *Miranda* cannot be understood without reference to them; they are crucial pieces of the Miranda story itself. More than mere background or illustrations of the Warren Court mind-set, *Mapp, Gideon* and *Malloy* made it impossible for the Warren Court to avoid direct confrontation with new challenges to police interrogation as then practiced.

First, consider *Malloy*. It held that the states were subject not only to the Fourteenth Amendment ban on involuntary statements but also to the Fifth Amendment ban on ''compel[ed]'' incriminating statements.

Despite the verbal affinity between the operative terms (compelled and involuntary), it was clear to all concerned that the Fifth Amendment prohibition had much wider reach. Involuntary statements, though variously defined, are in essence those obtained by something akin to breaking a witness's will, and such statements can never be used for any purpose. But statements obtained by threat of some less grievous penalty (obtained by subpoena, for example) normally are not problematic at all. Indeed the process of compelling witnesses to testify is routine—the bread and butter of litigation.[20] It is worth repeating this contrast between the two concepts, because—

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[18] *See* Todd Gitlin, The Sixties: Years of Hope, Days of Rage 151 (1987).

[19] *See* Margaret Raymond, Rejecting Totalitarianism: Translating the Guarantees of Constitutional Criminal Procedure, 76 N.C. L. Rev. 1193 (1998).

[20] *See* United States v. Nixon, 418 U.S. 683, 709 (1974). *See generally* Stephen J. Schulhofer, Miranda, Dickerson, and the Puzzling Persistence of Fifth Amendment Exceptionalism, 99 Mich. L. Rev. 941, 944–48 (2001) (hereinafter cited as Schulhofer, Exceptionalism).

although the contrast is clear and indispensible—it is so easily and so often overlooked. Long before *Malloy*, states had been barred from ever using ''involuntary'' incriminating statements, but *Malloy* also barred use of ''compelled'' incriminating statements. The dissenters in *Malloy* were well aware that this holding brought more than redundancy or a mere change in terminology. They understood clearly that the Fifth Amendment prohibition swept much more broadly than that of the Fourteenth, and they forcefully protested the imposition of the more stringent restriction on the states.[21]

The compulsion at issue in *Malloy* itself was that of judicial subpoena. But the Court could not long avoid deciding whether informal pressures should be considered equivalent to those of a formal subpoena. And if informal pressures could ever qualify, it would be difficult to deny that the informal pressures brought to bear in police interrogation— pressures intentionally designed to elicit incriminating information from unwilling suspects—easily qualified as ''compelling'' in the Fifth Amendment sense, even when they did not rise to the level of coercion that breaks the suspect's will.[22]

Gideon added further, wholly independent concerns. The case involved a defendant who had requested counsel at trial. But in light of Sixth Amendment doctrines previously settled, *Gideon* by itself took the Court 90% of the way to *Miranda*. The case law had already made clear that the right to counsel applied not only at the trial but early enough to permit ''effective aid in the preparation and trial of the case.''[23] And just a year after *Gideon*, the Court in *Escobedo* held that post-arrest interrogation designed to elicit a confession, after suspicion had already ''focus[ed]'' on the arrestee, was a ''critical … stage when legal aid and advice are surely needed.'[24] Therefore, the Court held, the Sixth Amendment (with the exclusionary-rule concept inspired by *Mapp*) required suppression of the resulting confession.

Escobedo (arguably a natural application of the ''critical stage'' concept) cast a dark shadow over customary police interrogation practices, as once again the decision's proponents and critics both understood. The only wiggle room left for police interrogators, short of asking the Court to overrule Escobedo (or *Gideon*!) was the fact that the defendants in those cases knew their rights and had requested counsel specifically. If the Sixth Amendment right could be limited to those circumstances, *Gideon* and *Escobedo* would not require police to warn suspects of their rights.

But Sixth Amendment doctrine had already settled this point too, and in a clear fashion that left little room for compromise. Even absent an affirmative request, the Sixth Amendment required access to counsel except when the defendant had made ''an

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[21] Malloy, 378 U.S., at 14–20 (Harlan, J., dissenting).

[22] See Stephen J. Schulhofer, Reconsidering Miranda, 54 U. Chi. L. Rev. 435, 440–46 (1987).

[23] Powell v. Alabama, 287 U.S. 45, 71 (1932).

[24] Escobedo v. Illinois, 378 U.S. 478, 488 (1964) (internal quotation marks omitted).

intentional relinquishment or abandonment of a known right.'[25] Unless the Court was prepared to reverse itself and announce (counterfactually) that police interrogation was not a critical stage, or unless it was willing to except police interrogation from the normal principle that the right to counsel cannot be lost by ignorance or failure to make an affirmative request, the essential parameters of Miranda had been fixed, and police interrogation as theretofore practiced had been doomed, from the moment that Gideon—one of the Warren Court's most universally celebrated decisions— had been decided. Indeed, Gideon and related Sixth Amendment principles cast an even wider shadow, because the earlier cases had already recognized that the right to assistance at critical stages applied even when the defendant was not in custody. [26]

Thus, *Gideon* and *Malloy*—decisions that are never considered controversial today—made something very much like Miranda, or an even more restrictive decision, very difficult for a principled Court to avoid.

Finally, the voluntariness test then used to assess interrogation added momentum from an independent direction. Even as the test grew more sensitive and restrictive, the Court had become increasingly dissatisfied with its effectiveness. The 1959 *Spano* case had prompted four concurring Justices (not yet with Warren's support) to conclude that a new framework completely severed from voluntariness ''balancing'' was necessary.[27] In 1961, Justice Frankfurter made a monumentally elaborate effort to provide workable parameters for a rehabilitated voluntariness test. [28] Yet the effort was patently unsuccessful; only one other Justice was willing to join his opinion. The Court's decisions were replete with expressions of frustration with the voluntariness test and recognition, by its opponents and its erstwhile supporters alike, that over decades of experience, it had proved completely unworkable in practice.[29] Matters could not long continue in that vein, in any Court committed to controlling police-interrogation abuses.

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[25] Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

[26] *E.g*. Powell v. Alabama, 287 U.S. 45 (1932). *Powell*, or ''the Scottsboro Boys'' case, is the subject of a separate chapter in this volume. The *Powell* defendants were in custody, but the Court's decision was based on the need for counsel *before trial*, to assure adequate opportunity for preparation. The *Powell* principle clearly applies to defendants not in custody. *See, e.g.*, Massiah v. United States, 377 U.S. 201 (1964). For the classic discussion of the tension between the right to counsel at trial and the pre-*Escobedo* refusal to recognize a right to the assistance of counsel during pre-trial interrogation, *see* Yale Kamisar, Equal Justice in the Gatehouses and Mansions of American Criminal Procedure, in Criminal Justice in Our Time 19–36 (Y. Kamisar, F. Inbau & T. Arnold, eds. 1965).

[27] Spano, 360 U.S. at 324 (Douglas, J., concurring) (joined by Justices Black and Brennan); *id*., at 326 (Stewart, J., concurring) (joined by Justices Douglas and Brennan)

[28] Culombe v. Connecticut, 367 U.S. 568 (1961) (plurality opinion) (joined by Justice Stewart).

[29] *See* Schulhofer, Confessions, supra note 16, at 869.

In sum, against a background of unusually powerful political and social developments, three strands of specific doctrinal evolution (voluntariness, self-incrimination and the right to counsel) converged in the run-up to Miranda, a perfect storm poised to engulf investigation routines that had been commonplace for generations.

III. THE *MIRANDA* DECISION

As every law student and nearly all television viewers know, *Miranda* held that before questioning a suspect in custody, police must deliver a now-familiar four-part warning—that the suspect has the right to remain silent, that anything he says can be used against him, that he has the right to the assistance of counsel, and that if he cannot afford one, counsel will, on request, be appointed for him at state expense. This understanding of *Miranda*, while not wrong as far as it goes, misses nearly all the important features of the opinion, both analytically and operationally.

Analytically, the key to *Miranda* is the Court's decision to rely on Fifth Amendment principles, applying the ban on ''compulsion'' to stationhouse questioning but *rejecting* the broader restrictions that a Sixth Amendment right to counsel would have triggered. Operationally, the crucial portions of the holding are those that require police to follow specific procedures *after* the warnings are given. Questioning cannot proceed until the police obtain the suspect's ''knowing and intelligent'' waiver of his rights, they must not use inducements or trickery to obtain that waiver, and if the suspect indicates at any time that he no longer wishes to talk, then all questioning must cease.

This last step, the cut-off rule, is the real heart of *Miranda*. Neither the famous warnings nor the waiver requirement imposed radically new limits on police practices, but the automatic cut-off rule was a dramatic change in permissible interrogation tactics.

IV. POLITICAL AND JURISPRUDENTIAL FALLOUT

Miranda drew bitter opposition, literally from day one. Prosecutors protested loudly that the Court had handcuffed the police, usurping legislative prerogatives by imposing detailed rules that allegedly guaranteed the release of thousands of violent criminals. Two years later, after contentious hearings and biting criticism of the Court, Congress, in a provision of the ''Omnibus Crime Control and Safe Streets Act of 1968,'' purported to overrule *Miranda* and reinstate ''voluntariness'' as the sole criterion for

determining the admissibility of a confession.[30]

Even then, the political firestorm did not abate. Richard Nixon had observed Barry Goldwater's attempt to raise ''law and order'' as a major theme in the 1964 presidential campaign. [31]For two years prior to *Miranda*, Nixon had been exploring ways to make the argument work more successfully against liberal opponents and the Democratic Party. For Nixon, *Miranda* came at the perfect time and provided just the highly visible opening he needed. Sharply escalating crime rates in the mid–1960s and urban rioting throughout the country in 1968 gave the issue powerful political traction. Judges and politicians who were ''soft on crime'' became Nixon's specific target in the 1968 presidential campaign, which gave prominent place to his pledge to appoint ''strict constructionists'' and remake the Warren Court.

Once elected, Nixon did just that, appointing Warren Burger as Chief Justice and adding William Rehnquist soon thereafter. And the Burger Court moved quickly in the direction that Nixon and much of the country desired. Although the Court (and the Nixon Justice Department) both ignored the 1968 statute's purported repeal of *Miranda*, the Court adopted a long list of qualifications and exceptions to the *Miranda* requirements and repeatedly found ways to avoid reversing convictions in cases involving *Miranda* violations.[32] By the mid–1970s the Burger Court had decided numerous cases presenting *Miranda* issues and had not reversed a single conviction on *Miranda* grounds.[33]

Making matters worse, the Burger Court seemed determined to pull the ground out from under *Miranda*'s conceptual foundation and to cast doubt on the decision's legitimacy. The Court repeatedly referred to *Miranda* in grudging terms, even to the point of stating that the *Miranda* rules were not constitutionally required, that *Miranda* ''sweeps more broadly than the Fifth Amendment itself,'[34] and that confessions taken in violation of *Miranda* were not necessarily compelled[35] *Miranda*, the leading symbol of Warren Court activism, seemed headed for oblivion.

Yet the Court hesitated to deliver the coup de grace. And as time passed, the Court's impetus to do so seemed to slacken, perhaps because subsequent decisions seemed to have softened Miranda's impact or because the catastrophic law-enforcement

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[30] U.S.C. § 3501.

[31] *See* Lia Baker, Miranda: Crime, Law and Politics 40–42 (1983).

[32] *E.g.*, Oregon v. Elstad, 470 U.S. 298 (1985); New York v. Quarles, 467 U.S. 649 (1984); Michigan v. Tucker, 417 U.S. 433 (1974).

[33] *See* Geoffey R. Stone, The Miranda Doctrine in the Burger Court, 1977 Sup. Ct. Rev. 99.

[34] Elstad, 470 U.S., at 306.

[35] *Id.*, at 312, suggesting that a genuine violation of the Fifth Amendment requires proof of ''physical violence or other deliberate means calculated to break the suspect's will.''

consequences so confidently predicted in 1966 never materialized.[36]

When Edwin Meese became President Reagan's Attorney General, he pressed the Department of Justice to complete this piece of unfinished business by attacking *Miranda* head on.[37] But he ran into surprising resistance—from his own Solicitor General,[38] from professional prosecutors and even from police chiefs nationwide.[39] Though antipathy to *Miranda* remained, especially among those like Meese whose law-enforcement careers had begun in the 1950s, there was now a widespread impression that *Miranda* was not so bad after all.

By the 1980s a common view among police chiefs was that *Miranda* did not substantially impede the flow of confessions and even had some advantages for police.[40] *Miranda* made clear the steps necessary to insure a confession's admissibility and in some cases even helped interrogators get confessions in the first place, probably by inducing suspects to let down their guard and encouraging them to believe that they could safely attempt to talk their way out of trouble. More broadly, *Miranda*, once seen as a symbol of illegitimate judicial activism, had become for the police a legitimating symbol of their own professionalism, a highly public affirmation of their respect for the rights of suspects and for the rule of law.[41]

Miranda's most committed opponents nonetheless persisted in their efforts to overturn it. And in 2000 they finally managed to get the attention of the Supreme Court when a federal appellate court held (rejecting the Justice Department's position in support of *Miranda*) that the 1968 statute had validly superceded *Miranda* and replaced its strictures with the old due-process voluntariness test.[42]

By this point there were decades of Supreme Court precedent insisting that

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[36] Mich L. Rev 2475, 79–85。

[37] *See* Phillip Shenon, ''Meese Seen as Ready to Challenge Rule on Telling Suspects of Rights,'' N.Y. Times, Jan. 22, 1987, p. 1

[38] Charles Fried, Order and Law 46 (1990).

[39] *See, e.g.,* Eduardo Paz–Martinez, ''Police Chiefs Defend Miranda Against Meese Threats,'' Boston Globe, Feb.5, 1987, pp. 25, 29.

[40] *See* Stephen J. Schulhofer, Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs, 90 Nw. U. L. Rev. 500, 503–04 & notes 9 & 13 (1996) (hereafter cited as Schulhofer, Practical Effect).

[41] *See* Richard A. Leo. The Impact of Miranda Revisited, 86 J. Crim. L. & Criminology 621, 680 (1996).

[42] United States v. Dickerson, 166 F.3d 667 (4th Cir. 1999).

Miranda's rules were not constitutionally required. But in decisions rendered at the same time and thereafter, there were also numerous Supreme Court judgments that reversed state criminal convictions on *Miranda* grounds,[43] an action that would be untenable, indeed inconceivable, if *Miranda*'s rules were not constitutionally required. Observers on both sides of the issue hoped that the Court would resolve this paradox, either by firmly endorsing *Miranda*'s constitutional credentials or by disavowing them and wiping the *Miranda* rules off the books once and for all.

In the end neither side got all it had hoped for. In *Dickerson v. United States*[44] the Supreme Court reaffirmed *Miranda* and held that both state and federal courts must comply with its requirements. That ruling, moreover, came on a surprisingly strong 7–2 vote, with an opinion authored by none other than *Miranda*'s most prominent Supreme Court critic, Chief Justice William Rehnquist. Yet the opinion also reaffirmed prior decisions casting doubt on *Miranda*'s constitutional foundations. While insisting that compliance with Miranda was obligatory, the *Dickerson* majority to some extent perpetuated the *Miranda* paradox by refusing to characterize the *Miranda* rules as constitutional requirements, and by using only weaker formulations that treated *Miranda* as ''constitutionally based,'' with ''constitutional underpinnings.''[45] *Dickerson* also endorsed the previously created exceptions to *Miranda*. And the Court's most recent decisions make clear that it intends to give those exceptions a broad reading, leaving police free to use most indirect fruit of interrogations that disregard *Miranda*,[46] at least absent proof of deliberate efforts to circumvent the requirements.[47]

Did we wind up in the right place? To what extent has *Miranda* really changed police behavior for the better, and at what cost in terms of lost confessions and lost convictions? Should a Court fully cognizant of its doctrinal obligations and the limits of the judicial role have been more cautious from the outset? Or should such a Court have been even more interventionist? And would greater caution or greater activism have produced better results in the long run? The remainder of this Chapter considers these practical and jurisprudential dimensions of the *Miranda* story.

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[43] *E.g.*, Minnick v. Mississippi, 498 U.S. 146 (1990); Arizona v. Roberson, 486 U.S. 675 (1988); Edwards v. Arizona, 451 U.S. 477 (1981).

[44] 530 U.S. 428 (2000).

[45] *Id.*, at 440 & note 5

[46] United States v. Patane, 542 U.S. 630 (2004).

[47] Missouri v. Seibert, 542 U.S. 600 (2004).

V. ASSESSING *MIRANDA*

The *Miranda* rules, as we have seen, consist principally of three requirements. The first and best known is that prior to custodial questioning, police must give the suspect a specific, four-part warning. Less well known are two requirements that *Miranda* imposes on police actions thereafter. Before initiating interrogation, the police must obtain a ''knowing and intelligent'' waiver, and if the suspect indicates that he no longer wishes to talk, all questioning must cease.

Viewed in this way, the *Miranda* holding has the troubling feel of detailed legislation, inappropriate for a court.[48] In this conventional picture, moreover, the decision compounds that failing by seeming to obliterate years of precedent under the voluntariness test and to trump any alternative approach; hence the charge, common then and now, that *Miranda* precluded more flexible case-by-case approaches and creative legislative solutions.[49] And as conventionally understood, *Miranda* had the added and particularly disturbing feature that it seemed to ''hand-cuff'' the police, making it likely that the guilty would demand lawyers immediately and force the prosecution to turn them loose for lack of sufficient evidence. This last effect, we now know, did not materialize, but only, it is widely believed, because subsequent decisions ''tamed'' the holding in ways that the original *Miranda* Court supposedly never intended.

Yet if we put aside the *Miranda* we know from popular fiction and from off-hand portrayals that academics themselves often perpetuate, these common criticisms of *Miranda* collapse. If we trace carefully the doctrinal and operational dimensions of the actual decision, a very different picture emerges.

Miranda did not involve an illegitimate form of adjudication, it did not impose ''code-like'' rules, it did not supplant the voluntariness test, and it did not preclude legislative solutions. *Miranda* took a conventional judicial approach to constitutional interpretation, and the Court's doctrinal conclusions were—on their merits—solidly grounded. If the Court's conclusions are analytically vulnerable, it is only because they represent a retrenchment, pulling back from broader Fifth and Sixth Amendment restrictions that previous cases had foreshadowed.

Nor, from a practical perspective, did *Miranda* ''handcuff'' the police, even in its original Warren Court formulation. Operationally, *Miranda* gave police free rein to continue using a wide range of interrogation practices, the opinion deliberately avoided language that would have imposed more restrictive requirements, and it chose not to

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[48] *E.g.*, Edwin Meese III, Square Miranda Rights With Reason, Wall St. J.22 (June 13, 1986).

[49] *E.g.*, William J. Stuntz, Miranda's Mistake, 99 Mich. L. Rev. 975, 977–78 (2001); Paul G. Cassell, Miranda's Social Costs: An Empirical Reassessment, 90 Nw. U. L. Rev. 387, 498 (1996).

address many of the most serious defects in the voluntariness test. Seen in light of what the *Miranda* opinion actually says, and the details of what it actually does, the portrait conventionally drawn by *Miranda*'s critics turns out to be almost a mirror image of the reality.

This section first considers the constitutional principles on which Miranda rests and then takes a close look at *Miranda*'s operational requirements, both as the *Miranda* opinion originally formulated them, and as they have worked in practice.

Constitutional Foundations

(1) *The Sixth Amendment right to counsel.* On the eve of *Miranda*, the Court seemed poised to hold (and many said Escobedo had already held) that the Sixth Amendment barred all police questioning, in or out of the stationhouse, after suspicion had focused on the accused, unless counsel was actually present or unless counsel had been waived under scrupulously guarded conditions. Many said as well that whatever one thought of *Escobedo*, the universally acclaimed *Gideon* decision required the same restrictions in any event.

Miranda's first analytic step was to reinterpret *Escobedo* as a Fifth Amendment—not a Sixth Amendment—case.[50] While focusing attention on interrogation's potential for compulsion, the Court in effect eliminated broader and more restrictive right-to-counsel concerns from the equation in typical interrogation situations, even inside the stationhouse. And the Court left police with almost unrestricted freedom to question suspects outside the stationhouse, at least prior to the time when formal judicial proceedings began.[51] On the right-to-counsel issues at least, *Miranda* was an unequivocal victory for law enforcement, a victory based, moreover, on an unusual (and previously unprecedented) formalism in interpreting the Sixth Amendment's crucial critical-stage concept.[52] On this score, if there is any objection to *Miranda*'s legitimacy, it is that the Court eliminated Sixth Amendment concerns by fiat, in a terse footnote that suggests no principled basis, indeed no explanation whatever, for the Court's departure from the functional approach that had guided critical-stage assessments for more than three decades.

An explanation can be imagined, of course—the explanation that practical law enforcement needs require this exception from the usual Sixth Amendment standards.

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[50] Miranda, 384 U.S. at 444 note 4.

[51] *See, e.g.*, Beckwith v. United States, 425 U.S. 341 (1976); Berkemer v. McCarty, 468 U.S. 420 (1984).

[52] Compare Powell v. Alabama, 287 U.S. 45 (1932).

That explanation, however, simply underscores again the fact that the Court gave law-enforcement concerns great weight, and did so in spite of the more traditional criteria of judicial decision-making and constitutional interpretation.

(2) *Fifth Amendment compulsion.* Three elements of *Miranda*'s holding focused on the Fifth Amendment. The Court held first that Fifth Amendment compulsion can be either formal or informal and, second, that absent warnings and a waiver, all interrogation in a custodial setting is inherently compelling. Third, the Court held that police can ''dispel'' this inherent compulsion in either of two ways—by delivering the prescribed warnings and obtaining the suspect's statement of his willingness to talk, or by taking any other steps equally effective in informing the suspect of his rights and assuring his ability to exercise them. And as a corollary of this third point, once the warned suspect voluntarily waives his rights, compulsion has been dispelled, and thereafter, police can proceed to question the suspect in the isolated custodial setting after all. Indeed, *Miranda* holds, such questioning can continue indefinitely, unless and until the suspect indicates that he no longer wishes to talk. Any statement made prior to that point will be admissible, provided only that it is voluntary.

Seen through this lens—that is, through the lens of the opinion itself—*Miranda* involved conventional, not illegitimate modes of constitutional interpretation, and it left ample room for legislatures to prescribe alternative approaches. *Miranda*'s Fifth Amendment foundation is not only ''legitimate,'' but substantively solid, as we can see by taking each of its three elements in turn.

(a) Informal pressure. In holding that the word ''compel'' includes informal pressure, the Court was, of course, engaged in an entirely conventional act of judicial interpretation. And on the merits, *Miranda*'s holding on this point, though a departure from Supreme Court precedent of the early to mid-Twentieth Century, was clearly correct, in accord with common sense and with the early historical understanding (so far as it is known) of the self-incrimination privilege. That piece of the holding is also in accord with a strong line of uncontroversial precedent in post-*Miranda* cases outside the interrogation setting. Today, virtually none of *Miranda*'s many critics suggests that Fifth Amendment compulsion should be limited to formal penalties only.[53]

(b) The per se rule. *Miranda*'s second step—the holding that absent warnings, any custodial interrogation involves ''compelling'' pressure— poses, again, a conventional question of interpreting constitutional text. Yet critics often suggest that because of the emphatically per se character of the Court's holding, the Court adopted a ''prophylactic rule,'' that the Court cannot properly do such a thing in constitutional

[53] *See, e.g.*, Stephen J. Markman, The Fifth Amendment and Custodial Questioning: A Response, 54 U. Chi. L. Rev. 938, 939 (1987) (criticizing *Miranda* but conceding that *Miranda*'s first holding—that ''compulsion'' can include informal pressure—was ''obviously correct.'')

adjudication, and therefore that this feature renders the Miranda holding illegitimate.[54]

This criticism is commonplace, and a source of discomfort even for some of *Miranda*'s defenders. Nonetheless, it is untenable. There is nothing illegitimate—or even unusual—about per se rules in constitutional adjudication. They are commonplace in First Amendment settings, for example.[55] And such per se rules are especially commonplace—even predominant—in cases, both before and after *Miranda*, that are concerned with defining ''compulsion'' in Fifth Amendment settings outside the stationhouse.[56]

To take only one of many possible examples, a threat to discharge a public employee for refusing to testify—or even for refusing to explain his misconduct informally—is impermissibly compelling per se.[57] Numerous circumstantial factors affect the actual force of such a threat for any given employee, but the Court has expressly held that such circumstances are irrelevant. The threat is automatically deemed compelling, regardless of a particular employee's specific economic situation. And none of the Justices has ever condemned precedents of this sort as improper ''prophylactic rules'' or illegitimate usurpations of legislative prerogatives.

Even in the Court's police-interrogation voluntariness case law, the area that most quintessentially requires case-by-case judgments under the totality of the circumstances, the Court had, long before *Miranda*, adopted many per se rules. For example, the Court had made explicit since the 1940s that confessions obtained by dozens of hours of continuous interrogation are automatically deemed involuntary, regardless of any surrounding circumstances.[58] The same rule no doubt applies today to confessions obtained by punching or kicking the accused.[59] And these points again are uncontroversial. None of those who attempt to suggest that *Miranda*'s per se rule is somehow illegitimate cast any doubt whatever on the legitimacy or substantive soundness of the rule that confessions obtained by a punch or a kick are involuntary per se.

A more nuanced criticism concedes that per se rules can be legitimate but argues that Miranda's particular per se rule is not sound on its merits. The argument here is that a conclusive presumption of compulsion is inappropriate because unwarned custodial

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[54] *See, e.g.*, Joseph D. Grano, Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy, 80 N. W. U. L. Rev.100 (1985).

[55] *See* David A. Stauss, The Ubiquity of Prophylactic Rules, 55 U. Chi. L. Rev.190 (1988).

[56] For cases illustrating these points, *see* Schulhofer, Exceptionalism, *supra* note 20, at 946–48.

[57] Lefkowitz v. Cunningham, 431 U.S. 801 (1977).

[58] *E.g.*, Ashcraft v. Tennessee, 322 U.S.143 (1944).

[59] *See, e.g.*, Stein v. New York, 346 U.S. 156, 182 (1953).

interrogation often is not sufficiently coercive to overbear a defendant's will.[60] But coercion of this sort is normally not considered necessary to establish a Fifth Amendment violation. At least in contexts outside that of custodial police interrogation, Fifth Amendment compulsion is satisfied by any significant pressure or penalty that the state deploys against a suspect for the specific purpose of getting him to reveal incriminating testimonial information.[61] The effort to paint the *Miranda* per se rule as extreme can be considered plausible only from two perspectives. That effort can be considered plausible if we ignore the restrictions beyond Fourteenth Amendment voluntariness that *Malloy* and the Fifth Amendment bring into play. Or it can be considered plausible if we accept a kind of Fifth Amendment exceptionalism, under which the standards used to assess compulsion in the context of police interrogation are different from—and more demanding than—the standards uncontroversially accepted for determining Fifth Amendment compulsion in every other setting.[62]

Against the background of generally accepted Fifth Amendment conceptions of compulsion, is a per se rule appropriate in making judgments about custodial police interrogation? Given the relative infrequency of cases in which compelling pressures will truly be absent and the difficulties of case-by-case decision-making in this area, a conclusive presumption of compulsion is in fact a responsible tool of adjudication.

Indeed, the problem of determining compulsion in the context of police interrogation could fairly be placed right at the top of any list of constitutional issues that properly demand some form of pre se rule.[63]

(c) The warnings. *Miranda*'s next step required that the suspect receive a complex, four-part warning of his rights. More precisely, *Miranda* required either that police give the four-part warning or put in place some other, equally effective system to inform a suspect of his right to remain silent and assure that he will have the opportunity to exercise that right.

Here, the complaints about illegitimate judicial legislation seem at first glance to have some substance. The Court had apparently mandated a detailed, ''code-like'' warnings system. And the Court seemed to reinforce the legislative character of that holding by stating that the warnings procedure was *not* in itself constitutionally required. The Court seemed, in the name of the Constitution, to be requiring state and local police to take steps that even the *Miranda* Court did not view as a constitutional mandate.

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[60] *See, e.g.*, Dickerson v. United States, 530 U.S. at 444 (Scalia, J., dissenting).

[61] For detailed discussions of this point, *see* Schulhofer, Reconsidering Miranda, *supra* note 22, at 445

[62] For development of this argument, *see* Schulhofer, Exceptionalism, *supra* note 20, at 944–51.

[63] *See* Schulhofer, Reconsidering Miranda, *supra* note 22, at 451–53.

What the Court meant, of course, was that *some* system of protection from the custodial pressures was constitutionally required. And absent effective alternatives, the *Miranda* warnings therefore *would be* every bit as obligatory as any other constitutional requirement. Rather than leave state and local police guessing about what kind of a system would suffice, the Court chose an approach that in effect gave police officers the best of both worlds. The Court offered them a model system of safeguards that they could use with confidence, guaranteeing that it would pass constitutional muster, all the while leaving state legislatures and the police the option—indeed expressly encouraging them—to develop any other approach that would be equally effective.

The approach that the *Miranda* Court chose was—odd as it may seem to say so—*diffident*. It showed respect for legislative prerogatives and allowed the maximum flexibility that was consistent with the suspect's right to protection from unconstitutionally compelling pressures. Yet, paradoxically, the Court's approach was seized upon by critics and distorted to support claims that the Court had overreached and imposed mandatory rules that the Constitution itself did not require. *Miranda*'s diffidence allowed unsympathetic Courts in later years to state with apparent accuracy that the rights announced in *Miranda* are "not themselves rights protected by the Constitution,"[64] and that failure to follow the *Miranda* rules "is not in itself a violation of the Fifth Amendment.''[65] But where alternative safeguards were not deployed, as was invariably the case, then the police had carried out an interrogation while impermissibly compelling pressures were still in place. If *Miranda*'s underlying constitutional principles are correct, police interrogation without following *Miranda*'s subsidiary rules (or some comparable substitute) *is* ''in itself a violation of the Fifth Amendment.''

Miranda's supposedly offensive code of rules, in short, not only do not constrain legislatures inappropriately; they also do not ''handcuff'' the police. Indeed the code doesn't restrict the police at all. What it does is precisely the opposite. If the Court was correct in holding that any interrogation in the custodial setting is inherently compelling, then far from handcuffing the police, the warnings act to liberate the police. The warnings grant police officers a green light to continue questioning the isolated suspect who is held against his will in the confines of the stationhouse, a process that otherwise would violate the Constitution itself—not merely some derivative system of prophylactic rules.

The notion that police-initiated warnings really can ''dispel'' that inherent compulsion seems dubious at best. But however that may be, the warnings unquestionably serve—and from the outset were designed to serve—the function of permitting custodial interrogation to continue. Whether and to what extent those requirements, even as originally written—imposed real operational constraints remains

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[64] Michigan v. Tucker, 417 U.S. 433, 444 (1974).

[65] Oregon v. Elstad, 470 U.S. 298, 307 & note 1 (1985).

to be considered.

Miranda's Operational Rules

(1) Access to counsel. *Miranda*, as we have seen, reinterpreted *Escobedo* as a Fifth Amendment case and as a result eliminated Sixth Amendment constraints from most interrogation situations inside the stationhouse. And because the *Miranda* rules that replace *Escobedo* apply *only* in custodial situations, the Court left police with largely unrestricted freedom to question suspects *outside* the stationhouse, at least prior to the time when formal judicial proceedings began.[66]

Miranda does, to be sure, use quite a lot of right-to-counsel language, and it even states that suspects facing custodial interrogation have such a right. But the *Miranda* right to counsel is not the suspect's affirmative Sixth Amendment right to comprehensive legal assistance in the suspect's defense. Rather it is (at most) only a Fifth Amendment tool for helping to dissipate the custodial pressures. And in practice this right is even more limited than that, because it comes into play only when a suspect in the grip of those very pressures chooses to invoke it. Having detailed in powerful language the ways that a suspect in the isolated police station environment, ''surrounded by antagonistic forces,''[67] faces intimidating pressures that can ''operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators,'[68] the *Miranda* Court granted a right to have counsel present only ''if the defendant so desires.'[69] And the Court assumed that the suspect's decision to express this desire could be ''unfettered'[70] even when it must be made while he remains in the isolation of the interrogation room, and when it must be communicated to the same antagonistic forces whose hostility created the need for counsel's protection in the first place. The choice of that approach cannot have been a product of inadvertence or naive optimism. The *Miranda* Court knew what it was doing.

(2) The warnings. Having dispensed with an effective, affirmative right to counsel grounded in the Sixth Amendment, the *Miranda* Court proceeded to require that the suspect be told *by the police* that he can choose to remain silent. No doubt such a warning can help assure a suspect that the police acknowledge his rights and are prepared to respect them. No doubt the inherent pressures of the custodial situation are thereby mitigated to some degree, and no doubt some officers anticipated that this requirement would pose an obstacle or at best a troublesome nuisance. For the Warren

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[66] *See, e.g.*, Beckwith v. United States, 425 U.S. 341 (1976).

[67] Miranda, 384 U.S. at 461.

[68] *Id.*, at 469–70.

[69] *Id.*, at 470

[70] *Id.*, at 469.

Court to have taken this step and imposed the warning requirement was not nothing.

Nor, however, was it a lot. The Court was well aware of the difficulty of determining after the fact, without recorded evidence or written documents, exactly what had transpired in the interrogation room. The *Miranda* opinion discusses that problem at length[71] but then does nothing whatever about it. The Court required no written or recorded corroboration of how—or indeed whether—the warnings were in fact delivered.

Likewise, the Court was well aware that warnings entrusted to the police are easily blunted. Here too the Court itself makes the point explicitly: ''A once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice to [assure that the individual's right to choose between silence and speech remains unfettered] among those who most require knowledge of their rights. . . .'[72] Yet once again the Court does nothing whatever to address the problem. In the conventional picture of an activist Warren Court determined to subject the police to tight restrictions and perhaps even to stamp out the use of confessions altogether, the oversight has to seem inexplicable. But again, the Court surely knew what it was doing.

(3) Waiver. Once the warnings are given, the police cannot initiate questioning until the suspect freely agrees to talk. But what are the standards by which the validity of such a waiver is to be judged? The waiver cannot be prompted by any persuasion, cajolery or deception, and the opinion stresses that the police have a ''heavy burden'' to prove waiver.[73]

These are not meaningless restrictions, but again, they are far from airtight. In essence the test for a valid waiver remains what it was before *Miranda*—voluntariness under the totality of the circumstances. (To be sure, there is an important difference: police cannot apply the previously permissible ''suction process'' to obtain such a waiver.)

And once again, the swearing-contest problem remains as well. In imposing a ''heavy burden,'' the *Miranda* Court must have meant, at a minimum, that a police officer's testimony about waiver would have to appear sincere and convincing. But at the same time that it stressed the dangers of interrogation-room secrecy, the Court chose not to require that the waiver be made in writing, recorded, or witnessed by any neutral observer. It is no doubt too cynical to assume that the *Miranda* Court deliberately contemplated and invited police perjury on this point; perhaps the Court hoped to tackle the swearing contest soon after. But it is fair to wonder whether a Court seeking a truly

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[71] Miranda, 384 U.S. at 445, 448.

[72] *Id.*, at 469–70.

[73] *Id.*, at 475.

effective package of prophylactic rules should have started where *Miranda* starts and postponed what *Miranda* postponed.

(4) After Waiver. We now know that most suspects facing interrogation waive their *Miranda* rights and agree to talk.[74] In light of the porous character of the first three *Miranda* safeguards (counsel, the warnings and waiver), this result should not have been surprising. It should have been apparent, and indeed from the outset it *was* apparent to perceptive observers, that the guts of *Miranda* was the set of rules it established for interrogations conducted after waiver.

But what are those rules? Even the most attentive television viewer might understandably conclude that *Miranda* has nothing to say on this subject.[75] Indeed, one important potential requirement was strikingly omitted. *Miranda* forbids the use of cajolery or deception to obtain a waiver. But the opinion is silent, no doubt deliberately so, on the propriety of using cajolery and deception *after waiver*. And just three years after Miranda, the Court, in an opinion by Justice Thurgood Marshall, held that the use of deceptive tactics did not render a confession ''involuntary.'[76] ''Because the admissibility of statements given after a valid waiver . . . must be determined on the basis of the voluntariness test,'[77] a suspect who attempts to explain himself to his captors waives his right to be protected from cajolery, deception and psychological ploys designed to test his story. In that respect, interrogation after a *Miranda* waiver remains very much the same process that it was during the 1950s.

There is one extremely important difference. *Miranda*, unlike the voluntariness test, provides that when a suspect indicates at any point during interrogation that he no longer wishes to talk, then ''the interrogation must cease.''[78] Under the voluntariness test, police had been permitted to continue questioning, challenging, cajoling and deceiving the unwilling, resisting suspect, as they did (though ultimately to an excessive extent) in the *Spano* case. *Miranda*'s cut-off rule is, operationally, the heart of the *Miranda* system and arguably its only real teeth. But for the suspect who fails to state unequivocally that he wants to remain silent or consult an attorney, the only limits that apply to interrogation tactics are identical to those in effect before *Gideon, Malloy, Escobedo* and *Miranda*—the amorphous balancing concepts of the due process

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[74] *See* Schulhofer, Practical Effect, supra note 40, at 560.

[75] *See, e.g.*, Akhil Reed Amar, ''OK, All Together Now: 'You Have the Right to . . .''' L.A. Times, Dec. 12, 1999, at M1 (equating the *Miranda* rights with the *Miranda* warnings and asserting that the public knows the *Miranda* rights because it knows the *Miranda* warnings).

[76] Frazier v. Cupp, 394 U.S. 731 (1969).

[77] Welsh S. White, What is an Involuntary Confession Now?, 50 Rutgers L. Rev. 2001, 2004 (1998).

[78] Miranda, 384 U.S. at 474.

voluntariness test.

Unlike the due-process voluntariness test, *Miranda* doctrine does not overtly balance each suspect's dignity interests against the law- enforcement interests of the state in his case. Rather, under *Miranda*, the suspect's Fifth Amendment rights are ostensibly absolute. But under the system *Miranda* puts in place, the police retain ample room to pursue their law-enforcement interests, even by methods that bring considerable pressure to bear on the suspect. *Miranda* does not, any more than the due-process test, come directly to grips with the dilemma arising from our simultaneous commitments to the privilege against self- incrimination and to a law-enforcement system in which police interrogation is perceived as a necessity.

The Consequences in Practice

Almost as soon as it was announced, *Miranda* prompted district attorneys and police chiefs throughout the country to monitor its effects, and many of their early studies claimed that the decision had had catastrophic effects on law enforcement.[79] Precipitous declines in confession rates and conviction rates were reported. Yet most of these early studies were crudely designed, and often, on closer examination, their results proved to be fatally flawed. Subsequent studies presented quite a different picture. The weight of the evidence suggested that any negative impact on confession and conviction rates was small and rapidly diminishing over time. The informal impressions of law enforcement personnel and other criminal justice practitioners were in accord with these conclusions.[80]

The currently prevailing view, even among police and prosecutors, that *Miranda*'s impact on conviction rates is negligible and that it does not present serious problems for law enforcement.[81] Typically, only 20% to 25% of suspects invoke their

[79] *See, e.g.*, Baker, *supr*a note 31, at 180–81, 403–05; Yale Kamisar, Police Interrogation and Confessions 47–49 & note 11 (1980).

[80] *See, e.g.*, Stephen L. Wasby, Small Town Police and the Supreme Court (1976); ABA Special Comm'n on Criminal Justice in a Free Society, Criminal Justice in Crisis 28 (1988).

[81] *See* Roger Parloff, ''Miranda on the Hot Seat,'' New York Times Magazine, Sept. 26, 1999, pp. 84, 87; Schulhofer, Practical Effect, *supra* note 40, at 504. There has been one dissenting voice, a law professor who revisited the early empirical studies, made several adjustments, and concluded that *Miranda* was responsible for the loss of a conviction in 3.8% of all serious criminal cases. Cassell, *supra* note 49. The 3.8% attrition figure could in itself be taken as a refutation of the apocalyptic claims of *Miranda*'s detractors. But on close examination, even the claim of a 3.8% impact proved to be artificially inflated and unsupportable. When the available before/after studies are reanalyzed with all appropriate qualifications in mind, *Miranda*'s empirically detectable harm to law enforcement shrinks in effect to

right to silence at any point prior to or during interrogation.[82] Carefully conducted studies indicate that in roughly 55–65% of all interrogations, the police ultimately succeed in obtaining an incriminating statement—rates comparable to those that commonly prevailed prior to *Miranda*.[83]

Indeed, experienced law-enforcement officials typically believe that the *Miranda* rules are appropriate and that they offer substantial benefits for the police. *Miranda* procedures are less difficult for police officers to follow than the vagaries of the voluntariness standard. By assuring the public that police must operate within defined rules, *Miranda* provides legitimacy to the process of interrogation behind closed doors. Law-enforcement institutions ''have not only successfully adapted . . . to Miranda, but have publicly embraced Miranda as a legitimating symbol of their professionalism and commitment to fairness in the criminal process.'[84]

If *Miranda* has had no impact on the flow of confessions, some might conclude that the decision was a failure—not simply because confessions have survived (eliminating them was never a goal that could plausibly be attributed to *Miranda*), but because a continuing flow of confessions seems to imply continuation of the pressures police deploy to obtain confessions. But recent observational studies of police interrogation tactics demonstrate that today's suspects typically confess not because of fear of mistreatment but primarily because of misplaced confidence in their own ability to talk their way out of trouble. Modern police questioning has become an elaborate ''confidence game,'' in which detectives subtly establish rapport with their ''mark'' and dupe the suspect into believing that he can help himself by letting out a portion of the facts or by inventing a plausible alibi.[85]

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zero. *See* Schulhofer, Practical Effect, *supra* note 40, at 544–45. For other studies concluding that Miranda has caused no empirically detectable harm to law enforcement, *see, e.g.*, George C. Thomas III, Plain Talk About the Miranda Empirical Debate: A ''Steady State'' Theory of Confessions, 43 UCLA L. Rev. 933, 935–36, 952–55 (1996); Richard A. Leo, Inside the Interrogation Room, 86 J. Crim. L. & Criminology 266, 280 (1996); Peter Carlson, You Have the Right to Remain Silent, Washington Post, Sept., 13, 1998, at 9; John J. Donohue III, Did Miranda Diminish Police Effectiveness?, 50 Stan. L. Rev. 1147 (1998).

[82] *See, e.g.*, Cassell, supra note 49, at 496.

[83] *See, e.g.*, Leo, *supra* note 81, at 280; Thomas, supra note 81, at 935–36, 946–53.

[84] Leo, *supra* note 41, at 680.

[85] *See* David Simon, Homicide 197–202 (1991); Richard A. Leo, Miranda's Revenge: Police Interrogation as a Confidence Game, 30 L. & Soc'y Rev. 259 (1996).

VI. CONCLUSION

For those who consider only the ‘‘bottom line’’ of confessions rates and convictions, *Miranda* may appear an irrelevancy. But our best available evidence suggests that today’s confessions are primarily the result of persuasion, deception and the suspect’s overconfidence, rather than the product of pressure and fear. That is no merely technical difference. The Fifth Amendment protects and any decent society should protect suspects from state-orchestrated compulsion to convict themselves. But our Constitution does not protect and a decent society ought not to protect suspects from misplaced confidence in their ability to outsmart the police. *Miranda* seems to have moved us closer to a system that relies more on the latter method and less on the former.

That said, *Miranda* left many of the most serious problems in police interrogation untouched. *Miranda* did not substantially reduce the possibilities for physically abusive questioning, and it stopped far short of protecting suspects from all pressure to waive their Fifth Amendment rights. *Miranda* did nothing at all about police dominance of the swearing contest over what had actually occurred behind the closed doors of the interrogation room. It did almost nothing about the problem of false confessions. In all these respects, a Court determined to implement the Fifth Amendment privilege could have done much more.

Miranda, in short, was a compromise. It was carefully structured to preserve police interrogation as an investigative tool and to preserve the shrouds of secrecy that protect the practice from the prying eyes of judges and the public. Nothing in *Miranda* prevents a state from requiring its police to videotape their interrogations whenever possible. Indeed no conceivable law-enforcement interest—at least no *legitimate* law-enforcement interest—stands in the way of such a requirement. Yet to this day only a handful of jurisdictions require videotaping, and only a handful of police departments preserve videotapes showing anything more than the end result—the confession itself, but not the dynamic that produced it. The resistance prompted by *Miranda*’s prophylactic safeguards against compulsion would likely seem tame in comparison to the massive opposition that prophylactic safeguards against police perjury would have provoked.

Seen from that perspective, *Miranda* is a grand but largely symbolic gesture. The symbolic importance of criminal procedure guarantees, however, should not be underestimated. Symbols like *Miranda* underscore our societal commitment to a government of limited powers. Such symbols serve, however imperfectly, to encourage restraint in an area where emotion easily runs uncontrolled. They can help educate and persuade the thousands of front-line officials upon whose voluntary compliance the constitutional order ultimately depends. As the Court has said in a related context,

‘‘[O]ver the long term, [the] demonstration that our society attaches serious consequences to violation of constitutional rights is thought to encourage those who formulate law enforcement policies, and the officers who implement them, to incorporate [constitutional] ideals into their value system.’[86] Over the course of a generation, Miranda appears to have had just such an effect, a subtle but by no means modest accomplishment.

[86] Stone v. Powell, 428 U.S. 465, 492 (1976).

Chapter 3 Police-Induced Confessions: Risk Factors and Recommendations[1]

Saul M. Kassin | Steven A. Drizin | Thomas Grisso | Gisli H. Gudjonsson | Richard A. Leo | Allison D. Redlich

In recent years, a disturbing number of high-profile cases, such as the Central Park jogger case, have surfaced involving innocent people who had confessed and were convicted at trial, only later to be exonerated (Drizin & Leo, 2004; Gudjonsson, 1992, 2003; Kassin, 1997; Kassin & Gudjonsson, 2004; Lassiter, 2004; Leo & Ofshe, 1998). Although the precise incidence rate is not known, research suggests that false confessions and admissions are present in 15–20% of all DNA exonerations (Garrett, 2008; Scheck, Neufeld, & Dwyer, 2000; http://www.innocenceproject.org/). Moreover, because this sample does not include those false confessions that are disproved before trial, many that result in guilty pleas, those in which DNA evidence is not available, those given to minor crimes that receive no post-conviction scrutiny, and those in juvenile proceedings that contain confidentiality provisions, the cases that are discovered most surely represent the tip of an iceberg.

In this new era of DNA exonerations, researchers and policy makers have come to realize the enormous role that psychological science can play in the study and prevention of wrongful convictions. In cases involving wrongfully convicted defendants, the most common reason (found in three-quarters of the cases) has been eyewitness misidentification. Eyewitness researchers have thus succeeded at identifying the problems and proposing concrete reforms. Indeed, following upon an AP-LS White Paper on the subject (Wells et al., 1998), the U.S. Department of Justice assembled a working group of research psychologists, prosecutors, police officers, and lawyers, ultimately publishing guidelines for law enforcement on how to minimize eyewitness identification error (Technical Working Group for Eyewitness Evidence, 1999; see Doyle, 2005; Wells et al., 2000). While other problems have been revealed—for

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example, involving flaws in various forensic sciences (see Faigman, Kaye, Saks, & Sanders, 2002), the number of cases involving confessions—long considered the ‘‘gold standard’’ in evidence—has proved surprising (http://www.innocenceproject.org/).

Wrongful convictions based on false confessions raise serious questions concerning a chain of events by which innocent citizens are judged deceptive in interviews and misidentified for interrogation; waive their rights to silence and to counsel; and are induced into making false narrative confessions that form a sufficient basis for subsequent conviction. This White Paper summarizes much of what we know about this phenomenon. It draws on core psychological principles of influence as well as relevant forensic psychology studies involving an array of methodologies. It identifies various risk factors for false confessions, especially in police interviewing, interrogation, and the elicitation of confessions. It also offers recommendations for reform.

Citing the impact on policy and practice of the eyewitness White Paper, Wiggins and Wheaton (2004) called for a similar consensus-based statement on confessions. Fulfilling this call, the objectives of this White Paper are threefold. The first is to review the state of the science on interviewing and interrogation by bringing together a multidisciplinary group of scholars from three perspectives: (1) clinical psychology (focused on individual differences in personality and psychopathology); (2) experimental psychology (focused on the influence of social, cognitive, and developmental processes); and (3) criminology (focused on the empirical study of criminal justice as well as criminal law, procedure, and legal practice). Our second objective is to identify the dispositional characteristics (e.g., traits associated with Miranda waivers, compliance, and suggestibility; adolescence; mental retardation; and psychopathology) and situational-interrogation factors (e.g., prolonged detention and isolation; confrontation; presentations of false evidence; and minimization) that influence the voluntariness and reliability of confessions. Our third objective is to make policy recommendations designed to reduce both the likelihood of police-induced false confessions and the number of wrongful convictions based on these confessions.

I. BACKGROUND

The pages of American legal history are rich in stories about false confessions. These stories date back to the Salem witch trials of 1692, during which about 50 women confessed to witchcraft, some, in the words of one observer, after being ‘‘tyed…Neck and Heels till the Blood was ready to come out of their Noses’’ (Karlsen, 1989, p.101). Psychologists’ interest as well can be traced to its early days as a science.

One hundred years ago, in On the Witness Stand, Hugo Munsterberg (1908) devoted an entire chapter to the topic of ‘‘Untrue Confessions.’’ In this chapter, he discussed the Salem witch trials, reported on a contemporary Chicago confession that he believed to be false, and sought to explain the causes of this phenomenon (e.g., he used such words as ‘‘hope,’’ ‘‘fear,’’ ‘‘promises,’’ ‘‘threats,’’ ‘‘suggestion,’’ ‘‘calculations,’’ ‘‘passive yielding,’’ ‘‘shock,’’ ‘‘fatigue,’’ ‘‘emotional excitement,’’ ‘‘melancholia,’’ ‘‘auto-hypnosis,’’ ‘‘dissociation,’’ and ‘‘self-destructive despair’’).

A. DNA Exonerations and Discoveries in the U.S.

In 1989, Gary Dotson was the first wrongfully convicted individual to be proven innocent through the then-new science of DNA testing. Almost two decades later, more than 200 individuals have been exonerated by post-conviction DNA testing and released from prison, some from death row. In 15–20% of these cases, police-induced false confessions were involved (Garrett, 2008; www.innocence project.org). A disturbing number of these have occurred in high-profile cases, such as New York City’s Central Park Jogger case, where five false confessions were taken within a single investigation. In that case, five teenagers confessed during lengthy interrogations to the 1989 brutal assault and rape of a young woman in Central Park. Each boy retracted his statement immediately upon arrest, saying he had confessed because he expected to go home afterward. All the boys were convicted and sent to prison, only to be exonerated in 2002 when the real rapist gave a confession, accurately detailed, that was confirmed by DNA evidence (People of the State of New York v. Kharey Wise et al., 2002).

Post-conviction DNA tests and exonerations have offered a window into the causes of wrongful conviction. Researchers and legal scholars have long documented the problem and its sources of error (Borchard, 1932; Frank & Frank, 1957; see Leo, 2005 for a review). Yet criminal justice officials, commentators, and the public have tended until recently to be highly skeptical of its occurrence, especially in death penalty cases (Bedau & Radelet, 1987). The steady stream of post-conviction DNA exonerations in the last two decades has begun to transform this perception. Indeed, these cases have established the leading causes of error in the criminal justice system to be eyewitness misidentification, faulty forensic science, false informant testimony, and false confessions (Garrett, 2008).

B. The Problem of False Confessions

A false confession is an admission to a criminal act— usually accompanied by a narrative of how and why the crime occurred—that the confessor did not commit. False confessions are difficult to discover because neither the state nor any organization keeps records of them, and they are not usually publicized. Even if they are discovered, false confessions are hard to establish because of the difficulty of proving the confessor's innocence. The literature on wrongful convictions, however, shows that there are several ways to determine whether a confession is false. Confessions may be deemed false when: (1) it is later discovered that no crime was committed (e.g., the presumed murder victim is found alive, the autopsy on a ''shaken baby'' reveals a natural cause of death); (2) additional evidence shows it was physically impossible for the confessor to have committed the crime (e.g., he or she was demonstrably elsewhere at the time or too young to have produced the semen found on the victim); (3) the real perpetrator, having no connection to the defendant, is apprehended and linked to the crime (e.g., by intimate knowledge of nonpublic crime details, ballistics, or physical evidence); or (4) scientific evidence affirmatively establishes the confessor's innocence (e.g., he or she is excluded by DNA test results on semen, blood, hair, or saliva).

Drizin and Leo (2004) analyzed 125 cases of proven false confession in the U.S. between 1971 and 2002, the largest sample ever studied. Ninety-three percent of the false confessors were men. Overall, 81% of the confessions occurred in murder cases, followed by rape (8%) and arson (3%). The most common bases for exoneration were the real perpetrator was identified (74%) or that new scientific evidence was discovered (46%). With respect to personal vulnerabilities, the sample was younger than the total population of murderers and rapists: A total of 63% of false confessors were under the age of 25, and 32% were under 18; yet of all persons arrested for murder and rape, only 8 and 16%, respectively, are juveniles (Snyder, 2006). In addition, 22% were mentally retarded, and 10% had a diagnosed mental illness. Surprisingly, multiple false confessions to the same crime were obtained in 30% of the cases, wherein one false confession was used to prompt others. In total, 81% of false confessors in this sample whose cases went to trial were wrongfully convicted.

Although other researchers have also documented false confessions in recent years, there is no known incidence rate, and to our knowledge empirically based estimates have never been published. There are several reasons why an incidence rate cannot be determined. First, researchers cannot identify the universe of false confessions because no governmental or private organization keeps track of this information. As noted earlier, the sample of discovered cases is thus incomplete.

Second, even if one could identify a nonrandom set of hotly contested and possibly false confessions, it is often difficult if not impossible as a practical matter to obtain the primary case materials (e.g., police reports; pretrial and trial transcripts; and electronic recordings of the interrogations) needed to determine ‘‘ground truth’’ with sufficient certainty to prove that the confessor is innocent. Also, it is important to note that although most case studies are based in the U.S. and England, proven false confessions have been documented in countries all over the world—including Canada (CBC News, August 10, 2005), Norway (Gudjonsson, 2003), Finland (Santtila, Alkiora, Ekholm, & Niemi, 1999), Germany (Otto, 2006), Iceland (Sigurdsson & Gudjonsson, 2004), Ireland (Inglis, 2004), The Netherlands (Wagenaar, 2002), Australia (Egan, 2006), New Zealand (Sherrer, 2005), China (Kahn, 2005), and Japan (Onishi, 2007).

For estimating the extent of the problem, self-report methods have also been used. Sigurdsson and Gudjonsson (2001) conducted two self-report studies of prison inmates in Iceland and found that 12% claimed to have made a false confession to police at some time in their lives, a pattern that the authors saw as part of the criminal lifestyle. In a more recent study of Icelandic inmates, the rate of self- reported false confessions had increased (Gudjonsson, Sigurdsson, Einarsson, Bragason, & Newton, 2008). Similar studies have been conducted in student samples within Iceland and Denmark. Among those interrogated by police, the self-reported false confession rates ranged from 3.7 to 7% among college and older university students (Gudj- onsson, Sigurdsson, Asgeirsdottir, & Sigfusdottir, 2006; Gudjonsson, Sigurdsson, & Einarsson, 2004; Steingrimsdottir, Hreinsdottir, Gudjonsson, Sigurdsson, & Nielsen, 2007; Gudjonsson, Sigurdsson, Bragason, Einarsson, & Valdimarsdottir, 2004). In a North American survey of 631 police investigators, respondents estimated from their own experience that 4.78% of innocent suspects confess during interrogation (Kassin et al., 2007). Retrospective self- reports and observer estimates are subject to various cognitive and motivational biases and should be treated with caution as measures of a false confession rate. In general, however, they reinforce the wrongful conviction data indicating that a small but significant minority of innocent people confess under interrogation.

II. POLICE INTERROGATIONS IN CONTEXT

The practices of interrogation and the elicitation of confessions are subject to historical, cultural, political, legal, and other contextual influences. Indeed, although this article is focused on confessions to police within in a criminal justice framework, it is important to note that similar processes occur, involving varying degrees of pressure,

within the disparate frameworks of military intelligence gathering and corporate loss-prevention investigations. Focused on criminal justice, we examine American interrogation practices of the past and present; the role played by Miranda rights; the admissibility and use of confession evidence in the courts; and current practices not only in the U.S. but in other countries as well.

A. "Third-Degree" Practices of the Past

From the late nineteenth century through the 1930s, American police occasionally employed ''third-degree'' methods of interrogation—inflicting physical or mental pain and suffering to extract confessions and other types of information from crime suspects. These techniques ranged from the direct and explicit use of physical assaults to tactics that were both physically and psychologically coercive to lesser forms of duress. Among the most commonly used ''third-degree'' techniques were physical violence (e.g., beating, kicking, or mauling suspects); torture (e.g., simulating suffocation by holding a suspect's head in water, putting lighted cigars or pokers against a suspect's body); hitting suspects with a rubber hose (which seldom left marks); prolonged incommunicado confinement; deprivations of sleep, food, and other needs; extreme sensory discomfort (e.g., forcing a suspect to stand for hours on end, shining a bright, blinding light on the suspect); and explicit threats of physical harm (for a review, see Leo, 2004). These methods were varied and commonplace (Hopkins, 1931), resulting in large numbers of coerced false confessions (Wickersham Commission Report, 1931).

The use of third-degree methods declined precipitously from the 1930s through the 1960s. They have long since become the exception rather than the rule in American police work, having been replaced by interrogation techniques that are more professional and psychologically oriented. The twin pillars of modern interrogation are behavioral lie-detection methods and psychological interrogation techniques, both of which have been developed and memorialized in interrogation training manuals. By the middle of the 1960s, police interrogation practices had become entirely psychological in nature (Wald, Ayres, Hess, Schantz, & Whitebread, 1967). The President's Commission on Criminal Justice and the Administration of Justice declared in 1967: ''Today the third degree is virtually non-existent'' (Zimring & Hawkins, 1986, p. 132). Still, as the United States Supreme Court recognized in Miranda v. Arizona (1966), psychological interrogation is inherently compelling, if not coercive, to the extent that it relies on sustained pressure, manipulation, trickery, and deceit.

B. Current Law Enforcement Objectives and Practices in the U.S.

American police typically receive brief instruction on interrogation in the academy and then more sustained and specialized training when promoted from patrol to detective. Interrogation is an evidence-gathering activity that is supposed to occur after detectives have conducted an initial investigation and determined, to a reasonable degree of certainty, that the suspect to be questioned committed the crime.

Sometimes this determination is reasonably based on witnesses, informants, or tangible evidence. Often, however, it is based on a clinical hunch formed during a pre-interrogation interview in which special ‘‘behavior-provoking’’ questions are asked (e.g., ‘‘What do you think should happen to the person who committed this crime?’’) and changes are observed in aspects of the suspect’s behavior that allegedly betray lying (e.g., gaze aversion, frozen posture, and fidgety movements). Yet in laboratories all over the world, research has consistently shown that most commonsense behavioral cues are not diagnostic of truth and deception (DePaulo et al., 2003). Hence, it is not surprising as an empirical matter that laypeople on average are only 54% accurate at distinguishing truth and deception; that training does not produce reliable improvement; and that police investigators, judges, customs inspectors, and other professionals perform only slightly better, if at all—albeit with high levels of confidence (for reviews, see Bond & DePaulo, 2006; Meissner & Kassin, 2002; Vrij, 2008).

The purpose of interrogation is therefore not to discern the truth, determine if the suspect committed the crime, or evaluate his or her denials. Rather, police are trained to interrogate only those suspects whose culpability they ‘‘establish’’ on the basis of their initial investigation (Gordon & Fleisher, 2006; Inbau, Reid, Buckley, & Jayne, 2001). For a person under suspicion, this initial impression is critical because it determines whether police proceed to interrogation with a strong presumption of guilt which, in turn, predisposes an inclination to ask confirmatory questions, use persuasive tactics, and seek confessions (Hill, Memon, & McGeorge, 2008; Kassin, Goldstein, & Savitsky, 2003). In short, the single-minded purpose of interrogation is to elicit incriminating statements, admissions, and perhaps a full confession in an effort to secure the conviction of offenders (Leo, 2008).

Designed to overcome the anticipated resistance of individual suspects who are presumed guilty, police interrogation is said to be stress-inducing by design—structured to promote a sense of isolation and increase the anxiety and despair associated with denial relative to confession. To achieve these goals, police employ a number of tactics.

As described in Inbau et al.'s (2001) Criminal Interrogation and Confessions, the most influential approach is the so-called Reid technique (named after John E. Reid who, along with Fred Inbau, developed this approach in the 1940s and published the first edition of their manual in 1962). First, investigators are advised to isolate the suspect in a small private room, which increases his or her anxiety and incentive to escape. A nine-step process then ensues in which an interrogator employs both negative and positive incentives. On one hand, the interrogator confronts the suspect with accusations of guilt, assertions that may be bolstered by evidence, real or manufactured, and refuses to accept alibis and denials. On the other hand, the interrogator offers sympathy and moral justification, introducing ''themes'' that minimize the crime and lead suspects to see confession as an expedient means of escape. The use of this technique has been documented in naturalistic observational studies (Feld, 2006b; Leo, 1996b; Simon, 1991; Wald et al., 1967) and in recent surveys of North American investigators (Kassin et al., 2007; Meyer & Reppucci, 2007).

C. Miranda Warnings, Rights, and Waivers

One of the U.S. legal system's greatest efforts to protect suspects from conditions that might produce involuntary and unreliable confessions is found in the U.S. Supreme Court decision in Miranda v. Arizona (1966). The Court was chiefly concerned with cases in which the powers of the state, represented by law enforcement, threatened to overbear the will of citizen suspects, thus threatening their Constitutional right to avoid self-incrimination.

In Miranda, the Court offered a remedy, requiring that police officers had to inform suspects of their rights to remain silent and to the availability of legal counsel prior to confessions. This requirement aimed to strike a balance against the inherently threatening power of the police in relation to the disadvantaged position of the suspect, thus reducing coercion of confessions. In cases involving challenges to the validity of the waiver of rights, courts were to apply a test regarding the admissibility of the confession at trial. Statements made by defendants would be inadmissible if a waiver of the rights to silence and counsel was not made ''voluntarily, knowingly, and intelligently.'' One year after the Miranda decision, In re Gault (1967) extended these rights and procedures to youth when they faced delinquency allegations in juvenile court.

Forty years later, there is no research evidence that Miranda and Gault achieved their ultimate objective. Police officers routinely offer the familiar warnings to suspects prior to taking their statements. But research has not unequivocally

determined whether confessions became more or less likely, are any more or less reliable, or are occurring in ways that are more or less ‘‘voluntary, knowing, and intelligent’’ than in the years prior to Miranda. Several years ago, Paul Cassell, an outspoken critic of Miranda, had maintained (based on pre–post studies as well as international comparisons) that the confession and conviction rates have dropped significantly as a direct result of the warning and waiver requirements, thus triggering the release of dangerous criminals (Cassell, 1996a, 1996b; Cassell & Hayman, 1996). Yet others countered that his analysis was based on selective data gathering methods and unwarranted inferences (Donahue, 1998; Feeney, 2000; Thomas & Leo, 2002); that these declines, if real, were insubstantial (Schulhofer, 1996); that four out of five suspects waive their rights and submit to questioning (Leo, 1996a, 1996b); and that the costs to law enforcement were outweighed by social benefits—for example, that Miranda has had a civilizing effect on police practices and has increased public awareness of constitutional rights (Leo, 1996c; Thomas, 1996).

In recent years, the U.S. Supreme Court has upheld the basic warning-and-waiver requirement (Dickerson v. United States, 2000)—for example, refusing to accept confessions given after a warning that was tactically delayed to produce an earlier inadmissible statement (Missouri v. Seibert, 2004). Practically speaking, however, research has suggested that the Court’s presumption concerning the protections afforded by Miranda warnings is questionable. At minimum, a valid waiver of rights requires that police officers provide suspects an understandable description of their rights and that suspects must understand these warnings to waive them validly. What empirical evidence do we have that Miranda’s procedural safeguards produce these conditions?

First, the rights of which suspects must be informed were clearly defined in Miranda, but the warnings were not. The Miranda decision included an appendix wherein the Court offered an example of the warnings that were suggested, but police departments were free to devise their own warnings. A recent study examined 560 Miranda warning forms used by police throughout the U.S. (Rogers, Harrison, Shuman, Sewell, & Hazelwood, 2007). A host of variations in content and format were identified, and metric analysis of their wording revealed reading-level requirements ranging from third-grade level to the verbal complexity of postgraduate textbooks (see Kahn, Zapf, & Cooper, 2006, for similar results; also see Rogers, Hazelwood, Sewell, Harrison, & Shuman, 2008). Moreover, Miranda warning forms varied considerably in what they conveyed. For example, only 32% of the forms told suspects that legal counsel could be obtained without charge. Thus, many warning forms raise serious doubts about the knowing and intelligent waiver of rights by almost any suspect who is ‘‘informed’’ by them.

Second, studies have repeatedly shown that a substantial proportion of adults with mental disabilities, and ‘‘average’’ adolescents below age 16 have impaired understanding of Miranda warnings when they are exposed to them. Even adults and youth who understand them sometimes do not grasp their basic implications. Many of these studies have examined actual adult or juvenile defendants, using reliable procedures that allow the quality of an individual’s understanding to be scored according to specified criteria. For example, do people after warnings factually understand that ‘‘I don’t have to talk’’ and that ‘‘I can get an attorney to be here now and during any questioning by police?’’ To answer this question, respondents have been examined in the relatively benign circumstance of a testing session with a researcher rather than in the context of an accusatory, highly stressful interrogation using standardized Miranda warnings that have about an average sixth- to seventh-grade reading level. Thus, the results obtained in these studies represent people’s grasp of the Miranda warnings under relatively favorable circumstances. Under these conditions, average adults exhibit a reasonably good understanding of their rights (Grisso, 1980, 1981). But studies of adults with serious psychological disorders (Cooper & Zapf, 2008; Rogers, Harrison, Hazelwood, & Sewell, 2007) or with mental retardation (Clare & Gudjonsson, 1991; Everington & Fulero, 1999; Fulero & Everington, 1995; O’Connell, Garmoe, & Goldstein, 2005) have found substantial impairments in understanding of Miranda warnings compared to nonimpaired adult defendants.

Many studies have examined adolescents’ understanding of Miranda warnings, and the results have been very consistent (Abramovitch, Higgins-Biss, & Biss, 1993; Abramovitch, Peterson-Badali, & Rohan, 1995: Colwell et al., 2005; Goldstein, Condie, Kalbeitzer, Osman, & Geier, 2003; Grisso, 1980, 1981; Redlich, Silverman, & Steiner, 2003; Viljoen, Klaver, & Roesch, 2005; Viljoen & Roesch, 2005; Wall & Furlong, 1985). In one comprehensive study, 55% of 430 youth of ages 10–16 misunderstood one or more of the Miranda warnings (for example, ‘‘That means I can’t talk until they tell me to’’). Across these studies, the understanding of adolescents ages 15–17 with near-average levels of verbal intelligence tends not to have been inferior to that of adults. But youth of that age with IQ scores below 85, and average youth below age 14, performed much poorer, often misunderstanding two or more of the warnings.

Some studies have shown that many defendants, especially adolescents, who seem to have an adequate factual understanding of Miranda warnings, do not grasp their relevance to the situation they are in (e.g., Grisso, 1980, 1981; Viljoen, Zapf, & Roesch, 2007). For example, one may factually understand that ‘‘I can have an attorney before and during questioning’’ yet not know what an attorney is or what role an

attorney would play. Others may understand the attorney's role but disbelieve that it would apply in their own situation—as when youth cannot imagine that an adult would take their side against other adults, or when a person with paranoid tendencies believes that any attorney, even his own, would oppose him.

The ability to grasp the relevance of the warnings beyond having a mere factual understanding of what they say is sometimes referred to as having a ''rational understanding'' or ''appreciation'' of the warnings. Many states, however, require only a factual understanding of Miranda rights for a ''knowing and intelligent'' waiver (e.g., People v. Daoud, 2000). In those states that apply a strict factual understanding standard, youth who technically understand the warnings (e.g., ''I can have an attorney to talk to'' or ''I can stay silent'') but harbor faulty beliefs that may distort the significance of these warnings (''An attorney will tell the court whatever I say'' or ''You have to tell the truth in court, so eventually I'll have to talk if they want me to'') are considered capable of having made a valid waiver, even if they have no recognition of the meanings of the words or a distorted view of their implications.

Even among those with adequate understanding, suspects will vary in their capacities to ''think'' and ''decide'' about waiving their rights. Whether decision-making capacities are deemed relevant for a ''voluntary, knowing, and intelligent'' waiver will depend on courts' interpretations of ''intelligent'' or ''voluntary.'' Several studies have thus examined the decision-making process of persons faced with hypothetical Miranda waiver decisions.

Studies of adolescents indicate that youth under age 15 on average perform differently from older adolescents and adults. They are more likely to believe that they should waive their rights and tell what they have done, partly because they are still young enough to believe that they should never disobey authority. Studies have also shown that they are more likely to decide about waiver on the basis of the potential for immediate negative consequences—for example, whether they will be permitted to go home if they waive their rights—rather than considering the longer-range consequences associated with penalties for a delinquency adjudication (Grisso, 1981; Grisso et al., 2003). Young adolescents presented with hypothetical waiver decisions are less likely than older adolescents to engage in reasoning that involves adjustment of their decisions based on the amount of evidence against them or the seriousness of the allegations (Abramovitch, Peterson- Badali, & Rohan, 1995). These results regarding the likelihood of immature decision-making processes are consistent with research on the development of psychosocial abilities of young adolescents in everyday circumstances (Steinberg &

Cauffman, 1996) and other legal contexts (Grisso & Schwartz, 2000; Owen-Kostelnik, Reppucci, & Meyer, 2006).

Other Miranda decision-making studies have examined the suggestibility of persons with disabilities (Clare & Gudjonsson, 1995: Everington & Fulero, 1999; O'Connell, Garmoe, & Goldstein, 2005) and adolescents (Goldstein et al., 2003; Redlich et al., 2003; Singh & Gudjonsson, 1992). Suggestibility refers to a predisposition to accept information communicated by others and to incorporate that information into one's beliefs and memories. In general, these studies indicate that persons with mental retardation and adolescents in general are more susceptible to suggestion in the context of making hypothetical waiver decisions, and that greater suggestibility is related to poorer comprehension of the warnings. These results take on special significance in light of observational studies of police behavior when obtaining Miranda waiver decisions from adolescents (Feld, 2006a, 2006b) and adults (Leo, 1996b). As described elsewhere in this article, police officers often approach suspects with ''friendly'' suggestions regarding both the significance of the Miranda waiver procedure and their decision. In either case, results indicate that adults with disabilities and adolescents in general are prone to adjust their behaviors and decisions accordingly.

In a formal sense, whether one waives his or her rights voluntarily, knowingly, and intelligently does not have a direct bearing on the likelihood of false confessions (Kassin, 2005; White, 2001). The decision to waive one's rights in a police interrogation does not necessarily lead to a confession, much less a false confession. Nevertheless, research cited earlier regarding the lack of attentiveness of persons with disabilities and adolescents to long-range consequences suggests an increased risk that they would also comply with requests for a confession—whether true of false—to obtain the presumed short-term reward (e.g., release to go home). In addition, some studies have found that poor comprehension of Miranda warnings is itself predictive of a propensity to give false confessions (Clare & Gudjonsson, 1995; Goldstein et al., 2003). Sometimes this stems from low intelligence or a desire to comply; at other times it appears to be related to a na¨ıve belief that one's actual innocence will eventually prevail—a belief that is not confined to adolescents or persons with dis- abilities (Kassin & Norwick, 2004).

Finally, many states require the presence of a parent or other interested adult when youth make decisions about their Miranda rights (Oberlander, Goldstein, & Goldstein, 2003). These rules are intended to offer youth assistance in thinking through the decision while recognizing that caretakers cannot themselves waive their children's rights in delinquency or criminal investigations. Studies have shown, however, that the

presence of parents at Miranda waiver events typically does not result in any advice at all or, when it does, provides added pressure for the youth to waive rights and make a statement (Grisso & Ring, 1979). The presence of parents may be advisable, but it does not offer a remedy for the difficulties youth face in comprehending or responding to requests for a waiver of their rights.

In summary, research suggests that adults with mental disabilities, as well as adolescents, are particularly at risk when it comes to understanding the meaning of Miranda warnings. In addition, they often lack the capacity to weigh the consequences of rights waiver, and are more susceptible to waiving their rights as a matter of mere compliance with authority.

D. Overview of Confession Evidence in the Courts

American courts have long treated confession evidence with both respect and skepticism. Judicial respect for confessions emanates from the power of confession evidence and the critical role that confessions play in solving crimes. The U.S. Supreme Court has recognized that confession evidence is perhaps the most powerful evidence of guilt admissible in court (Miranda v. Arizona, 1966)—so powerful, in fact, that ‘‘the introduction of a confession makes the other aspects of a trial in court superfluous, and the real trial, for all practical purposes, occurs when the confession is obtained” (Colorado v. Connelly, 1986, p. 182 citing McCormick, 1972, p. 316).

Judicial skepticism of confession evidence stems from the historical fact that some law enforcement officers, aware that confession evidence can assure conviction, have abused their power in the interrogation room. As the U.S. Supreme Court stated in Escobedo v. Illinois (1964): ‘‘We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the ‘confession’ will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation’’ (pp. 488–489).

Judicial concern with juror over-reliance on confession evidence gave rise to a series of evolving rules designed to curb possible abuses in the interrogation room, exclude unreliable confessions from trial, and prevent wrongful convictions. These doctrines, which developed both in the common law of evidence and under the

Constitution as interpreted by the U.S. Supreme Court, fell into two distinct sets of legal rules: corroboration rules and the voluntariness rules (Ayling, 1984; Leo, Drizin, Neufeld, Hal, & Vatner, 2006).

Corroboration Rules

The corroboration rule, which requires that confessions be corroborated by independent evidence, was the American take on the English rule known as the corpus delicti rule. Corpus delicti literally means ‘‘body of the crime’’—that is, the material substance upon which a crime has been committed’’ (Garner, 2004, p. 310). The rule was founded at common law in England in the wake of Perry’s Case, a seventeenth-century case in which a mother and two brothers were convicted and executed based upon a confession to a murder that was later discovered to be false when the supposed murder victim turned up alive (Leo et al., 2006). America’s version of Perry’s Case is the infamous 1819 case of Stephen and Jesse Boorn, two brothers who were convicted and sentenced to death in Manchester, Vermont for the murder of their brother-in-law Russell Colvin. Fortunately for the two men, both of whom had confessed to the killing under intense pressure from authorities, their lawyers located Colvin alive before their hangings took place (Warden, 2005).

In American homicide cases, in response to Boorn, the rule came to mean that no individual can be convicted of a murder without proof that a death occurred, namely the existence of a ‘‘dead body.’’ As the rule evolved in the courts over time, it was applied to all crimes and required that before a confession could be admitted to a jury, prosecutors had to prove: (1) that a death, injury, or loss had occurred and (2) that criminal agency was responsible for that death, injury, or loss (Leo et al., 2006). The rule was designed to serve three purposes: to prevent false confessions, to provide incentives to police to continue to investigate after obtaining a confession, and to safeguard against the tendency of juries to view confessions as dispositive of guilt regardless of the circumstances under which they were obtained (Ayling, 1984).

The corpus delicti rule does not require corroboration that the defendant committed the crime, nor does it demand any proof of the requisite mental state or any other elements of the crime. Moreover, the rule only requires corroboration of the fact that a crime occurred; it does not require that the facts contained in the confession be corroborated. Given the relative ease of establishing the corpus delicti in most criminal cases (e.g., producing a dead body in a homicide case and showing that death was not self-inflicted or the result of an accident), and the weight that most jurors attach to

confession evidence, prosecutors can still obtain many convictions from unreliable confessions. The rule thus makes it easier in some cases for prosecutors to convict both the guilty and the innocent (Leo et al., 2006).

At the same time, in a certain class of cases, the corpus delicti rule may bar the admission of reliable confessions. Because the rule requires that prosecutors prove that there be death or injury resulting from a criminal act, prosecutors may have a hard time getting confessions admitted when the evidence is unclear as to whether any injury had occurred (e.g., child molestation without physical evidence) or whether it resulted from an accident or natural causes as opposed to a criminal act (e.g., child death by smothering or Sudden Infant Death Syndrome; see Taylor, 2005).

For these reasons and others, the rule has been severely criticized. In Smith v. United States (1954), the U.S. Supreme Court criticized the corpus delicti rule for ‘‘serv[ing] an extremely limited function’’ (p. 153). The Court noted that the rule was originally designed to protect individuals who had confessed to crimes that never occurred but that it does little to protect against the far more frequent problem wherein a suspect confesses to a crime committed by someone else. In short, the rule did ‘‘nothing to ensure that a particular defendant was the perpetrator of a crime’’ (State v. Mauchley, 2003, p. 483).

In place of the corpus delicti rule, the Supreme Court, in two decisions released on the same day—Smith and Opper v. United States (1954)—announced a new rule, dubbed the trustworthiness rule, which requires corroboration of the confession itself rather than the fact that a crime occurred. Under the trustworthiness rule, which was adopted by several states, the government may not introduce a confession unless it provides ‘‘substantial independent evidence which would tend to establish the trustworthiness of the confession’’ (State v. Mauchley, 2003, p. 48; citing Opper).

In theory, the trustworthiness standard is a marked improvement on the corpus delicti rule in its ability to prevent false confessions from entering the stream of evidence at trial. In practice, however, the rule has not worked to screen out false confessions. Because investigators sometimes suggest and incorporate crime details into a suspect’s confession, whether deliberately or inadvertently, many false confessions appear highly credible to the secondhand observer. Without an electronic recording of the entire interrogation process, courts are thus left to decide a swearing contest between the suspect and the detective over the source of the details contained

within the confession. Moreover, the quantum of corroboration in most jurisdictions that apply the trustworthiness doctrine is very low, allowing many unreliable confessions to go before the jury (Leo et al., 2006).

Rules Prohibiting Involuntary Confession

Until the late eighteenth century, out-of-court confessions were admissible as evidence even if they were the involuntary product of police coercion. In 1783, however, in The King v. Warrickshall, an English Court recognized the inherent lack of reliability of involuntary confessions and established the first exclusionary rule: Confessions are received in evidence, or rejected as inadmissible, under a consideration whether they are or are not intitled [sic] to credit. A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt…but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape…that no credit ought to be given it; and therefore it should be rejected (*King v. Warrickshall*, 1783, pp. 234–235).

The basis for excluding involuntary confessions in Warrickshall was a concern that confessions procured by torture or other forms of coercion must be prohibited because of the risk that such tactics could cause an innocent person to confess. In other words, involuntary confessions were to be prohibited because they were unreliable. Following Warrickshall, in the late 1800s, the U.S. Supreme Court adopted this reliability rationale for excluding involuntary confessions in a series of decisions (Hopt v. Utah, 1884; Pierce v. United States, 1896; Sparf v. United States, 1895; Wilson v. United States, 1896).

The Supreme Court adopted a second rationale for excluding involuntary confessions in 1897, in Bram v. United States. In Bram, the Court for the first time linked the voluntariness doctrine to the Fifth Amendment's provision that ''no person shall be compelled in any criminal case to be a witness against himself.'' This privilege against self-incrimination was not rooted in a concern about the reliability of confessions. Rather, its origins were grounded in the rule of nemo teneturseipsum prodere (''no one is bound to inform on himself''), a rule dating back to the English ecclesiastical courts which sought to protect individual free will from state intrusion (Leo et al., 2006). The rule of nemo tenetur, which was adopted in the colonies and incorporated into the Fifth Amendment, applied only to self-incriminating statements in

court, and had never been applied to extrajudicial confessions. By mixing two unrelated voluntariness doctrines, Bram rewrote history and provoked considerable confusion by courts and academics alike (Wigmore, 1970). Still, it gave birth to a new basis for excluding involuntary confession evidence— the protection of individual free will.

A third basis for excluding involuntary confessions began to emerge in 1936, in the case of Brown v. Mississippi, to deter unfair and oppressive police practices. In Brown, three black tenant farmers who had been accused of murdering a white farmer were whipped, pummeled, and tortured until they provided detailed confessions. The Court unanimously reversed the convictions of all three defendants, holding that confessions procured by physical abuse and torture were involuntary. The Court established the Fourteenth Amendment's due process clause as the constitutional test for assessing the admissibility of confessions in state cases. In addition to common law standards, trial judges would now have to apply a federal due process standard when evaluating the admissibility of confession evidence, looking to the ''totality of the circumstances'' to determine if the confession was 'made freely, voluntarily and without compulsion or inducement of any sort'''(Haynes v. Washington, 1963, quoting Wilson v. United States, 1896). As such, the Court proposed to consider personal characteristics of the individual suspect (e.g., age, intelligence, mental stability, and prior contact with law enforcement) as well as the conditions of detention and interrogation tactics that were used (e.g., threats, promises, and lies).

This deterrence rationale, implied in Brown, was made even more explicit in Haley v. Ohio, a case involving a 15- year-old black boy who was questioned throughout the night by teams of detectives, isolated for 3 days, and repeatedly denied access to his lawyer (Haley v. Ohio,1948). While the majority held that the confession was obtained ''by means which the law should not sanction'' (pp. 600–601), Justice Frankfurter, in his concurrence, went a step further, stating that the confession must be held inadmissible ''[t]o remove the inducement to resort to such methods this Court has repeatedly denied use of the fruits of illicit methods'' (p. 607).

As these cases suggest, the Supreme Court relied on different and sometimes conflicting rationales for excluding involuntary confessions throughout the twentieth century (Kamisar, 1963; White, 1998). It was not always clear which of the three justifications the Court would rely on when evaluating the voluntariness of a confession. Nevertheless, the Court did appear to designate certain interrogation methods—including physical force, threats of harm or punishment, lengthy or incommunicado questioning, solitary confinement, denial of food or sleep, and

promises of leniency—as presumptively coercive and therefore unconstitutional (White, 2001). The Court also considered the individual suspect's personal characteristics, such as age, intelligence, education, mental stability, and prior contact with law enforcement, in determining whether a confession was voluntary. The template of the due process voluntariness test thus involved a balancing of whether police interrogation pressures, interacting with a suspect's personal dispositions, were sufficient to render a confession involuntary (Schulhofer, 1981).

The ''totality of the circumstances'' test, while affording judges flexibility in practice, has offered little protection to suspects. Without bright lines for courts to follow, and without a complete and accurate record of what transpired during the interrogation process, the end result has been largely unfettered and unreviewable discretion by judges. In practice, when judges apply the test, ''they exclude only the most egregiously obtained confessions and then only haphazardly'' (Feld, 1999, p. 118). The absence of a litmus test has also encouraged law enforcement officers to push the envelope with respect to the use of arguably coercive psychological interrogation techniques (Penney, 1998). Unlike its sweeping condemnation of physical abuse in Brown v. Mississippi, the Court's overall attitude toward psychological interrogation techniques has been far less condemnatory. In particular, the Court's attitudes toward the use of maximization and minimization (Kassin & McNall, 1991) and the false evidence ploy and other forms of deception (Kassin & Kiechel, 1996)—techniques that have frequently been linked to false confessions (Kassin & Gudjonsson, 2004)—has been largely permissive. A discussion of some of these cases follows.

Cases Addressing Interrogation Tactics: Maximization and Minimization

Today's interrogators seek to manipulate a suspect into thinking that it is in his or her best interest to confess. To achieve this change in perceptions of subjective utilities, they use a variety of techniques, referred to broadly as ''maximization'' and ''minimization'' (Kassin & McNall, 1991). Maximization involves a cluster of tactics designed to convey the interrogator's rock-solid belief that the suspect is guilty and that all denials will fail. Such tactics include making an accusation, overriding objections, and citing evidence, real or manufactured, to shift the suspect's mental state from confident to hopeless. Toward this end, it is particularly common for interrogators to communicate as a means of inducement, implicitly or explicitly, a threat of harsher consequences in response to the suspect's denials (Leo & Ofshe, 2001).

In contrast, minimization tactics are designed to provide the suspect with moral justification and face-saving excuses for having committed the crime in question. Using this approach, the interrogator offers sympathy and understanding; normalizes and minimizes the crime, often suggesting that he or she would have behaved similarly; and offers the suspect a choice of alternative explanations—for example, suggesting to the suspect that the murder was spontaneous, provoked, peer-pressured, or accidental rather than the work of a cold-blooded premeditated killer. As we will see later, research has shown that this tactic communicates by implication that leniency in punishment is forthcoming upon confession.

As the 1897 case of Bram v. United States demonstrates, minimization has been part of the arsenal of police interrogation tactics for over a century. In Bram, the authorities induced the defendant to confess based on the kind of unspoken promise that anchors the modern psychological interrogation: ‘‘Bram, I am satisfied that you killed the captain. But some of us here think you could not have done the crime alone. If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders’’ (Bram v. United States, 1897, p. 539). This statement contained no direct threats or promises; rather, it combined elements of maximization (the interrogator’s stated certainty in the suspect’s guilt) and minimization (the suggestion that he will be punished less severely if he confesses and names an accomplice). Using language that condemns the latter, the Supreme Court reversed Bram’s conviction, holding that a confession ‘‘must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight’’ (pp. 542–543).

Although a strict interpretation of Bram seemed to suggest a ban on minimization, courts throughout the twentieth century followed a practice of evading, contradicting, disregarding, and ultimately discarding Bram (Hirsch, 2005a). Briefly in the 1960s, it appeared that the Supreme Court was ready to revitalize Bram and to apply it broadly to the psychological interrogation techniques taught by such legendary police reformers as Chicago’s Fred Inbau and John Reid. Indeed, the landmark case of Miranda v. Arizona (1966), described earlier, cited Bram and condemned the Reid technique and other tactics that ‘‘are designed to put the subject in a psychological state where his story is but an elaboration of what the police purport to know already—that he is guilty’’ (p. 450). This newfound concern with the impact of psychological interrogation tactics, however, was short lived. In the immediate aftermath of Miranda, the Supreme Court adopted a more deferential attitude toward law enforcement in its confession jurisprudence. In particular, Arizona v. Fulminante (1991) in dicta may have sounded the death knell for Bram. Responding to a party’s invocation of Bram, the Court casually remarked that ‘‘under current precedent [Bram] does not state the standard for determining the voluntariness of a confession’’ (p. 286). However, White (1997) noted that ‘‘as Fulminante’s holding indicates, some promises may be sufficient

in and of themselves to render a confession involuntary; other promises may or may not be permissible depending upon the circumstances'' (p. 150).

Cases Addressing Interrogation Tactics: Trickery and Deception

The false evidence ploy is a controversial tactic occasionally used by police. Not all interrogation trainers approve of this practice (Gohara, 2006), the use of which has been implicated in the vast majority of documented police-induced false confessions (Kassin, 2005). In several pre-Miranda voluntariness cases, the U.S. Supreme Court recognized that deception can induce involuntary confessions, although the Court never held that such tactics would automatically invalidate a confession. In Leyra v. Denno (1954), for example, Leyra asked to see a physician because he was suffering from sinus problems and police brought in a psychiatrist who posed as a general physician. The Supreme Court held that the ''subtle and suggestive'' questioning by the psychiatrist amounted to a continued interrogation of the suspect without his knowledge. This deception and other circumstances of the interrogation rendered Leyra's confession involuntary. Similarly, in Spano v. New York (1959), the suspect considered one of the interrogating officers to be a friend. The Court held that the officer's false statements, in which he suggested that the suspect's actions might cost the officer his job, were a key factor in rendering the resulting confession involuntary. In Miranda v. Arizona (1966), the Supreme Court discussed the use of trickery and deception and noted that the deceptive tactics recommended in standard interrogation manuals fostered a coercive environment. Again, the Court did not specifically prohibit such tactics, choosing instead to offer suspects some relief from the coercive effect by empowering them with rights which could be used to bring interrogation to a halt. The criticism of deception may have fanned hopes that the Court would deal a more direct blow to this controversial tactic in future cases. But such hopes were quickly quashed.

Three years later, in Frazier v. Cupp (1969), the Supreme Court addressed interrogation trickery and issued a decision that to this day has been interpreted by police and the courts as a green light to deception. In Frazier, police used a standard false evidence ploy—telling Frazier that another man whom he and the victim had been seen with on the night of the crime had confessed to their involvement. The investigating detective also used minimization, suggesting to Frazier that he had started a fight with the victim because the victim made homosexual advances toward him. Despite the use of these deceptive tactics, the Court held that Frazier's confession was voluntary. This ruling established that police deception by itself is not sufficient to

render a confession involuntary. Rather, according to Frazier, deception is but one factor among many that a court should consider. Some state courts have distinguished between mere false assertions, which are permissible, and the fabrication of reports, tapes, and other evidence—which is not. In the Florida case of State v. Cayward (1989), the defendant's confession was suppressed because police had typed up a phony crime laboratory report that placed Cayward's DNA on the victim. However, the court's concern was not that the manufactured evidence might prompt an innocent person to confess but that it might find its way into court as evidence. Similarly, New Jersey confessions were suppressed when produced by a fake, staged audiotape of an alleged eyewitness account (State v. Patton, 1993) and a fake crime lab report identifying the suspect's DNA at the crime scene (State v. Chirokovskcic, 2004). This is where the law remains today despite numerous cautionary notes from academics and researchers on the use of deception (Gohara, 2006; Gudjonsson, 2003; Kassin, 2005; Kassin & Gudjonsson, 2004; Skolnick & Leo, 1992; but see Grano, 1994; Slobogin, 2007).

E. Practices in England

Interrogations and confession evidence are regulated in England and Wales by the Police and Criminal Evidence Act of 1984 (PACE; Home Office, 1985), which became effective in January 1986. The Act is supplemented by five Codes of Practice, referred to as Codes A (on stop and search), B (entry and searches of premises), C (detention and questioning of suspects), D (on identification parades), and E (tape recording of interviews). The Codes provide guidance to police officers concerning procedures and the appropriate treatment of suspects. Code C is particularly relevant to issues surrounding ''fitness to be interviewed,'' as it provides guidance ''on practice for the detention, treatment and questioning of persons by police officers'' (Home Office, 2003, p. 47).

The most important interview procedures set out in PACE and its Codes of Practice are that: Suspects who are detained at a police station must be informed of their legal rights; in any 24-h period the detainee must be allowed a continuous period of rest of at least 8 hours; detainees who are vulnerable in terms of their age or mental functioning should have access to a responsible adult (known as an 'appropriate adult'), whose function is to give advice, further communication, and ensure that the interview is conducted properly and fairly; and all interviews shall be electronically recorded.

Compared to the approach typically taken in the U.S. (e.g., using the Reid technique), investigative interview practices in England are less confrontational. Williamson (2007) discussed in detail how psychological science has influenced the training of police officers and their interviewing practice, making it fairer and more transparent. Prior to 1992, investigators in Britain received no formal training and the chief purpose of interviewing suspects was to obtain confessions. Following some high-profile miscarriages of justice, such as the ''Guildford Four'' and ''Birmingham Six,'' the Association of Chief Police Officers for England and Wales (ACPO) published the first national training program for police officers interviewing both suspects and witnesses. This new approach was developed through a collaboration of police officers, psychologists, and lawyers. The mnemonic PEACE was used to describe the five distinct parts of the new interview approach (''Preparation and Planning,'' ''Engage and Explain,'' ''Account,'' ''Closure,'' and ''Evaluate''). The theory underlying this approach, particularly in cases of witnesses, victims, and cooperative suspects, can be traced to Fisher and Geiselman's (1992) work on the ''Cognitive Interview'' (Milne & Bull, 1999; for research evidence, see Clarke & Milne, 2001; Williamson, 2006). Recent analyses of police–suspect interviews in England have revealed that the confrontation-based tactics of maximization and minimization are in fact seldom used (Soukara, Bull, Vrij, Turner, & Cherryman, in press; Bull & Soukara, 2009).

III. POLICE-INDUCED FALSE CONFESSIONS

As described earlier, the process of interrogation is designed to overcome the anticipated resistance of individual suspects who are presumed guilty and to obtain legally admissible confessions. The single-minded objective, therefore, is to increase the anxiety and despair associated with denial and reduce the anxiety associated with confession. To achieve these goals, police employ a number of tactics that involve isolating the suspect and then employing both negative and positive incentives. On the negative side, interrogators confront the suspect with accusations of guilt, assertions that are made with certainty and often bolstered by evidence, real or manufactured, and a refusal to accept alibis and denials. On the positive side, interrogators offer sympathy and moral justification, introducing ''themes'' that normalize and minimize the crime and lead suspects to see confession as an expedient means of escape. In this section, we describe some core principles of psychology relevant to understanding the suspect's decision making in this situation; then we describe the problem of false confessions and the situational and dispositional factors that put innocent people at risk.

A. Types of False Confessions

Although it is not possible to calculate a precise incidence rate, it is clear that false confessions occur in different ways and for different reasons. Drawing on the pages of legal history, and borrowing from social-psychological theories of influence, Kassin and Wrightsman (1985) proposed a taxonomy that distinguished among three types of false confession: voluntary, coerced-compliant, and coerced-internalized (see also Kassin, 1997; Wrightsman & Kassin, 1993). This classification scheme has provided a useful framework for the study of false confessions and has since been used, critiqued, extended, and refined by others (Gudjonsson, 2003; Inbau et al., 2001; McCann, 1998; Ofshe & Leo, 1997a, 1997b).

Voluntary False Confessions

Sometimes innocent people have claimed responsibility for crimes they did not commit without prompting or pressure from police. This has occurred in several high-profile cases. After Charles Lindbergh's infant son was kidnapped in 1932, 200 people volunteered confessions. When ''Black Dahlia'' actress Elizabeth Short was murdered and her body mutilated in 1947, more than 50 men and women confessed. In the 1980s, Henry Lee Lucas in Texas falsely confessed to hundreds of unsolved murders, making him the most prolific serial confessor in history. In 2006, John Mark Karr volunteered a confession, replete with details, to the unsolved murder of young JonBenet Ramsey. There are a host of reasons why people have volunteered false confessions—such as a pathological desire for notoriety, especially in high-profile cases reported in the news media; a conscious or unconscious need for self-punishment to expiate feelings of guilt over prior transgressions; an inability to distinguish fact from fantasy due to a breakdown in reality monitoring, a common feature of major mental illness; and a desire to protect the actual perpetrator—the most prevalent reason for false admissions (Gudjonsson et al., 2004; Sigurdsson & Gudjonsson, 1996, 1997, 2001). Radelet, Bedau, and Putnam (1992) described one case in which an innocent man confessed to a murder to impress his girlfriend. Gudjonsson (2003) described another case in which a man confessed to murder because he was angry at police for a prior arrest and wanted to mislead them in an act of revenge.

Compliant False Confessions

In contrast to voluntary false confessions, compliant false confessions are those in which suspects are induced through interrogation to confess to a crime they did not commit. In these cases, the suspect acquiesces to the demand for a confession to escape a stressful situation, avoid punishment, or gain a promised or implied reward. Demonstrating the form of influence observed in classic studies of social influence (e.g., Asch, 1956; Milgram, 1974), this type of confession is an act of mere public compliance by a suspect who knows that he or she is innocent but bows to social pressure, often coming to believe that the short-term benefits of confession relative to denial outweigh the long-term costs. Based on a review of a number of cases, Gudjonsson (2003) identified some very specific incentives for this type of compliance—such as being allowed to sleep, eat, make a phone call, go home, or, in the case of drug addicts, feed a drug habit. The desire to bring the interview to an end and avoid additional confinement may be particularly pressing for people who are young, desperate, socially dependent, or phobic of being locked up in a police station. The pages of legal history are filled with stories of compliant false confessions. In the 1989 Central Park jogger case described earlier, five teenagers confessed after lengthy interrogations. All immediately retracted their confessions but were convicted at trial and sent to prison—only to be exonerated 13 years later (*People of the State of New York v. Kharey Wise et al.*, 2002).

Internalized False Confessions

In the third type of false confession, innocent but malleable suspects, told that there is incontrovertible evidence of their involvement, come not only to capitulate in their behavior but also to believe that they may have committed the crime in question, sometimes confabulating false memories in the process. Gudjonsson and MacKeith (1982) argued that this kind of false confession occurs when people develop such a profound distrust of their own memory that they become vulnerable to influence from external sources. Noting that the innocent confessor's belief is seldom fully internalized, Ofshe and Leo (1997a) have suggested that the term ''persuaded false confession'' is a more accurate description of the phenomenon. The case of 14-year-old Michael Crowe, whose sister Stephanie was stabbed to death in her bedroom, illustrates this type of persuasion. After a series of interrogation sessions, during which time police presented Crowe with compelling false physical evidence of his guilt, he concluded that he was a killer, saying: ''I'm not sure how I did it. All I know is I did it.'' Eventually, he was

convinced that he had a split personality—that ‘‘bad Michael’’ acted out of a jealous rage while ‘‘good Michael’’ blocked the incident from memory. The charges against Crowe were later dropped when a drifter in the neighborhood that night was found with Stephanie’s blood on his clothing (Drizin & Colgan, 2004).

B. Relevant Core Principles of Psychology

Earlier we reviewed the tactics of a modern American interrogation and the ways in which the U.S. Supreme Court has treated these tactics with respect to the voluntariness and admissibility of the confessions they elicit. As noted, the goal of interrogation is to alter a suspect’s decision making by increasing the anxiety associated with denial and reducing the anxiety associated with confession (for an excellent description of a suspect’s decision-making process in this situation, see Ofshe & Leo, 1997b).

Long before the first empirical studies of confessions were conducted, the core processes of relevance to this situation were familiar to generations of behavioral scientists. Dating back to Thorndike’s (1911) law of effect, psychologists have known that people are highly responsive to reinforcement and subject to the laws of conditioning, and that behavior is influenced more by perceptions of short-term than long-term consequences. Of distal relevance to a psychological analysis of interrogation are the thousands of operant animal studies of reinforcement schedules, punishment, appetitive, avoidance, and escape learning, as well as behavioral modification applications in clinics, schools, and workplaces. Looking through this behaviorist lens, it seems that interrogators have sometimes shaped suspects to confess to particular narrative accounts of crimes like they were rats in a Skinner box (see Herrnstein, 1970; Skinner, 1938).

More proximally relevant to an analysis of choice behavior in the interrogation room are studies of human decision making in a behavioral economics paradigm. A voluminous body of research has shown that people make choices that they think will maximize their well-being given the constraints they face, making the best of the situation they are in—what Herrnstein has called the ‘‘matching law’’ (Herrnstein, Rachlin, & Laibson, 1997). With respect to a suspect’s response to interrogation, studies on the discounting of rewards and costs show that people tend to be impulsive in their orientation, preferring outcomes that are immediate rather than delayed, with

delayed outcomes depreciating over time in their subjective value (Rachlin, 2000). In particular, animals and humans clearly prefer delayed punishment to immediate aversive stimulation (Deluty, 1978; Navarick, 1982). These impulsive tendencies are especially evident in juvenile populations and among cigarette smokers, alcoholics, and other substance users (e.g., Baker, Johnson, & Bickel, 2003; Bickel & Marsch, 2001; Bickel, Odum, & Madden, 1999; Kollins, 2003; Reynolds, Richards, Horn, & Karraker, 2004).

Rooted in the observation that people are inherently social beings, a second set of core principles is that individuals are highly vulnerable to influence from change agents who seek their compliance. Of direct relevance to an analysis of interrogation are the extensive literatures on attitudes and persuasion (Petty & Cacioppo, 1986), informational and normative influences (e.g., Asch, 1956; Sherif, 1936), the use of sequential request strategies, as in the foot-in-the-door effect (Cialdini, 2001), and the gradual escalation of commands, issued by figures of authority, to effectively obtain self- and other-defeating acts of obedience (Milgram, 1974). Conceptually, Latane's (1981) social impact theory provides a predictive mathematical model that can account for the influence of police interrogators—who bring power, proximity, and number to bear on their exchange with suspects (for a range of social psychological perspectives on interrogation, see Bem, 1966; Davis & O'Donahue, 2004; Zimbardo, 1967).

A third set of core principles consists of the ''seven sins of memory'' that Schacter (2001) identified from cognitive and neuroscience research—a list that includes memory transience, misattribution effects, suggestibility, and bias. When Kassin and Wrightsman (1985) first identified coerced-internalized or coerced-persuaded false confessions, they were puzzled. At the time, existing models of memory could not account for the phenomenon whereby innocent suspects would come to internalize responsibility for crimes they did not commit and confabulate memories about these nonevents. These cases occur when a suspect is dispositionally or situationally rendered vulnerable to manipulation and the interrogator then misrepresents the evidence, a common ploy. In light of a now extensive research literature on misinformation effects and the creation of illusory beliefs and memories (e.g., Loftus, 1997, 2005), experts can now better grasp the process by which people come to accept guilt for a crime they did not commit as well as the conditions under which this may occur (see Kassin, 2008).

C. ituational Risk Factors

Among the situational risk factors associated with false confessions, three will be singled out: interrogation time, the presentation of false evidence, and minimization. These factors are highlighted because of the consistency in which they appear in cases involving proven false confessions.

Physical Custody and Isolation

To ensure privacy and control, and to increase the stress associated with denial in an incommunicado setting, interrogators are trained to remove suspects from their familiar surroundings and question them in the police station—often in a special interrogation room. Consistent with guidelines articulated by Inbau et al. (2001), most interrogations are brief. Observational studies in the U.S. and Britain have consistently shown that the vast majority of interrogations last approximately from 30 minutes up to 2 hours (Baldwin, 1993; Irving, 1980; Leo, 1996b; Wald et al., 1967). In a recent self-report survey, 631 North American police investigators estimated from their experience that the mean length of a typical interrogation is 1.60 hours. Consistent with cautionary advice from Inbau et al. (2001) against exceeding 4 hours in a single session, these same respondents estimated on average that their longest interrogations lasted 4.21 hours (Kassin et al., 2007). Suggesting that time is a concern among practitioners, one former Reid technique investigator has defined interrogations that exceed 6 hours as ‘‘coercive’’ (Blair, 2005). In their study of 125 proven false confessions, Drizin and Leo (2004) thus found, in cases in which interrogation time was recorded, that 34% lasted 6–12 hours, that 39% lasted 12–24 hours, and that the mean was 16.3 hours.

It is not particularly surprising that false confessions tend to occur after long periods of time—which indicates a dogged persistence in the face of denial. The human needs for belonging, affiliation, and social support, especially in times of stress, are a fundamental human motive (Baumeister & Leary, 1996). People under stress seek desperately to affiliate with others for the psychological, physiological, and health benefits that social support provides (Rofe, 1984; Schachter, 1959; Uchino, Cacioppo, & Kiecolt-Glaser, 1996). Hence, prolonged isolation from significant others in this situation constitutes a form of deprivation that can heighten a suspect’s distress and incentive to remove himself or herself from the situation. Depending on the number of

hours and conditions of interrogation, sleep deprivation may also become a source of concern. Controlled laboratory experiments have shown that sleep deprivation, which may accompany prolonged periods of isolation, can heighten susceptibility to influence and impair decision-making abilities in complex tasks. The range of effects is varied, with studies showing that sleep deprivation markedly impairs the ability to sustain attention, flexibility of thinking, and suggestibility in response to leading questions (Blagrove, 1996; for a review, see Harrison & Horne, 2000). This research literature is not all based in the laboratory. For example, performance decrements have been observed in medical interns (e.g., Veasey, Rosen, Barzansky, Rosen, & Owens, 2002; Weinger & Ancoli-Israel, 2002)—as when sleep deprivation increased the number of errors that resident surgeons made in a virtual reality surgery simulation (Taffinder, McManus, Gul, Russell, & Darzi, 1998). Also demonstrably affected are motorists (Lyznicki, Doege, Davis, & Williams, 1998) and F-117 fighter pilots (Caldwell, Caldwell, Brown, & Smith, 2004). Combining the results in a meta-analysis, Pilcher and Huffcut (1996) thus concluded that: ‘‘overall sleep deprivation strongly impairs human functioning.’’ The use of sleep deprivation in interrogation is hardly a novel idea. In Psychology and Torture, Suedfeld (1990) noted that sleep deprivation is historically one of the most potent methods used to soften up prisoners of war and extract confessions from them. Indeed, Amnesty International reports that most torture victims interviewed report having been deprived of sleep for 24 hours or more.

Presentations of False Evidence

Once suspects are isolated, interrogators, armed with a strong presumption of guilt, seek to communicate that resistance is futile. This begins the confrontation process, during which interrogators exploit the psychology of inevitability to drive suspects into a state of despair. Basic research shows that once people see an outcome as inevitable, cognitive and motivational forces conspire to promote their acceptance, compliance with, and even approval of the outcome (Aronson, 1999). In the case of interrogation, this process also involves interrupting the suspect’s denials, overcoming objections, and refuting alibis. At times, American police will overcome a suspect’s denials by presenting supposedly incontrovertible evidence of his or her guilt (e.g., a fingerprint, blood or hair sample, eyewitness identification, or failed polygraph)—even if that evidence does not exist. In the U.S., it is permissible for police to outright lie to suspects about the evidence (Frazier v. Cupp, 1969)—a tactic that is recommended in training (Inbau et al., 2001), and occasionally used (Kassin et al., 2007; Leo, 1996b).

Yet basic psychological research warns of the risk of this manipulation. Over the years, across a range of subdisciplines, basic research has revealed that misinformation renders people vulnerable to manipulation. To cite but a few highly recognized classics in the field, experiments have shown that presentations of false information—via confederates, witnesses, counterfeit test results, bogus norms, false physiological feedback, and the like—can substantially alter subjects' visual judgments (Asch, 1956; Sherif, 1936), beliefs (Anderson, Lepper, & Ross, 1980), perceptions of other people (Tajfel, Billig, Bundy, & Flament, 1971), behaviors toward other people (Rosenthal & Jacobson, 1968), emotional states (Schachter & Singer,1962), physical attraction (Valins, 1966), self-assessments (Crocker, Voelkl, Testa, & Major, 1991), memories for observed and experienced events (Loftus, 2005), and even certain medical outcomes, as seen in studies of the placebo effect (Brown, 1998; Price, Finniss, & Benedetti, 2008). Scientific evidence for human malleability in the face of misinformation is broad and pervasive.

The forensic literature on confessions reinforces and extends this classic point, indicating that presentations of false evidence can lead people to confess to crimes they did not commit. This literature is derived from two sources of information. First, studies of actual cases reveal that the false evidence ploy, which is not permitted in Great Britain and most other European nations, is found in numerous wrongful convictions in the U.S., including DNA exonerations, in which there were confessions in evidence (Drizin & Leo, 2004; Leo & Ofshe, 1998). That this tactic appears in proven false confession cases makes sense. In self-report studies, actual suspects state that the reason they confessed is that they perceived themselves to be trapped by the weight of evidence (Gudjonsson & Sigurdsson, 1999; Moston, Stephenson, & Williamson, 1992).

Concerns about the polygraph are illustrative in this regard. Although it is best known for its use as a lie-detector test, and has value as an investigative tool, posttest ''failure'' feedback is often used to pressure suspects and can prompt false confessions. This problem is so common that Lykken (1998) coined the term ''fourth degree'' to describe the tactic (p. 235), and the National Research Council Committee to Review the Scientific Evidence on the Polygraph (2003) warned of the risk of polygraph-induced false confessions. In a laboratory demonstration that illustrates the point, Meyer and Youngjohn (1991) elicited false confessions to the theft of an experimenter's pencil from 17% of subjects told that they had failed a polygraph test on that question.

The second source of evidence is found in laboratory experiments that have

tested the causal hypothesis that false evidence leads innocent people to confess to prohibited acts they did not commit. In one study, Kassin and Kiechel (1996) accused college students typing on a keyboard of causing the computer to crash by pressing a key they were instructed to avoid. Despite their innocence and initial denials, subjects were asked to sign a confession. In some sessions but not others, a confederate said she witnessed the subject hit the forbidden key. This false evidence nearly doubled the number of students who signed a written confession, from 48 to 94%.

Follow-up studies have replicated this effect to the extent that the charge was plausible (Horselenberg et al., 2006; Klaver, Lee, & Rose, 2008), even when the confession was said to bear a financial or other consequence (Horselenberg, Merckelbach, & Josephs, 2003; Redlich & Goodman, 2003), and even among informants who are pressured to report on a confession allegedly made by another person (Swanner, Beike, & Cole, in press). The effect has been particularly evident among stress-induced males (Forrest, Wadkins, & Miller, 2002) and children and juveniles who tend to be both more compliant and suggestible than adults (Candel, Merckelbach, Loyen, & Reyskens, 2005; Redlich & Goodman, 2003). Using a completely different paradigm, Nash and Wade (2009) used digital editing software to fabricate video evidence of participants in a computerized gambling experiment ‘‘stealing’’ money from the ‘‘bank’’ during a losing round. Presented with this false evidence, all participants confessed—and most internalized the belief in their own guilt. One needs to be cautious in generalizing from laboratory experiments. Yet numerous false confession cases have featured the use and apparent influence of the false evidence ploy. In one illustrative case, in 1989, 17-year-old Marty Tankleff was accused of murdering his parents despite the complete absence of evidence against him. Tankleff vehemently denied the charges for several hours—until his interrogator told him that his hair was found within his mother’s grasp, that a ‘‘humidity test’’ indicated he had showered (hence, the presence of only one spot of blood on his shoulder), and that his hospitalized father had emerged from his coma to say that Marty was his assailant—all of which were untrue (the father never regained consciousness and died shortly thereafter). Following these lies, Tankleff became disoriented and confessed. Solely on the basis of that confession, Tankleff was convicted, only to have his conviction vacated and the charges dismissed 19 years later (Firstman & Salpeter, 2008; Lambert, 2008).

Minimization: Promises Implied But Not Spoken

In addition to thrusting the suspect into a state of despair by the processes of

confrontation, interrogators are trained to minimize the crime through ‘‘theme development,’’ a process of providing moral justification or face-saving excuses, making confession seem like an expedient means of escape. Interrogators are thus trained to suggest to suspects that their actions were spontaneous, accidental, provoked, peer-pressured, drug-induced, or otherwise justifiable by external factors. In the Central Park jogger case, every boy gave a false confession that placed his cohorts at center stage and minimized his own involvement (e.g., 16-year-old Kharey Wise said he felt pressured by peers)—and each said afterward that he thought he would go home after confessing based on statements made by police.

Minimization tactics that imply leniency may well lead innocent people who feel trapped to confess. Two core areas of psychology compel this conclusion. The first concerns the principle of reinforcement. As noted earlier, generations of basic behavioral scientists, dating back to Thorndike (1911), and formalized by Skinner (1938), have found that people are highly responsive to reinforcement and the perceived consequences of their behavior. More recent studies of human decision making have added that people are particularly influenced by outcomes that are immediate rather than delayed, the latter depreciating over time in their subjective value (Rachlin, 2000). The second core principle concerns the cognitive psychology of pragmatic implication. Over the years, researchers have found that when people read text or hear speech, they tend to process information ‘‘between the lines’’ and recall not what was stated per se, but what was pragmatically implied. Hence, people who read that ‘‘The burglar goes to the house’’ often mistakenly recall later that the burglar actually broke into the house; those who hear that ‘‘The flimsy shelf weakened under the weight of the books’’ often mistakenly recall that the shelf actually broke (Chan & McDermott, 2006; Harris & Monaco, 1978; Hilton, 1995). These findings indicate that pragmatic inferences can change the meaning of a communication, leading listeners to infer something that is ‘‘neither explicitly stated nor necessarily implied’’ (Brewer, 1977).

Taken together, basic research showing that people are highly influenced by perceived reinforcements and that people process the pragmatic implications of a communication suggests the possibility that suspects infer leniency in treatment from minimizing remarks that depict the crime as spontaneous, accidental, pressured by others, or otherwise excusable—even in the absence of an explicit promise. To test this hypothesis, Kassin and McNall (1991) had subjects read a transcript of an interrogation of a murder suspect (the text was taken from an actual New York City interrogation). The transcripts were edited to produce three versions in which the detective made a contingent explicit promise of leniency, used the technique of minimization by blaming the victim, or did not use either technique. Subjects read one version and then estimated the sentence that they thought would be imposed on the suspect. The result:

As if explicit promises had been made, minimization lowered sentencing expectations compared to conditions in which no technique was used.

More recently, researchers have found that minimization can also lead innocent people to confess. Using the computer crash paradigm described earlier, Klaver, Lee, and Rose (2008) found that minimization remarks significantly increased the false confession rate when the accusation concerning the forbidden key press was plausible. Russano, Meissner, Kassin, and Narchet (2005) devised a newer laboratory paradigm to not only assess the behavioral effects of minimization but to assess the diagnosticity of the resulting confession (a technique has ‘‘diagnosticity’’ to the extent that it increases the ratio of true to false confessions). In their study, subjects were paired with a confederate for a problem-solving study and instructed to work alone on some problems and jointly on others. In the guilty condition, the confederate sought help on a problem that was supposed to be solved alone, inducing a violation of the experimental prohibition. In the innocent condition, the confederate did not make this request to induce the crime. The experimenter soon ‘‘discovered’’ a similarity in their solutions, separated the subject and confederate, and accused the subject of cheating. The experimenter tried to get the subject to sign an admission by overtly promising leniency (a deal in which research credit would be given in exchange for a return session without penalty), making minimizing remarks (‘‘I’m sure you didn’t realize what a big deal it was’’), using both tactics, or using no tactics. Overall, the confession rate was higher among guilty subjects than innocent, when leniency was promised than when it was not, and when minimization was used than when it was not. Importantly, diagnosticity—defined as the rate of true confessions to false confessions—was highest at 7.67 when no tactics were used (46% of guilty suspects confessed vs. only 6% of innocents) and minimization— just like an explicit offer of leniency—reduced diagnosticity to 4.50 by increasing not only the rate of true confessions (from 46 to 81%) but even more so the rate of false confessions (which tripled from 6 to 18%). In short, minimization provides police with a loophole in the rules of evidence by serving as the implicit but functional equivalent to a promise of leniency (which itself renders a confession inadmissible). The net result is to put innocents at risk to make false confessions.

It is important to note that minimization and the risk it engenders is not a mere laboratory phenomenon. Analyzing more than 125 electronically recorded interrogations and transcripts, Ofshe and Leo (1997a, 1997b) found that police often use techniques that serve to communicate promises and threats through pragmatic implication. These investigators focused specifically on what they called high-end inducements—appeals that communicate to a suspect that he or she will receive less punishment, a lower prison sentence, or some form of prosecutorial or judicial leniency

upon confession and/or a higher charge or longer prison sentence in the absence of confession. In some homicide cases, for example, interrogators suggested that if the suspect admits to the killing it would be framed as unintentional, as an accident, or as an act of justifiable self-defense—not as premeditated cold-blooded murder, the portrayal that would follow from continued denial. This is a variant of the ‘‘maximization’’/‘‘minimization’’ technique described by Kassin and McNall (1991), which communicates through pragmatic implication that the suspect will receive more lenient treatment if he or she confesses but harsher punishment if he or she does not.

D. Dispositional Risk Factors

In any discussion of dispositional risk factors for false confession, the two most commonly cited concerns are a suspect's age (i.e., juvenile status) and mental impairment (i.e., mental illness, mental retardation). These common citations are because of the staggering overrepresentation of these groups in the population of proven false confessions. For example, of the first 200 DNA exonerations in the U.S., 35% of the false confessors were 18 years or younger and/or had a developmental disability. In their sample of wrongful convictions, Gross, Jacoby, Matheson, Montgomery, and Patel (2005) found that 44% of the exonerated juveniles and 69% of exonerated persons with mental disabilities were wrongly convicted because of false confessions.

Adolescence and Immaturity

There is strong evidence that juveniles are at risk for involuntary and false confessions in the interrogation room (for reviews see Drizin & Colgan, 2004; Owens-Kostelnik, Reppucci, & Meyer, 2006; Redlich, 2007; Redlich & Drizin, 2007; Redlich, Silverman, Chen, & Steiner, 2004). Juveniles are over represented in the pool of identified false confession cases: 35% of the proven false confessors in the Drizin and Leo (2004) sample were younger than age 18, and within this sample of juveniles, 55% were aged 15 or younger. Comparatively, of all persons arrested for murder and rape, only 8 and 16%, respectively, are juveniles (Snyder, 2006). Numerous high-profile cases, such as the Central Park Jogger case (Kassin, 2002), have demonstrated the risks of combining young age, and the attributes that are associated with it (e.g., suggestibility, heightened obedience to authority, and immature decision-making abilities), and the psychologically oriented interrogation tactics described earlier. Hence, Inbau et al.

(2001) concede that minors are at special risk for false confession and advise caution when interrogating a juvenile. Referring to the presentation of fictitious evidence, for example, they note: ‘‘This technique should be avoided when interrogating a youthful suspect with low social maturity’’ (p. 429).

The field of developmental psychology was born over a century ago in the influential writings of James Baldwin, Charles Darwin, G. Stanley Hall, and William Stern (see Parke, Ornstein, Rieser, & Zahn-Waxler, 1994). Since that time, basic research has shown that children and adolescents are cognitively and psychosocially less mature than adults—and that this immaturity manifests in impulsive decision making, decreased ability to consider long-term consequences, engagement in risky behaviors, and increased susceptibility to negative influences. Specifically, this body of research indicates that early adolescence marks the onset of puberty, heightening emotional arousability, sensation seeking, and reward orientation; that mid- adolescence is a period of increased vulnerability to risk- taking and problems in affect and behavior; and that late adolescence is a period in which the frontal lobes continue to mature, facilitating regulatory competence and executive functioning (for reviews, see Steinberg, 2005; Steinberg & Morris, 2001). Recent neurological research on brain development dovetails with findings from behavioral studies. Specifically, these studies have shown continued maturation during adolescence in the limbic system (emotion regulation) and in the prefrontal cortex (planning and self-control), with gray matter thinning and white matter increasing (Steinberg, 2007).

The developmental capabilities and limitations of adolescents are highly relevant to behavior in the interrogation room. In Roper v. Simmons (2005), Justice Kennedy cited three general differences between juveniles and adults in support of the Court’s reasoning for abolishing the death penalty for juveniles. First, he addressed the lessened maturity and responsibility of juveniles compared to adults with specific mention to the 18-year bright-line requirements for marriage without parental consent, jury duty, and voting. Second, Justice Kennedy noted that ‘‘juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure’’ (p. 15). Consistent with this portrait, Drizin and Leo (2004) found in their sample of false confessions that several involved two or more juveniles (out of 38 multiple false confession cases, half involved juveniles). In recommending that police ‘‘play one [suspect] against the other,’’ Inbau et al. (2001) note that this tactic may be especially effective on young, first-time offenders (pp. 292–293). Third, Justice Kennedy recognized that juveniles’ personality or ‘‘character’’ is not as well developed as adults. In light of the volatility of adolescence, it is interesting that Inbau et al. (2001) also suggest ‘‘themes’’ for confession that exploit a juvenile’s restless energy, boredom, low resistance to temptation, and lack of supervision.

Drawing on basic principles of developmental psychology, there is now a wealth of forensically oriented research indicating that juveniles—suspects, defendants, and witnesses—have age-related limitations of relevance to the legal system in comparison to adults. For example, individuals younger than 16 years generally have impairments in adjudicative competence (e.g., the ability to help in one's own defense) and comprehension of legal terms (Grisso et al., 2003; Saywitz, Nathanson, & Snyder, 1993). In a subset of studies particularly germane to interrogations, several researchers employing a range of methodologies have shown that the risk of false confession is heightened during childhood and adolescence relative to adulthood. Of particular note, as described earlier, juveniles are more likely than adults to exhibit deficits in their understanding and appreciation of the Miranda rights that were explicitly put into place to protect people subject to ''inherently coercive'' interrogations (see Grisso, 1981; Redlich et al., 2003).

In the first set of studies, laboratory-based experiments have examined juveniles' responses in mock crimes and interrogations. Using the Kassin and Kiechel (1996) computer crash paradigm, Redlich and Goodman (2003) found that juveniles aged 12- and 13-years-old, and 15- and 16- years-old, were more likely to confess than young adults (aged 18–26 years), especially when confronted with false evidence of their culpability. In fact, a majority of the younger participants, in contrast to adults, complied with the request to sign a false confession without uttering a word. In another laboratory experiment, researchers examined the effect of positive and negative reinforcement on children aged 5 through 8 years (Billings et al., 2007). Reinforcement strongly affected children's likelihood of making false statements: Of those in the reinforcement condition, 52% made false admissions of guilty knowledge and 30% made false admissions of having witnessed the crime (within a span of 3.5 minutes!). In contrast, of children in the control condition, only 36 and 10% made false guilty knowledge and admissions, respectively. These findings mirror the vast majority of studies on the interview-relevant abilities of child-victim/witnesses (e.g., Garven, Wood, & Malpass, 2000).

In a second set of studies, youths have made decisions in response to hypothetical scenarios. Goldstein et al. (2003) investigated male juvenile offenders' self-reported likelihood of providing false confessions across different interrogation situations and found that younger age significantly predicted false confessions (25% surmised that they would definitely confess despite innocence to at least one of the situations). Similarly, Grisso et al. (2003) examined juveniles' and young adults' responses to a hypothetical mock-interrogation situation—specifically, whether they

would confess to police, remain silent, or deny the offense. Compared to individuals aged 16 and older, those between 11 and 15 were significantly more likely to report that they would confess.

In a third set of studies, juveniles have been asked to self-report on actual interrogation experiences. In a sample of 114 justice-involved juveniles, Viljoen, Klaver, and Roesch (2005) found that suspects who were 15-years old and younger, compared to those who were 16- and 17-years old, were significantly more likely to waive their right to counsel and to confess. Overall, only 11 (less than 10%) said they had asked for an attorney during police questioning (see also Redlich et al., 2004) and 9 (6%) said they had at some point falsely confessed. A survey of over 10,000 Icelandic students aged 16–24 years similarly revealed that of those with interrogation experiences, 7% claimed to have falsely confessed, with the rates being higher among those with more than one interrogation experience (Gudjonsson, Sigurdsson, Asgeirsdottir, & Sigfusdottir, 2006). In a massive and more recent effort, more than 23,000 juveniles from grades 8, 9, and 10 (average age of 15.5 years) were surveyed from seven countries—Iceland, Norway, Finland, Latvia, Lithuania, Russia, and Bulgaria. Overall, 11.5% (2,726) reported having been interrogated by police. Within this group, 14% reported having given a false confession (Gudjonsson, Sigurdsson, Asgeirsdottir, & Sigfusdottir, in press).

Cognitive and Intellectual Disabilities

Much of what is true of juveniles is similarly true for persons with intellectual disabilities—another group that is over-represented in false confession cases (see Gudjonsson, 2003; Gudjonsson & MacKeith, 1994). Hence, in Atkins v. Virginia (2002), the U.S. Supreme Court explicitly cited the possibility of false confession as a rationale underlying their decision to exclude this group categorically from capital punishment. The case of Earl Washington is illustrative of the problem. Reported to have an IQ ranging from 57 to 69 and interrogated over the course of 2 days, Washington ‘‘confessed’’ to five crimes, one being the rape and murder of a woman (charges resulting from the other four confessions were dismissed because of inconsistencies). Although he could not provide even basic details (e.g., that the victim was raped or her race) and although much of his statement was inconsistent with the evidence, Washington—who was easily led by suggestive questions and deferred to authority figures—was convicted, sentenced to death, and incarcerated for 18 years before being exonerated (Hourihan, 1995).

Mental retardation represents a constellation of symptoms, disorders, and adaptive functioning. The condition is defined by an IQ score of 70 or below and a range of impairments, such as adapting to societal norms, communication, social and interpersonal skills, and self-direction (American Psychiatric Association, 1994). In training police recruits, Perske (2004) identifies from research a number of tendencies exhibited by people who are mentally retarded. Collectively suggesting a heightened susceptibility to influence, the list includes the tendencies to rely on authority figures for solutions to everyday problems; please persons in authority; seek out friends; feign competence; exhibit a short attention span; experience memory gaps; lack impulse control; and accept blame for negative outcomes.

Some researchers have provided evidence for the diminished capacity of persons with cognitive disabilities in studies pertaining to interrogation (Fulero & Everington, 2004). Across four studies of Miranda comprehension, findings are quite consistent in showing that persons with mental retardation have significant deficits in their understanding and appreciation of Miranda warnings (Cloud, Shepard, Barkoff, & Shur, 2002; Everington & Fulero,1999; Fulero & Everington, 1995; O'Connell, Garmoe, & Goldstein, 2005). For example, O'Connell et al. (2005) found that 50% of people with mild mental retardation in their sample could not correctly paraphrase any of the five Miranda components (see also Everington & Fulero,1999). In comparison, less than 1% of adults in the general population score similarly low (Grisso, 1996). Moreover, research on the capacity of persons with mental retardation to learn and retain the knowledge and skills necessary to be competent suspects and defendants demonstrates that a significant number cannot meet this threshold, even with education (Anderson & Hewitt, 2002).

Everington and Fulero (1999) also examined the suggestibility of persons with mental retardation. Using the Gudjonsson Suggestibility Scale (GSS; a measure of interrogative suggestibility), they found that people with mental retardation were more likely to yield to leading questions and change their answers in response to mild negative feedback (see also O'Connell et al., 2005).

Gudjonsson (1991) examined GSS scores among three groups: alleged false confessors, alleged true confessors, and suspects who resisted confession during questioning. He found the alleged false confessors to have the lowest IQ scores as well as the highest suggestibility scores compared to the other two groups (Gudjonsson & Clare, 1995). Finally, Clare and Gudjonsson (1995) examined perceptions of a

videotaped suspect who provides a true and false confession during an interrogation and found that 38% of perceivers with intellectual disabilities, compared to only 5% of those without intellectual disabilities, believed the suspect would be allowed to go home while awaiting trial. Additionally, only 52% believed that the suspect should obtain legal advice if innocent, compared to 90% of others.

Personality and Psychopathology

In terms of susceptibility to false confession, it is important to consider other individual factors of relevance to a person's decision to confess. Gudjonsson (2003) discusses a number of personal risk factors, including enduring personality traits (e.g., suggestibility, compliance) as well as psychopathology and personality disorders—categories within the DSM-IV Axis I and II diagnostic framework that are relevant to false confessions.

A number of large-scale studies of false confessions, carried out in Iceland, show the importance of antisocial personality traits and history of offending both among prison inmates (Sigurdsson & Gudjonsson, 2001) and community samples (Gudjonsson, Sigurdsson, Asgeirsdottir, & Sigfusdottir, 2006, 2007; Gudjonsson, Sigurdsson, Bragason, et al., 2004; Gudjonsson et al., 2004). There have also been cases in which the personality disorder was considered crucial to understanding the false confession (Gudjonsson, 2006; Gudjonsson & Grisso, 2008). One interpretation of this finding is that persons with antisocial personality disorder, or antisocial traits, are more likely to be involved in offending, more often interviewed by police, and prone to lie for short-term instrumental gain, and are less concerned about the consequences of their behavior. This increases their tendency to make false denials as well as false confessions depending on their need at the time.

Psychopathology seems to be linked to false confessions in that persons with mental illness are over-represented in these cases. Psychological disorder is often accompanied by faulty reality monitoring, distorted perception, impaired judgment, anxiety, mood disturbance, poor self-control, and feelings of guilt. Gudjonsson (2003) provided a number of examples of cases where false confessions were directly related to specific disorders. Following the release of the Birmingham Six in 1991, research conducted for the British Royal Commission on Criminal Justice found that about 7% of suspects detained at police stations had a history of mental illness and that many

more were in an abnormal mental state due to anxiety and mood disturbance (Gudjonsson, Clare, Rutter, & Pearse, 1993). Similar findings were found in a recent study among suspects at Icelandic police stations (Sigurdsson, Gudjonsson, Einarsson, & Gudjonsson, 2006). In the U.S., research has consistently shown that rates of serious mental illness in the criminal justice system are at least two to five times higher than rates in the general population (e.g., James & Glaze, 2006; Lamb & Weinberger, 1998). To further compound the problem, the majority (75–80%) of offenders with mental illness have co-occurring substance abuse or dependence disorders (Abram, Teplin, & McClelland, 2003), which is an additional risk factor for false confessions (see Sigurdsson & Gudjonsson, 2001).

There is currently little research available to show how different disorders (e.g., anxiety, depression, and schizophrenia) potentially impair the suspect's capacity to waive legal rights and navigate his or her way through a police interview (Redlich, 2004). However, there is recent evidence from two separate studies to suggest that depressed mood is linked to a susceptibility to provide false confession to police (Gudjonsson et al., 2006; Sigurdsson et al., 2006). Gudjonsson et al. (2007) also recently found that multiple exposures to unpleasant or traumatic life events were significantly associated with self-reported false confessions during interrogation. Rogers et al. (2007a) found that most mentally disordered offenders exhibited insufficient understanding of Miranda, particularly when the warnings required increased levels of reading comprehension. Finally, Redlich (2007) found that offenders with mental illness self-reported a 22% lifetime false confession rate—notably higher than the 12% found in samples of prison inmates without mental illness (Sigurdsson & Gudjonsson, 1996).

An important type of psychopathology in relation to false confessions is attention deficit hyperactivity disorder (ADHD), which consists of three primary symptoms: inattention, hyperactivity, and impulsivity (American Psychiatric Association, 1994). This condition is commonly found among offenders (Young, 2007). Moreover, research shows that people with ADHD cope during questioning by answering a disproportionate number of questions with ''don't know'' replies—which may lead police to be suspicious of their answers (Gudjonsson, Young, & Bramham, 2007). They may also exhibit high levels of compliance. Gudjonsson et al. (2008) found that the rate of self-reported false confessions was significantly higher among prisoners who were currently symptomatic for attention deficit hyperactivity disorder (ADHD) than among the other prisoners (41 and 18%, respectively). These findings highlight the potential vulnerability during questioning of people who are currently symptomatic for ADHD.

When the police interview mentally disordered persons and juveniles in England and Wales, there are special legal provisions available to ensure that their statements to police are reliable and properly obtained—for example, in the presence of ‘‘appropriate adults.’’ The current legal provisions are detailed in the Codes of Practice (Home Office, 2003). Even when the police adhere to all the legal provisions, a judge may consider it unsafe and unfair to allow the statement to go before the jury. Here the crucial issue may be whether or not the defendant was ‘‘mentally fit’’ when interviewed. The term ‘‘fitness for interview’’ was first introduced formally in the current Codes of Practice, which became effective in 2003.

Fitness for interview is closely linked to the concept of ‘‘legal competencies,’’ which refers to an individual’s physical, mental, and social vulnerabilities that may adversely affect his or her capacity to cope with the investigative and judicial process (Grisso, 1986). Historically, legal competence constructs relating to confession evidence have focused primarily on the functional deficits of juveniles (Drizin & Colgan, 2004), and adult defendants with mental retardation (Fulero & Everington, 2004) and mental illnesses (Melton, Petrila, Poythress, & Slobogin, 1997). Increasingly, the construct of legal competence in criminal cases is also being applied to defendants with ‘‘personality disorder’’ (Gudjonsson & Grisso, 2008). The introduction of ‘‘fitness to be interviewed’’ within the current Codes of Practice in England and Wales is a significant step toward protecting vulnerable suspect populations (Gudjonsson, 2005). Indeed, a similar framework has been introduced in New Zealand and Australia (Gall & Freckelton, 1999).

E. Innocence as a Risk Factor

On September 20, 2006, Jeffrey Mark Deskovic was released from a maximum-security prison in New York, where he spent 15 years for a murder he said he committed but did not. Why did he confess? ‘‘Believing in the criminal justice system and being fearful for myself, I told them what they wanted to hear,’’ Deskovic said. Certain that DNA testing on the semen would establish his innocence, he added: ‘‘I thought it was all going to be okay in the end’’ (Santos, 2006, p. A1).

On the basis of anecdotal and research evidence, Kassin (2005) suggested the ironic hypothesis that innocence itself may put innocents at risk. Specifically, it appears that people who stand falsely accused tend to believe that truth and justice will prevail and that their innocence will become transparent to investigators, juries, and others. As a result, they cooperate fully with police, often failing to realize that they are suspects not witnesses, by waiving their rights to silence and a lawyer and speaking freely to defend themselves. Thus, although mock criminals vary their disclosures according to whether the interrogator seems informed about the evidence, innocents are uniformly forthcoming—regardless of how informed the interrogator seems (Hartwig, Granhag, Stro¨ mwall, & Kronkvist, 2006; Hartwig, Granhag, Stro¨ mwall, & Vrij, 2005).

Based on observations of live and videotaped interrogations, Leo (1996b) found that four out of five suspects waive their rights and submit to questioning—and that people who have no prior record of crime are the most likely to do so. In light of known recidivism rates, this result suggested that innocent people in particular are at risk to waive their rights. Kassin and Norwick (2004) tested this hypothesis in a controlled laboratory setting in which some subjects but not others committed a mock theft of $100. Upon questioning, subjects who were innocent were more likely to sign a waiver than those who were guilty, 81 to 36%. Afterward, most innocent subjects said that they waived their rights precisely because they were innocent: ‘‘I did nothing wrong,’’ ‘‘I had nothing to hide.’’ The feeling of reassurance that accompanies innocence may be rooted in a generalized and perhaps motivated belief in a just world in which human beings get what they deserve and deserve what they get (Lerner, 1980). It may also stem from the ‘‘illusion of transparency,’’ a tendency for people to overestimate the extent to which their true thoughts, emotions, and other inner states can be seen by others (Gilovich, Savitsky, & Medvec, 1998; Miller & McFarland, 1987). Whatever the mechanism, it is clear that Miranda warnings may not adequately protect the citizens who need it most—those accused of crimes they did not commit (Kassin, 2005).

These findings suggest that people have a na¨ıve faith in the power of innocence to set them free. This phenomenology was evident in the classic case of Peter Reilly, an18-year-old who falsely confessed to the murder of his mother. When asked years later why he did not invoke his Miranda rights, Reilly said, ‘‘My state of mind was that I hadn’t done anything wrong and I felt that only a criminal really needed an attorney, and this was all going to come out in the wash’’ (Connery, 1996, p. 93). Innocence may lead innocents to forego other important safeguards as well. Consider the case of Kirk Bloodsworth, the first death row inmate to be exonerated by DNA. In 1985, based solely

on eyewitness identifications, Bloodsworth was convicted for the rape and murder of a 9-year-old girl. He was exonerated by DNA 8 years later and ultimately vindicated when the true perpetrator was identified. The day of his arrest, Bloodsworth was warned that there would be cameras present and asked if he wanted to cover his head with a blanket. He refused, saying he did nothing wrong and was not going to hide—even though potential witnesses might see him on TV (Junkin, 2004).

IV. THE CONSEQUENCES OF CONFESSION

It is inevitable that some number of innocent people will be targeted for suspicion and subjected to excessively persuasive interrogation tactics, and many of them will naively and in opposition to their own self-interest waive their rights and confess. One might argue that this unfortunate chain of events is tolerable, not tragic, to the extent that the resulting false confessions are detected by authorities at some point and corrected. Essential to this presumed safety net is the belief that police, prosecutors, judges, and juries are capable of distinguishing true and false confessions.

The process begins with the police. Numerous false confession cases reveal that once a suspect confesses, police often close their investigation, deem the case solved, and overlook exculpatory evidence or other possible leads– even if the confession is internally inconsistent, contradicted by external evidence, or the product of coercive interrogation (Drizin & Leo, 2004; Leo & Ofshe, 1998). This trust in confessions may extend to prosecutors as well, many of whom express skepticism about police-induced false confessions, stubbornly refusing to admit to such an occurrence even after DNA evidence has unequivocally established the defendant's innocence (Findley & Scott, 2006; Hirsch, 2005b; Kassin & Gudjonsson, 2004). Upon confession, prosecutors tend to charge suspects with the highest number and types of offenses, set bail higher, and are far less likely to initiate or accept a plea bargain to a reduced charge (Drizin & Leo, 2004; Leo & Ofshe, 1998; but see Redlich, in press).

Part of the problem is that confessions can taint other evidence. In one case, for example, Pennsylvania defendant Barry Laughman confessed to rape and murder, which was later contradicted by blood typing evidence. Clearly influenced by the confession, the state forensic chemist went on to concoct four ''theories,'' none grounded in science, to explain away the mismatch. Sixteen years later, Laughman was set free (http://www.innocenceproject.org). Recent empirical studies have

demonstrated the problem as well. In one study, Dror and Charlton (2006) presented five latent fingerprint experts with pairs of prints from a crime scene and suspect in an actual case in which they had previously made a match or exclusion judgment. The prints were accompanied either by no extraneous information, an instruction that the suspect had confessed (suggesting a match), or an instruction that the suspect was in custody at the time (suggesting an exclusion). The misinformation produced a change in 17% of the original, previously correct judgments. In a second study, Hasel and Kassin (2009) staged a theft and took photographic identification decisions from a large number of eyewitnesses who were present. One week later, individual witnesses were told that the person they had identified denied guilt, or that he confessed, or that a specific other lineup member confessed. Influenced by this information, many witnesses went on to change their identification decisions, selecting the confessor with confidence, when given the opportunity to do so.

Not surprisingly, confessions are particularly potent in the courtroom. When a suspect in the U.S. retracts his or her confession, pleads not guilty, and goes to trial, a sequence of two decisions is set into motion. First, a judge determines whether the confession was voluntary and hence admissible as evidence. Then a jury, hearing the admissible confession, determines whether the defendant is guilty beyond a reasonable doubt. But can people distinguish between true and false confessions? And what effect does this evidence have within the context of a trial?

Research on the impact of confessions throughout the criminal justice system is unequivocal. Mock jury studies have shown that confessions have more impact than other potent forms of evidence (Kassin & Neumann, 1997) and that people do not fully discount confessions—even when they are judged to be coerced (Kassin & Wrightsman, 1980) and even when the confessions are presented secondhand by an informant who is motivated to lie (Neuschatz, Lawson, Swanner, Meissner, & Neuschatz, 2008). For example, Kassin and Sukel (1997) presented mock jurors with one of three versions of a murder trial transcript. In a low-pressure version, the defendant was said to have confessed to police immediately upon questioning. In a high-pressure version, participants read that the suspect was in pain and interrogated aggressively by a detective who waved his gun in a menacing manner. A control version contained no confession in evidence. Presented with the high-pressure confession, participants appeared to respond in the legally prescribed manner. They judged the statement to be involuntary and said it did not influence their decisions. Yet when it came to the all- important verdict measure, this confession significantly increased the conviction rate. This increase occurred even in a condition in which subjects were specifically admonished to disregard confessions they found to be coerced. Similar results have recently been reported in mock jury studies involving

defendants who are minors (Redlich, Ghetti, & Quas, 2008; Redlich, Quas, & Ghetti, 2008). This point concerning the power of confession evidence is bolstered by recent survey evidence indicating that although laypeople understand that certain interrogation tactics are psychologically coercive, they do not believe that these tactics elicit false confessions (Leo & Liu, 2009). Archival analyses of actual cases also reinforce this point. When proven false confessors pleaded not guilty and proceeded to trial, the jury conviction rates ranged from 73% (Leo & Ofshe, 1998) to 81% (Drizin & Leo, 2004). These figures led Drizin and Leo to describe confessions as ‘‘inherently prejudicial and highly damaging to a defendant, even if it is the product of coercive interrogation, even if it is supported by no other evidence, and even if it is ultimately proven false beyond any reasonable doubt’’ (p. 959).

There are at least three reasons why people cannot easily identify as false the confessions of innocent suspects. First, generalized common sense leads people to trust confessions the way they trust other behaviors that counter self- interest. Over the years, and across a wide range of contexts, social psychologists have found that social perceivers fall prey to the fundamental attribution error—that is, they tend to make dispositional attributions for a person’s actions, taking behavior at face value, while neglecting the role of situational factors (Jones, 1990; Ross, 1977). Gilbert and Malone (1995) offered several explanations for this bias, the most compelling of which is that people draw quick and relatively automatic dispositional inferences from behavior and then fail to adjust or correct for the presence of situational constraints. Common sense further compels the belief that people present themselves in ways that are self-serving and that confessions must therefore be particularly diagnostic of guilt. Indeed, most people reasonably believe that they would never confess to a crime they did not commit and have only rudimentary understanding of the predispositional and situational factors that would lead someone to do so (Henkel, Coffman, & Dailey, 2008).

A second reason is that people are typically not adept at deception detection. We saw earlier that neither lay people nor professionals distinguish truths from lies at high levels of accuracy. This problem extends to judgments of true and false confessions. To demonstrate, Kassin, Meissner, and Norwick (2005) videotaped male prison inmates providing true confessions to the crimes for which they were incarcerated and concocting false confessions to crimes selected by the experimenter that they did not commit. When college students and police investigators later judged these statements from videotapes or audiotapes, the results showed that neither group was particularly adept, exhibiting accuracy rates that ranged from 42 to 64%—typically not much better than chance performance. These findings suggest people cannot readily distinguish true and false confessions and that law enforcement experience does not improve performance. This latter result is not surprising, as many

of the behavioral cues that typically form part of the basis for training (e.g., gaze aversion, postural cues, and grooming gestures) are not statistically correlated with truth-telling or deception (DePaulo et al., 2003).

On the assumption that ‘‘I’d know a false confession if I saw one,’’ there is a third reason for concern: Police- induced false confessions often contain content cues presumed to be associated with truthfulness. In many documented false confessions, the statements ultimately presented in court contained not only an admission of guilt but vivid details about the crime, the scene, and the victim that became known to the innocent suspect through leading questions, photographs, visits to the crime scene, and other secondhand sources invisible to the naive observer. To further complicate matters, many false confessors state not just what they allegedly did, and how they did it, but why— as they self-report on revenge, jealousy, provocation, financial desperation, peer pressure, and other prototypical motives for crime. Some of these statements even contain apologies and expressions of remorse. To the na¨ıve spectator, such statements appear to be voluntary, textured with detail, and the product of personal experience. Uninformed, however, this spectator mistakes illusion for reality, not realizing that the taped confession is scripted by the police theory of the case, rehearsed during hours of unrecorded questioning, directed by the questioner, and ultimately enacted on paper, tape, or camera by the suspect (see Kassin, 2006).

V. RECOMMENDATIONS FOR REFORM

Confession is a potent form of evidence that triggers a chain of events from arrest, prosecution, and conviction, through post-conviction resistance to change in the face of exculpatory information. Recent DNA exonerations have shed light on the problem that innocent people, confident in the power of their innocence to prevail, sometimes confess to crimes they did not commit. Research has identified two sets of risks factors. The first pertains to the circumstances of interrogation, situational factors such as a lengthy custody and isolation, possibly accompanied by a deprivation of sleep and other need states; presentations of false evidence, a form of trickery that is designed to link the suspect to the crime and lead him or her to feel trapped by the evidence; and minimization tactics that lead the suspect and others to infer leniency even in the absence of an explicit promise. The second set of risk factors pertains to dispositional characteristics that render certain suspects highly vulnerable to influence and false confessions— namely, adolescence and immaturity; cognitive and intellectual

impairments; and personality characteristics and mental illness.

In light of the wrongful convictions involving false confessions that have recently surfaced, as well as advances in psychological research on interviewing, interrogations, and confessions, there are renewed calls for caution regarding confessions and the reform of interrogation practices not seen since the Wickersham Commission Report (1931) and U.S. Supreme Court opinion in Miranda (1966). Professionals from varying perspectives may differ in their perceptions of both the problems and the proposed solutions. Hence, it is our hope that the recommendations to follow will inspire a true collaborative effort among law enforcement professionals, district attorneys, defense lawyers, judges, social scientists, and policy makers to scrutinize the systemic factors that put innocent people at risk and devise effective safeguards.

A. Electronic Recording of Interrogations

Without equivocation, our most essential recommendation is to lift the veil of secrecy from the interrogation process in favor of the principle of transparency. Specifically, all custodial interviews and interrogations of felony suspects should be videotaped in their entirety and with a camera angle that focuses equally on the suspect and interrogator. Stated as a matter of requirement, such a policy evokes strong resistance in some pockets of the law enforcement community. Yet it has also drawn advocates from a wide and diverse range of professional, ideological, and political perspectives (e.g., American Bar Association, 2004; Boetig, Vinson, & Weidel, 2006; Cassell, 1996a; Drizin & Colgan, 2001;Geller, 1994; Gudjonsson, 2003; Leo,1996c; Slobogin, 2003; Sullivan, 2004; The Justice Project, 2007).

In England, under the Police and Criminal Evidence Act of 1984, the mandatory requirement for tape-recording police interviews was introduced to safeguard the legal rights of suspects and the integrity of the process. At first resisted by police, this requirement has positively transformed the ways in which police interviews are conducted and evaluated. Over the years, the need for taping has pressed for action within the U.S. as well. In Convicting the Innocent, a classic study of wrongful convictions, Edwin Borchard (1932) expressed concern that police abuses during interrogations led to involuntary and unreliable confessions. His solution, utilizing the technology of the time, was to make ‘‘[phonographic records’’ [of

interrogations] which shall alone be introducible in court'' (pp. 370–371).

Throughout the twentieth century, other advocates for recording were less concerned with preventing false confessions and more concerned with increasing the accuracy of the justice system by eliminating the swearing contests between police officers and suspects over what occurred during the interrogation (Kamisar, 1977; Weisberg, 1961). Still others saw that recording interrogations held tremendous benefits for law enforcement by discouraging note-taking and other practices that could inhibit suspects, helping police officers obtain voluntary confessions, nabbing accomplices, and protecting officers from false allegations of abuse (Geller, 1993; O'Hara, 1956). Despite these calls for recording, by the turn of the twentieth century only two states, by virtue of state Supreme Court decisions—Alaska (Stephan v. State, 1985) and Minnesota (State v. Scales, 1994)—required law enforcement officers to electronically record suspect interrogations. The pace of reform in this area, however, is picking up and once again a concern about false confessions seems to be the impetus. In the post-DNA age, and particularly in the past 5 years, as the number of wrongful convictions based on false confessions has continued to climb, concerns about the reliability of confession evidence have led to a renewed push for recording requirements (Drizin & Reich, 2004). As a result of statutes and court rulings, seven additional jurisdictions—Illinois, Maine, New Mexico, New Jersey, Wisconsin, North Carolina, and the District of Columbia— have joined Minnesota and Alaska, in requiring recordings of custodial interrogations in some circumstances (Robertson, 2007; Sullivan, 2004). In several other states, supreme courts have stopped short of requiring recording but either have issued strongly worded opinions endorsing recording—e.g., New Hampshire (State v. Barnett, 2002) and Iowa (State v. Hajtic, 2007)—or, in the case of Massachusetts, held that where law enforcement officers have no excuse for the failure to record interrogation, defendants are entitled to a strongly worded instruction admonishing jurors to treat unrecorded confessions with caution (Commonwealth v. DiGiambattista, 2004).

In addition to recent developments in state courts and legislatures, there is a growing movement among law enforcement agencies around the country to record interrogations voluntarily. Over the past 70 years, the idea has been anathema to many in law enforcement—including the FBI, which prohibits electronic recording, and John Reid & Associates, which used to vigorously oppose the practice of recording interrogations (Inbau et al., 2001; but see Buckley & Jayne's [2005] recent publication, Electronic Recording of Interrogations; for an historical review, see Drizin & Reich, 2004). Yet there are now signs that police opposition is thawing (e.g., Boetig et al., 2006). Several years ago, a National Institute of Justice study found that one-third of large police and sheriff's departments throughout the U.S. were already videotaping at

least some interrogations or confessions and that their experiences with the practice were positive (Geller, 1993). A more recent survey of more than 465 law enforcement agencies in states that do not require electronic recording of interrogations has revealed that the practice is widespread. Without any legislative or judicial compulsion, police departments in many states routinely record interviews and interrogations in major felony investigations. Without exception, they have declared strong support for the practice (Sullivan, 2004; Sullivan, Vail, & Anderson, 2008).

There are numerous advantages to a videotaping policy. To begin, the presence of a camera may deter interrogators from using the most egregious, psychologically coercive tactics—and deter frivolous defense claims of coercion where none existed. Second, a videotaped record provides trial judges (ruling on voluntariness) and juries (deter mining guilt) an objective and accurate record of the process by which a statement was taken—a common source of dispute that results from ordinary forgetting and self-serving distortions in memory. In a study that demonstrates the problem, Lamb, Orbach, Sternberg, Hershkowitz, and Horowitz (2000) compared interviewers' verbatim contemporaneous accounts of 20 forensic interviews with alleged child sex abuse victims with tape recordings of these same sessions. Results showed that more than half of the interviewers' utterances and one quarter of the details that the children provided did not appear in their verbatim notes. Even more troubling was that interviewers made frequent and serious source attribution errors—for example, often citing the children, not their own prompting questions, as the source of details. This latter danger was inadvertently realized by D.C. Detective James Trainum (2007) who—in an article entitled ''I took a false confession – so don't tell me it doesn't happen!''—recounted a case in which a suspect who had confessed to him was later exonerated: ''Years later, during a review of the videotapes, we discovered our mistake. We had fallen into a classic trap. We believed so much in our suspect's guilt that we ignored all evidence to the contrary. To demonstrate the strength of our case, we showed the suspect our evidence, and unintentionally fed her details that she was able to parrot back to us at a later time. It was a classic false confession case and without the video we would never have known'' (see also Trainum, 2008). Similarly, Police Commander Neil Nelson, of St. Paul, Minnesota, said that he too once elicited a false confession, which he came to doubt by reviewing the interrogation tape: ''You realize maybe you gave too much detail as you tried to encourage him and he just regurgitated it back'' (Wills, 2005; quoted online by Neil Nelson & Associates; http://www.neilnelson.com/pressroom.html).

To further complicate matters of recollection, police interrogations are not prototypical social interactions but, rather, extraordinarily stressful events for those who stand accused. In a study that illustrates the risk to accurate retrieval, Morgan et

al. (2004) randomly assigned trainees in a military survival school to undergo a realistic high-stress or low-stress mock interrogation. Twenty-four hours later, he found that those in the high-stress condition had difficulty even identifying their interrogators in a lineup. In real criminal cases, questions constantly arise about whether rights were administered and waived, whether the suspect was cooperative or evasive, whether detectives physically intimidated the suspect, whether promises or threats were made or implied, and whether the details in a confession emanated from the police or suspect, are among the many issues that become resolvable (in Great Britain, as well, taping virtually eliminated the concern that police officers were attributing to suspects admissions that would later be disputed; see Roberts, 2007).

In recent years, Sullivan (2004, 2007) has tirelessly interviewed law enforcement officials from hundreds of police and sheriff's departments that have recorded custodial interrogations and found that they enthusiastically favored the practice. Among the collateral benefits they often cited were that recording permitted detectives to focus on the suspect rather than take copious notes, increased accountability, provided an instant replay of the suspect's statement that sometimes revealed incriminating comments that were initially overlooked, reduced the amount of time detectives spent in court defending their interrogation practices, and increased public trust in law enforcement. Countering the most common apprehensions, the respondents in these interview studies reported that videotaping interrogations did not prove costly or inhibit suspects from talking to police or incriminating them- selves. Typical of this uniformly positive reaction, Detective Trainum (2007) notes: ''When videotaping was first forced upon us by the D.C. City Council, we fought it tooth and nail. Now, in the words of a top commander, we would not do it any other way.''

It is beyond the scope of this article to draft a model rule that would address such specific details as what conditions should activate a recording requirement, how the recordings should be preserved, whether exceptions to the rule should be made (e.g., if the equipment malfunctions, if the suspect refuses to make a recorded statement), and what consequences would follow from the failure to record (e.g., whether the suspect's statement would be excluded or admitted to the jury with a cautionary instruction). As a matter of policy, however, research does suggest that it is important not only that entire sessions be recorded, triggered by custodial detention, but that the camera adopt a neutral ''equal focus'' perspective that shows both the accused and his or her interrogators. In 20-plus years of research on illusory causation effects in attribution, Lassiter and his colleagues have taped mock interrogations from three different camera angles so that the suspect, the interrogator, or both were visible. Lay participants who saw only the suspect judged the situation as less coercive than those focused on the interrogator. By directing visual attention toward the accused, the camera can thus lead

jurors to underestimate the amount of pressure actually exerted by the ‘‘hidden’’ detective (Lassiter & Irvine, 1986; Lassiter, Slaw, Briggs, & Scanlan, 1992). Additional studies have confirmed that people are more attuned to the situational factors that elicit confessions whenever the interrogator is on camera than when the focus is solely on the suspect (Lassiter & Geers, 2004; Lassiter, Geers, Munhall, Handley, & Beers, 2001). Under these more balanced circumstances, juries make more informed attributions of voluntariness and guilt when they see not only the final confession but the conditions under which it was elicited (Lassiter, Geers, Handley, Weiland, & Munhall, 2002). Indeed, even the perceptions of experienced trial judges are influenced by variations in camera perspective (Lassiter, Diamond, Schmidt, & Elek, 2007).

B. Reform of Interrogation Practices

In light of recent events, the time is ripe for police, district attorneys, defense lawyers, judges, researchers, and policymakers to evaluate current methods of interrogation. All parties would agree that the surgical objective of interrogation is to secure confessions from perpetrators but not from innocent suspects. Hence, the process of interrogation should be structured in theory and in practice to produce outcomes that are accurate, as measured by the observed ratio of true to false confessions. Yet except for physical brutality or deprivation, threats of harm or punishment, promises of leniency or immunity, and flagrant violations of a suspect’s constitutional rights, there are no clear criteria by which to regulate the process. Instead, American courts historically have taken a ‘‘totality of the circumstances’’ approach to voluntariness and admissibility. Because Miranda does not adequately safeguard the innocent, we believe that the time is right to revisit the factors that comprise those circumstances.

As illustrated by the Reid technique and other similar approaches, the modern American police interrogation is, by definition, a guilt-presumptive and confrontational process—aspects of which put innocent people at risk. There are two ways to approach questions of reform. One is to completely reconceptualize this model at a macro level and propose that the process be converted from ‘‘confrontational’’ to ‘‘investigative.’’ Several years ago, after a number of high-profile false confessions, the British moved in this direction, transitioning police from a classic interrogation to a process of ‘‘investigative interviewing.’’ The Police and Criminal Evidence (PACE) Act of 1984 sought to reduce the use of psychologically manipulative tactics. In a post-PACE study, Irving and McKenzie (1989) found that the use of psychologically

manipulative tactics had significantly declined—without a corresponding drop in the frequency of confessions. The post-PACE confession rate is also somewhat higher in the UK than in the U.S. (Gudjonsson, 2003). In 1993, the Royal Commission on Criminal Justice further reformed the practice of interrogation by proposing the PEACE model described earlier (‘‘Preparation and Planning,’’ ‘‘Engage and Explain,’’ ‘‘Account,’’ ‘‘Closure,’’ and ‘‘Evaluate’’), the purpose of which is fact finding rather than confession. Observational research suggests that such investigative interviews enable police to inculpate offenders—and youthful suspects as well (Hershkowitz, Horowitz, Lamb, Orbach, & Sternberg, 2004; Lamb, Orbach, Hershkowitz, Horowitz, & Abbott, 2007)—by obtaining from them useful, evidence-generating information about the crime (for reviews, see Bull & Soukara, 2009; Williamson, 2006).

Similar techniques have been taught and employed in the U.S. as well, where Nelson (2007) reports from experience that it is highly effective. Recent laboratory research has also proved promising in this regard. In one series of experiments, interviewers more effectively exposed deceptive mock criminals when they strategically withheld incriminating evidence than when they confronted the suspects with that evidence (Hartwig et al., 2005, 2006). In an experiment using the Russano et al. (2005) cheating paradigm described earlier, Rigoni and Meissner (2008) independently varied and compared accusatorial and inquisitorial methods and found that the latter produced more diagnostic outcomes—lowering the rate of false confessions without producing a corresponding decrease in the rate of true confessions. Although more systematic research is needed, it is clear that investigative interviewing offers a potentially effective macro alternative to the classic American interrogation. Indeed, New Zealand and Norway have recently adopted the PEACE approach to investigative interviewing as a matter of national policy.

A second approach to the question of reform is to address specific risk factors inherent within a confrontational framework for interrogation. On the basis of converging evidence from actual false confession cases, basic principles of psychology, and forensic research, the existing literature suggests that certain interrogation practices alone and in combination with each other pose a risk to the innocent—whether they are dispositionally vulnerable or not. Focused in this way, but stopping short of making specific recommendations, we propose that the following considerations serve as a starting point for collaborative discussion.

Custody and Interrogation Time

As noted earlier, the human needs for belonging, affiliation, and social support, especially in times of stress, are a fundamental human motive. Prolonged isolation from significant others thus constitutes a form of deprivation that can heighten a suspect's distress and increase his or her incentive to escape the situation. Excessive time in custody may also be accompanied by fatigue and feelings of helplessness and despair as well as the deprivation of sleep, food, and other biological needs. The vast majority of interrogations last from 30 minutes up to 2 hours (Baldwin, 1993; Irving, 1980; Kassin et al., 2007; Leo, 1996b; Wald et al., 1967). Inbau et al. (2001) cautioned against surpassing 4 hours, and Blair (2005) argued that interrogations exceeding 6 hours are ''legally coercive.'' Yet research shows that in proven false confession cases the interrogations had lasted for an average of 16.3 hours (Drizin & Leo, 2004). Following PACE in Great Britain, policy discussions should begin with a proposal for the imposition of time limits, or at least flexible guidelines, when it comes to detention and interrogation, as well as periodic breaks from questioning for rest and meals. At a minimum, police departments should consider placing internal time limits on the process that can be exceeded— initially and at regular intervals thereafter, if needed— only with authorization from a supervisor of detectives.

Presentations of False Evidence

A second problem concerns the tactic of presenting false evidence, which is often depicted as incontrovertible, and which takes the form of outright lying to suspects—for example, about an eyewitness identification that was not actually made; an alibi who did not actually implicate the suspect; fingerprints, hair, or blood that was not actually found; or polygraph tests that they did not actually fail. In Frazier v. Cupp (1969), the U.S. Supreme Court reviewed a case in which police falsely told the defendant that his cousin (whom he said he was with), had confessed, which immediately prompted the defendant to confess. The Court sanctioned this type of deception—seeing it as relevant to its inquiry on voluntariness but not a reason to disqualify the resulting confession. Although some state courts have distinguished between mere false assertions, which are permissible, and the fabrication of reports, tapes, and other evidence, which are not, the Supreme Court has not revisited the issue.

From a convergence of three sources, there is strong support for the proposition that outright lies can put innocents at risk to confess by leading them to feel trapped by the inevitability of evidence against them. These three sources are: (1) the aggregation of actual false confession cases, many of which involved use of the false evidence ploy; (2) one hundred-plus years of basic psychology research, which proves without equivocation that misinformation can substantially alter people's visual perceptions, beliefs, motivations, emotions, attitudes, memories, self-assessments, and even certain physiological outcomes, as seen in studies of the placebo effect; and (3) numerous experiments, from different laboratories, demonstrating that presentations of false evidence increase the rate at which innocent research participants agree to confess to prohibited acts they did not commit. As noted earlier, scientific evidence for the malleability of people's perceptions, decisions, and behavior when confronted with misinformation is broad and pervasive. With regard to a specific variant of the problem, it is also worth noting that the National Research Council Committee to Review the Scientific Evidence on the Polygraph (2003) recently expressed concern over the risk of false confessions produced by telling suspects they had failed the polygraph (see also Lykken, 1998).

Over the years, legal scholars have debated the merits of trickery and deception in the interrogation room (e.g., Magid, 2001; Slobogin, 2007; Thomas, 2007) and some law enforcement professionals have argued that lying is sometimes a necessary evil, effective, and without risk to the innocent (Inbau et al., 2001). To this argument, two important points must be noted. First, direct observations and self-report surveys of American police suggest that the presentation of false evidence is a tactic that is occasionally used (e.g., Feld, 2006a, 2006b; Kassin et al., 2007; Leo, 1996b). Some interrogators no doubt rely on this ploy more than others do. Yet in a position paper on false confessions, the Wisconsin Criminal Justice Study Commission (2007) concluded that ''Experienced interrogators appear to agree that false evidence ploys are relatively rare'' (p. 6). Second, it is instructive that in Great Britain, where police have long been prohibited from deceiving suspects about the evidence, relying instead on the investigative interviewing tactics described earlier, there has been no evidence of a decline in confession rates (Clarke & Milne, 2001; Gudjonsson, 2003; Williamson, 2006).

In light of the demonstrated risks to the innocent, we believe that the false evidence ploy, which is designed to thrust suspects into a state of inevitability and despair, should be addressed. The strongest response would be an outright ban on the tactic, rendering all resulting confessions per se inadmissible—as they are if elicited by promises, threats, and physical violence (such a ban currently exists in England, Iceland, and Germany; suspects are differently protected in Spain and Italy, where defense

counsel must be present for questioning). A second approach, representing a relatively weak response, would involve calling for no direct action, merely a change of attitude in light of scientific research that will lead the courts to weigh the false evidence ploy more heavily when judging voluntariness and reliability according to a ‘‘totality of the circumstances.’’

Representing a compromise between an outright ban and inaction, we urge police, prosecutors, and the courts, in light of past wrongful convictions and empirical research, to heighten their sensitivity to the risks that false evidence poses to the innocent suspect. One way to achieve this compromise would be to curtail some variants of the false evidence ploy but not others—or in the case of some suspects but not others. As noted earlier, some state courts have distinguished between mere false assertions and the fabrication of reports, tapes, photographs, and other evidence, the latter being impermissible. This particular distinction seems arbitrary. False evidence puts innocents at risk to the extent that a suspect is vulnerable (e.g., by virtue of his or her youth, naivete´, intellectual deficiency, or acute emotional state) and to the extent that the alleged evidence it is presented as incontrovertible, sufficient as a basis for prosecution, and impossible to overcome. By this criterion, which the courts would have to apply on a case-by-case basis, a confession produced by telling an adult suspect that his cousin had confessed, the ploy used in Frazier v. Cupp (1969), might well be admissible. Yet a confession produced by telling a traumatized 14-year-old boy that his hair was found in his murdered sister’s grasp, that her blood was found in his bedroom, and that he failed an infallible lie detector test—the multiple lies presented to false confessor Michael Crowe—would be excluded (White, 2001).

Minimization Tactics

A third area of concern involves the use of minimization techniques (often called ‘‘themes,’’ ‘‘scenarios,’’ or ‘‘inducements’’) that can communicate promises of leniency indirectly through pragmatic implication. While American federal constitu tional law has long prohibited the use of explicit promises of leniency (Bram v. United States, 1897; Leyra v. Denno, 1954; Lynumn v. Illinois, 1963), uses of minimization are less clear. There is some legal support for the proposition that implicit promises of leniency are also prohibited in federal constitutional law (White, 1997), although a majority of states hold that a promise of leniency is only one factor to be considered in determining whether a confession is involuntary (White,2003).

Multiple sources support the proposition that implicit promises can put innocents at risk to confess by leading them to perceive that the only way to lessen or escape punishment is by complying with the interrogator's demand for confession, especially when minimization is used on suspects who are also led to believe that their continued denial is futile and that prosecution is inevitable. These sources are: (1) the aggregation of actual false confession cases, the vast majority of which involved the use of minimization or explicit promises of leniency (Drizin & Leo, 2004; Leo & Ofshe, 1998; Ofshe & Leo,1997a, 1997b; White, 2001); (2) basic psychological research indicating, first, that people are highly responsive to reinforcement and make choices designed to maximize their outcomes (Hastie & Dawes, 2001), and second that people can infer certain consequences in the absence of explicit promises and threats by pragmatic implication (Chan & McDermott, 2006; Harris & Monaco, 1978; Hilton, 1995); and (3) experiments specifically demonstrating that minimization increases the rate at which research participants infer leniency in punishment and confess, even if they are innocent (Kassin & McNall, 1991; Klaver, Lee, & Rose, 2008; Russano et al., 2005).

In light of the demonstrated risks to the innocent, we believe that techniques of minimization, as embodied in the ''themes'' that interrogators are trained to develop, which communicate promises of leniency via pragmatic implication, should be scrutinized. Some law enforcement professionals have argued that minimization is a necessary interrogation technique (Inbau et al., 2001). As with the false evidence ploy, there are several possible approaches to the regulation of minimization techniques—ranging from the recommendation that no action be taken to an outright ban on minimization. Between these extreme positions one might argue that some uses of minimization but not others should be limited or modified.

Minimization techniques come in essentially three forms: those that minimize the moral consequences of confessing, those that minimize the psychological consequences of confessing, and those that minimize the legal consequences of confessing (Inbau et al., 2001; Ofshe & Leo, 1997a, 1997b). One possible compromise between the two extreme positions noted above would be to permit moral and psychological forms of minimization, but ban legal minimization that communicates promises of leniency via pragmatic implication. With this distinction in mind, interrogators would be permitted, for example, to tell a suspect that he or she will feel better after confession (psychological minimization) or that he or she is still a good person (moral minimization), but not that the legal consequences of his actions will be minimized if he confesses (e.g., as may be implied by self-defense and other themes). More research is thus needed to distinguish among the different tactics that interrogators are trained to use (e.g., the provocation, peer pressure, and accident scenarios), and the

pragmatic inferences that these tactics lead suspects to draw concerning the consequences of confession.

C. Protection of Vulnerable Suspect Populations

There is a strong consensus among psychologists, legal scholars, and practitioners that juveniles and individuals with cognitive impairments or psychological disorders are particularly susceptible to false confession under pressure. Yet little action has been taken to modulate the methods by which these vulnerable groups are questioned when placed into custody as crime suspects. More than 45 years ago, the 1962 President's Panel on Mental Retardation questioned whether confessions from defendants with mental retardation should ever be admissible at trial (see Appelbaum & Appelbaum, 1994). In 1991, Fred Inbau wrote that ''special protections must be afforded to juveniles and to all other persons of below-average intelligence, to minimize the risk of untruthful admissions due to their vulnerability to suggestive questioning'' (1991, pp. 9–10). More recently, Inbau et al. (2001) advised against use of the false evidence ploy with youthful suspects or those with diminished mental capacity: ''These suspects may not have the fortitude or confidence to challenge such evidence and, depending on the nature of the crime, may become confused as to their own possible involvement'' (p. 429; also see Buckley, 2006).

It is uniformly clear to all parties that vulnerable suspect populations—namely, juveniles and people who are cognitively impaired or psychologically disordered—need to be protected in the interrogation room. In operational terms, we believe that there are two possible ways to protect these vulnerable populations. The first concerns the mandatory presence of an attorney. A least with regard to juveniles, a parent, guardian, or other interested adult is required in some states to protect young suspects who face interrogation. Yet research suggests that the presence of an interested adult does not increase the rate at which juveniles assert their constitutional rights because these adults, often passive, frequently urge their youths to cooperate with police—a tendency observed both in the U.S. (Grisso & Ring, 1979; Oberlander & Goldstein, 2001) and in the UK, where the law provides for access to an ''appropriate adult'' (Pearse & Gudjonsson, 1996). For this reason, juveniles—at least those under the age of 16 (at present, the research evidence is less clear when it comes to older adolescents)—should be accompanied and advised by a professional advocate, preferably an attorney, trained to serve in this role (see Gudjonsson, 2003).

As a second possible means of protection, law enforcement personnel who conduct interviews and interrogations should receive special training—not only on the limits of human lie detection, false confessions, and the perils of confirmation biases—but on the added risks to individuals who are young, immature, mentally retarded, psychologically disordered, or in other ways vulnerable to manipulation. In a survey of 332 Baltimore police officers, Meyer and Reppucci (2007) found that while respondents understood in general terms that adolescents lack maturity of judgment and are more malleable than adults, they did not by implication believe that juvenile suspects were at greater risk in the interrogation room. Hence, they reported using roughly the same Reid-like techniques with juveniles as they do with adults (e.g., confrontation, repetition, refusal to accept denials, false evidence, minimization, and use of alternative questions). Interestingly, one-third of these respondents stated that police could benefit from special training with regard to the interrogation of juvenile suspects. In light of research described earlier, as well as Inbau et al.'s (2001) cautionary notes on the interrogation of minors and their heightened risk for false confession, we agree.

D. Summary and Conclusion

In 1932, Edwin Borchard published Convicting the innocent: Sixty-five actual errors of criminal justice, in which several false confession cases were included. Addressing the question of how these errors were uncovered, he noted how ''sheer good luck'' played a prominent role and lamented on ''how many unfortunate victims of error have no such luck, it is impossible to say, but there are probably many.'' Today's generation of post-conviction exonerations well illustrate the role that sheer good luck plays (e.g., as when DNA, long ago collected, was preserved; as when the true perpetrator finds a conscience and comes forward). With increased scientific attention to the problem of false confessions, and the reforms recommended in this article, we believe it possible to reduce the serendipitous nature of these discoveries and to increase both the diagnosticity of suspects' statements and the ability of police, prosecutors, judges, and juries to make accurate decisions on the basis of these statements.

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Chapter 4 The Problem of Interrogation- Induced False Confession: Sources of Failure in Prevention and Detection

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In October of 1988, 20-year-old Nancy DePriest was tied up, raped, and murdered at the Pizza Hut where she worked in Austin, Texas. Two weeks later, 22-year-old Christopher Ochoa, who worked at another Pizza Hut, and his friend, 18-year-old Richard Danziger, ordered a beer at the Pizza Hut where DePriest had been murdered. They spoke to the security guard about the killing, asked where DePriest's body had been found, and said they had come to drink a beer in her memory. Suspicious employees then called the police. Two days later, police picked up Ochoa, a former high school honor student with no criminal record, and Danziger for questioning.

For over 2 days, Austin police detectives interrogated Ochoa offtape. As later events proved, he was not actually involved in the crime. In Ochoa's recounting, the detectives yelled at, harassed, and threatened him for hours; denied his requests for an attorney; told him, falsely, that he failed three separate polygraph tests; claimed that a codefendant was in the next room and about to implicate him; threatened to throw the book at him if he did not cooperate; threw a chair that missed him; threatened him with more violence if he continued to deny their accusations; threatened to put him in a jail cell where he was likely to be homosexually raped by jail inmates; and threatened, repeatedly, that he would be sent to death row and "given the needle" if he did not confess. Over the course of these 2 days of intense interrogation, Ochoa agreed to make three statements, each more incriminating than the last. Eventually, Ochoa signed a five-page, single-spaced wholly false confession that described in great detail how he and Danziger had robbed the Pizza Hut, and tied up, raped, and murdered DePriest.

To avoid the death penalty—and on the advice of his attorneys—Ochoa

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eventually pled guilty to first-degree murder, thus confessing falsely to DePriest's rape and murder a second time. As a condition of the plea agreement, Ochoa was forced to testify against Danziger at Danziger's trial, in effect repeating his false confession to the rape and murder of DePriest a third time. Ochoa avoided the death penalty— seemingly his primary motive for confessing falsely—and was sentenced to life imprisonment. Eleven years later Ochoa was exonerated when DNA evidence that excluded him and identified the true perpetrator of DePriest's rape-murder, Achim Marino. Marino confessed accurately and in detail to the crimes, provided police with unique, nonpublic crime scene details, and correctly instructed police where to locate the fruits of the crime (Leo, 2008; Ochoa, 2005). Two innocent men (Ochoa and his innocent alleged co-perpetrator Danziger) spent years of their lives in prison for Marino's crime, as the result of Ochoa's interrogation-induced false confessions.

Cases such as that of Ochoa are neither unique nor rare. Documented cases of interrogation- induced false confessions in the USA date back at least to the Salem witch trials of 1692, in which some 50 women confessed falsely to witchcraft. It was not until 1908, however, when Hugo Munsterberg published his classic work, *On the Witness Stand* (Munsterberg, 1908), that psychologists began to take note of the problem of false confession and to address potential causes. Munsterberg provided accounts of false confessions ranging from the Salem witch trials to contemporary cases in American cities, and addressed a variety of potential causes of the problem. In the century since Munsterberg's initial documentation and investigation of the phenomenon, there has been a steady increase in public interest in the issue of false confession, in identifying and documenting proven cases of false confessions, and in investigating their causes.

Among the many results of these efforts is a rising tide of cases, documented by media, social scientists, and attorneys, in which persons who were prosecuted, and often convicted, on the basis of false incriminating statements or full false confessions have later been proven innocent. While early accounts tended to be anecdotal and unsystematic case histories, these patterns were changed by a landmark study by Hugo Bedau and Michael Radelet, "*Miscarriage of Justice in Potentially Capital Cases*," published in the *Stanford Law Review.* The authors collected 350 cases of wrongful conviction, and provided a careful systematic analysis of their causes, the reasons they were discovered, and the number of innocents who had been executed. As in other systematic studies to come, they provided data as to the percent of cases in which particular forms of evidence had played a role in the conviction, showing that 14 % of the wrongfully convicted in their sample had falsely confessed.

In the decades since Bedau and Radelet's landmark study, numerous additional case histories have been identified and documented. Moreover, scholars have continued in the tradition of Bedau and Radelet by assembling sets of such cases and providing further analyses of the causes of wrongful conviction. The advent of DNA testing has provided a steady stream of exonerations of the wrongfully convicted that have been analyzed at various points in time by legal scholars and social scientists. The first such analysis was published by Connors, Lundregan, Miller, and McEwen (1996), showing that 18 % of 28 convictions of persons exonerated by DNA were attributable at least in part to false confessions. Subsequent analyses of DNA exonerations catalogued by various scholars and by the Innocence Project (innocenceproject.org) have found the percentage of documented wrongful convictions involving false confessions to range from 14 to 60 % (Garrett, 2011; Leo & Ofshe, 1998, 2001; Scheck, Neufield, & Dwyer, 2000; Warden, 2003).

Along with the many documented individual case histories involving false confessions, these analyses of collections of wrongful convictions reveal interrogation-induced false confessions to be a systemic feature of American criminal justice. Despite procedural safeguards such as legal rights under *Miranda v. Arizona (1966)* to refuse interrogation altogether or to have an attorney present during questioning, and a constitutional prohibition against legally coercive interrogation techniques, American law enforcement continues to elicit false confessions. Moreover, these false confessions continue to go unrecognized by police, prosecutors, judges, and juries, and to play a significant role in convicting the innocent. The many cases in which a false confession was first elicited unknowingly by law enforcement and then proceeded through prosecution, trial, and post-appellate appeal undetected raise two crucial questions (1) Why do false confessions occur, and what can be done to prevent them? (2) Why do they remain undetected once elicited, and what can be done to more successfully identify them when they do occur? We address each of these questions, with particular emphasis on the role of failures of relevant knowledge and understanding among those who elicit and misjudge false confessions.

I. AMERICAN POLICE INTERROGATION: A SEARCH FOR TRUTH OR FOR CONSEQUENCES?

The answer to the question of why interrogation- induced false confessions occur, though complicated, lies largely in the most basic *goal* of interrogation, that of ensuring conviction. The justice system relies heavily upon confessions for obtaining convictions. Absent a confession, many cases lack sufficient evidence to convict, and most others

would be much more costly to investigate and to develop sufficient evidence for conviction. Indeed, Fred Inbau, perhaps the most prominent developer of modern interrogation methods, offered this observation as one of three central points to support the necessity of interrogation: “Many criminal cases, even when investigated by the best qualified police departments, are capable of solution only by means of an admission or confession from the guilty individual or upon the basis of information obtained from the questioning of other criminal suspects” (Inbau, 1961, p. 1404). This situation places considerable pressure upon police to reliably elicit confessions from their suspects. As a result, the most fundamental goal of interrogation is, and always has been, to ensure conviction of the suspect. To this end, the interrogator aims to elicit, on the record, a definitively incriminating account of the crime from the suspect—one that can withstand any later challenge to its authenticity as the case proceeds through charging, prosecution, trial, and post-conviction appeal (Leo, 2008).

Many, if not most, interrogators intend to elicit the “truth” from their suspects, not simply to elicit any confession, however false. However, it is the confounding and confusion of the intention to elicit the truth with the goal of conviction that has led to the development and use of interrogation techniques that are physically or psychologically coercive (or both). In short, throughout history, interrogation techniques have developed to incorporate highly effective means to elicit compliance from a target, but in doing so, have also incorporated a number of specific practices antithetical to elicitation of the truth. In the following sections, we briefly review the history of police interrogation in America, noting how the simultaneous pursuit of the investigative goal of truthful accounts and the legal consequence of conviction inevitably both corrupts the search for truth, compromises the validity of the information it elicits, and compromises the ability to recognize the difference between the truths and falsehoods in suspects’ accounts.

II. THE EVOLUTION OF INTERROGATION IN AMERICAN: FROM PHYSICAL INTIMIDATION TO PSYCHOLOGICAL TRICKERY

The interrogator, whether intending to gather intelligence from a hostile combatant or from a criminal suspect, is faced with the difficult task of trying to elicit accurate information from a potentially hostile target. As one might expect, this task is quite different than that of an interviewer with a fully cooperative witness who wants to disclose as much accurate information as possible. In the latter case, the skilled interviewer seeks to question the witness in the most non-suggestive manner to avoid influencing or distorting witness memories or responses. Given these goals,

considerable research has addressed the many forms of unintentional suggestion by an interviewer that may shape the responses of respondents, and specific protocols have been developed for the specific purpose of avoiding all forms of suggestion (e.g., Fisher & Schreiber, 2007).

In contrast, when faced with a target motivated to withhold relevant information, an interrogator must incorporate strategies for overcoming the target's resistance. This poses a substantial challenge of how to best overcome this resistance to get the relevant and truthful information without simultaneously raising the risk of eliciting false information—in other words, how to maximize the *quantity* of relevant information obtained from suspects while maintaining its *quality* or validity. This challenge has never been fully met, and unfortunately, police interrogators throughout history have chosen strategies to overcome this resistance that (1) are the absolute antithesis of those developed to avoid suggestion and coercion, (2) are highly likely to increase the overall quantity of information, but to simultaneously decrease the proportion of accurate information elicited, and (3) reflect little awareness of or attempt to avoid the potential of these methods to corrupt the information they elicit.

For interrogators throughout the world and throughout history, a primary choice for overcoming the resistance of a reluctant target has been physical intimidation and coercion. American police have been no exception. Yet, such practices have become more controversial over the history of American jurisprudence, as they posed problems of violation of constitutional rights to avoid self-incrimination, as well as of the validity of information elicited. Thus, in the next section we review the progression from initial reliance on physical coercion through the evolution over time to progressively restrict—though not yet completely eliminate—such practices, and replace them with highly sophisticated psychological weapons of persuasion and trickery. In this context, we also address the extent to which problems of coercion and validity remain, notwithstanding this evolution.

III. AMERICAN POLICE AND THE "THIRD DEGREE"

The deliberate infliction of physical and psychological distress upon criminal suspects— colloquially referred to as the "third degree"— was rampant in American police interrogation during the late nineteenth century, and at least into the first three decades of the twentieth century. Police of the time generally lacked formal training,

including training in interrogation technique, and therefore it is perhaps not surprising that without understanding of how to cajole their suspects into confessing voluntarily they would turn to efforts to coerce the information from them instead. The brutality of the tactics they chose for this purpose was virtually unlimited, entailing both physical and psychological abuse restricted only by the imaginations of the interrogators. Suspects were beaten, burned with fire or acid, tear gassed, water-boarded, received painful electric shocks, stripped and subjected to extreme cold, and generally tortured, sometimes to the point of hospitalization or even death. They were isolated in solitary confinement for days or weeks (sometimes in small dark cells fed by fires that produced scorching heat and fouls odors), deprived of sleep, toilet facilities and food, and threatened with further abuse, death, harm to their families, and other incentives. Some were given "truth-serum" drugs to induce compliance. For others, terror was induced by such practices as hanging them out of windows threatening to drop them or holding them at gunpoint threatening to shoot. Others were threatened with more remote consequences such as prosecution for additional, possibly more serious, crimes, long-term imprisonment, and others (see Leo, 2004, 2008 for review). Not surprisingly, these practices were very effective in eliciting confessions from suspects. As long-time observer of police practices, Emanuel Lavine estimated, roughly 70 % of criminal cases were "solved" by confessions coerced through third degree abuse (Lavine, 1930, 1936).

Inevitably, reports of such practices routinely leaked into the press, and third degree tactics were well known by the citizenry. But it was not until 1910, triggered by two widely publicized cases of physical abuse, that third degree practices became the focus of a Senate committee appointed to investigate custodial abuses by federal law enforcement (*Journal of American Institute of Criminal Law and Criminology*, 1912). Based in part on the denials of then Attorney General George Wickersham, who testified that he did not believe third degree practices existed among federal law enforcement personnel, the committee issued an essentially toothless report citing in part to the inability to find evidence of third degree tactics, given the lack of witnesses (other than presumably incredible suspects). Police, in turn, reacted by both condemning and denying the existence of third degree practices (Lavine, 1930, 1936).

The public was less easily diverted, however, with significantly heightened media attention during the first three decades of the twentieth century fueling awareness of the problem. The resulting public outrage led 27 states to enact their own statues against the third degree during the period between 1908 and 1931 (Keedy, 1937; Wickersham Report, 1931). Like the Senate committee investigation, however, these statutes were again largely toothless, very rarely leading to the conviction of any officer or detective alleged to practice illegal third degree tactics. But the 1930s witnessed a sharp escalation in widespread investigation and condemnation of these practices, in

media, in US Supreme Court decisions, and in a government commission that provided an extensive and detailed report (from President Herbert Hoover's National Commission of Law Observance and Law Enforcement) of the widespread use of third degree practices: the "Report on Lawlessness in Law Enforcement," popularly known as the "Wickersham Report" after former attorney general and chair of the committee, George Wickersham. The Wickersham report and subsequent lurid depictions of the horrific brutality of third degree methods in the media created a national scandal providing considerable impetus to the nascent movement toward interrogation reform.

IV. FROM THIRD DEGREE TO PSYCHOLOGICAL TRICKERY

Initially, police reactions to the Wickersham report were defensive, largely criticism or denial, including the quite contradictory claims either that the third degree was simply sensationalism in the media and not actually ever used, or that it was indispensable and police could not do their work without it (Walker, 1977). Nevertheless, many police leaders and trainers had begun to question the ethics and effectiveness of third degree practices and to recognize that the extent of lawlessness and brutality revealed in the Wickersham report (and the subsequent widespread publicity of the findings) posed a significant threat to the credibility of law enforcement. Thereafter, third degree practices steadily declined until the 1960s, when the worst of the third degree methods became virtually nonexistent (President's Commission on Criminal Justice and the Administration of Justice, 1967), and the newly taught interrogation strategies became almost entirely psychological in nature (Smith, 1986).

This decline was precipitated in part by the revision of interrogation methods and training across American police and federal law enforcement. In 1940, the first interrogation manual published in America soundly condemned third degree practices as "vicious and useless," pointing to (what should have always been) the obvious truth that under sufficient torture a target will say anything he thinks his torturers want to hear (Kidd, 1940, pp. 45–46). During the next several decades, a number of additional interrogation training manuals appeared, all emphasizing avoidance of third degree practices, and purporting to offer more "scientific" interrogation methods incorporating sophisticated psychological techniques of lie detection and interrogation (e.g., Auther & Caputo, 1959; Inbau, 1942, 1948; Inbau & Reid, 1953, 1962, 1967; Inbau, Reid, & Buckley, 1986; Mulbar, 1951; O'Hara, 1956).

As they evolved from the 1940s forward, these and other interrogation training materials and practices sought to solve three central problems created by the previous

use of the third degree. First was the problem of public relations. The new methods sought to remove incompetence, inefficiency, corruption, and brutality from police practices, replace them with clear professional standards, and, in doing so, to repair the severe damage done to police credibility in the preceding decades. The new focus on "scientific" (presumably professional and legitimate) methods was directed in part toward this goal to increase the legitimacy of police and their methods in the eyes of the public.

Second, the new methods sought to avoid the legal problems created by the third degree— prominently, the fact that confessions obtained through third degree tactics were often ruled involuntary and inadmissible as evidence in trial, thus impairing the ability to achieve convictions. The law had steadily evolved during the twentieth century toward increased protection of due process and of defendants' constitutional rights to avoid self-incrimination. Hence, many manuals sought to educate police about the law regulating interrogation and the admission of confessions into trial evidence, and to suggest practices specifically directed toward maintaining the admissibility of any statements obtained from suspects. Prior to 1966, when the Supreme Court issued its ruling in *Miranda v. Arizona*, the manuals focused on the Supreme Court's standards for assessing the "voluntariness" of suspect's statements. After *Miranda*, the manuals also addressed the law of pre-interrogation warnings and practices recommended for acquiring a valid waiver of the suspect's *Miranda* rights to remain silent and to have an attorney present at the interrogation (Kamisar, 1980; White, 1998).

Third, the new methods purported to increase the quality of the results. Claiming to evolve from an "art" to create a "science" of interrogation, the manuals presented the new methods as a structured, tested, and empirically supported techniques that, if done according to protocol, would reliably yield valid results. That is, the methods were alleged to clearly distinguish between guilty and innocent suspects prior to interrogation (i.e., to reliably diagnose guilt through scientific lie detection procedures), and to then use less coercive interrogation methods on the (presumed) guilty to obtain true confessions at a high rate, while avoiding false confessions altogether. Based upon the assumption that guilt could be successfully diagnosed prior to interrogation, interrogation manuals and trainers made two claims still prevalent today (1) that they do not interrogate innocent suspects and (2) that even if an innocent person were to somehow be mistakenly interrogated, the methods taught in the manuals could not, and would not, induce an innocent person to falsely confess (e.g., Inbau, Reid, Buckley, & Jayne, 2001). Essentially, the manuals claim that their methods are not coercive, and therefore, there is no mechanism through which they would cause an innocent person to falsely confess. They had allegedly solved problems of both the quantity and quality of the information elicited, while avoiding impermissible problems of coercion.

As we review in the next section, however, much of the thrust of modern interrogation scholarship has been to dispute these very claims, showing that problems of quality and of coercion remain. In particular, the methods of lie detection taught to distinguish between guilty and innocent suspects, although presented as scientific and reliable, are, in fact, without scientific support (and in some cases soundly contradicted by science). Moreover, the methods of interrogation, while represented as noncoercive and not capable of inducing innocents to falsely confess, incorporate strong pressures and incentives that can, and demonstrably have, led innocents to falsely confess. Modern American police interrogation is *NOT* a diagnostic tool that can reliably elicit truthful information from suspects. Instead, it is a highly developed sophisticated and deceptive armament of weapons of social influence designed to induce the target to comply with the interrogator's demands to provide a self-incriminating account of the crime in question. As such, if deployed upon an innocent suspect, such powerful forces of influence may induce the suspect to comply with these demands, notwithstanding his innocence, and to provide false incriminating admissions or a fully developed false confession.

Modern interrogation methods developed in part on the basis of the imminently reasonable assumption that one could avoid the elicitation of false confessions if one avoided interrogation of innocent suspects. The best way to avoid interrogation of innocents is, of course, to have significant probable cause suggesting guilt before subjecting the suspect to a powerfully persuasive interrogation that may elicit both true and false confessions. Ideally, this would entail having substantial evidence linking the suspect to the crime. This may not always be possible, as investigation can require time, permitting the suspect to flee, or there may be little evidence available to collect—such as when only a witness account or police suspicions link the suspect to the crime. Given this situation, interrogators turned to efforts to classify suspects as guilty or innocent before the interrogation, through use of various lie detection methods. If one could reliably detect who was lying and who was telling the truth, the burden of investigation would be reduced or lifted, and one need to only interrogate the guilty to elicit the confessions that would facilitate their conviction. Toward this end, even as the era of the third degree began its decline in the 1930s, the "science" of lie detection began to develop rapidly and to play a central role in the new methods of interrogation. As we shortly show, however, such methods were highly "sciencey"—that is, having the appearance of science without the substance (Goldacre, 2010)—but, in fact, were untested pseudoscience.

A. Pseudoscience, Lie Detection, and the Misclassification of Innocents

Documented efforts to develop methods to reliably detect lies are essentially as old as the recorded history of man. Successful day-to-day lie detection is a necessary skill to negotiate the world of social interaction and the many would- be deceivers who would cheat, steal, and harm through their deceptions. Therefore, we all strive to be human lie detectors, whose well-being and even survival can depend upon the success of our efforts. Systems of justice throughout history have also demanded such methods, requiring reliable methods of distinguishing the guilty from the innocent in order to meet out justice.

Early efforts to formally distinguish the guilty from the innocent shared much of the violence of the third degree. In addition to torture (always a favorite), early societies conducted trials by "ordeal" based upon such magical or religious premises as the ideas that an innocent will be stronger in combat, the truthful person will be able to withstand such travails as submersing his arm in boiling water for longer (aided by the God who knows he is innocent, of course!), that the bleeding from a cut will stop more quickly for the innocent man, and others (Lykken, 1998). However, primitive, such methods share with even the most modern methods of lie detection a common but discredited assumption that specific behaviors or outcomes are unique to truth versus deception, and therefore reliably distinguish one from the other.

As the technology of lie detection developed into the twentieth century and purported to become more scientific, it focused upon two primary strategies: identification of physical measurements associated with deception (as, for example, with the polygraph or voice stress analyzer), and identification of overt behavioral indicators of deception (such as nonverbal responses or features of verbal statements). While the former required specific apparatus to test for deception, the latter could be carried out during social interactions with the target, either in formal interviews or other contexts.

The two classes of methods developed largely contemporaneously among law enforcement, with the polygraph becoming the predominant physical measurement technique, and some version of behavioral analysis (Inbau et al., 2001; Reid & Arther, 1953) becoming the predominant behavioral technique. Notwithstanding the primacy of the "Behavior Analysis Interview" (BAI) for contemporary American police interrogators, the variety of behavioral techniques developed during the last century has

far exceeded that of the physical techniques, and includes those such as “neurolinguistic programming” (in which eye movements are central to diagnosis of deceit), “Statement Validity Assessment” (in which transcribed verbal statements are analyzed according to 19 criteria indicating truth or deception), “Reality Monitoring” (based upon assumed differences in characteristics of actually experienced memories versus imagined events), and “Scientific Content Analysis” (“SCAN”: in which 12 criteria are applied to the content of statements). Like the BAI, SCAN is currently used worldwide by law enforcement and military agencies (see Vrij, 2008 for review of the nature and effectiveness of these techniques).

Unfortunately, none of the physical or behavioral methods of lie detection have identified indicators that are pathognomic (definitive indicators) of deception. For example, many of these physical and behavioral assessments are assumed to reflect the anxiety and nervousness considered to be more common among liars. However, the assumption that such nervousness occurs only among the deceptive is inherently flawed, as many have pointed out in criticizing the behavior analysis techniques (Kassin & Fong, 1999; Leo, 2008; Vrij, Mann, & Fisher, 2006), polygraph, voice stress analyzer, and others based on similar logic. Particularly among those being interviewed about their own involvement in criminal activity, nervousness is likely to be pervasive, and given such ceiling effects, indicators of nervousness are unlikely to be related to virtually any assessment, including that of deception.

Related to this is the point that the classic physical and behavioral lie detection techniques rely on differences in the target’s physical or behavioral responses during “control” questions versus “test” questions of various sorts, or between responses during presumably low stakes small talk or non-accusatory sections of the interrogation and high stakes crime relevant discussions. Presumably, the same target will show greater difference in indicators of stress and nervousness between the two situations when lying in the high stakes discussions. This assumption is flawed, however, in that both guilty and innocent suspects tend to experience more anxiety when responding to significant crime-related questions (Vrij, Fisher, Mann, & Leal, 2010).

Therefore, it is not surprising that many alleged indicators of deception are not related to deception at all. At best, some indicators are probabilistically associated with truth or deception—sometimes differentially so for individuals in specific social categories, as is the case for the polygraph (National Research Council of the National Academies, 2003). A number of scholars have noted, for example, that defendants belonging to social categories stigmatized by stereotypes linking them to criminal

behavior may experience “identity threat” when interviewed about criminal activity—leading them to display more anxiety and arousal, as well as increased cognitive load due to efforts to manage the thoughts and emotions provoked by the threat that the stereotype may be applied to them. This was first discussed in a National Academy evaluation of the polygraph in 2003 (National Research Council of the National Academies, 2003), and the implications of this problem for both physical and behavioral methods of lie detection in interrogation, as well as the end result of false confession, have since been more fully developed by ourselves and others (Davis & Leo, 2012a, 2012c; Najdowki, 2011).

Though indicators such as those of arousal may be probabilistically associated with deception, many others are associated in exactly the opposite way as commonly believed or taught in the interrogation manuals (Lykken, 1998; National Research Council of the National Academies, 2003; Vrij, 2008). Aldert Vrij, for example (Vrij, 2008), has provided detailed tables showing the difference between what is commonly believed to indicate deception as compared to what research has shown to actually relate to deception. Of 24 verbal and nonverbal cues, only for six did the perceptions and actuality correspond. Eight cues believed to indicate deception are actually unrelated, three that do indicate deception were unrecognized as such, and for two, what was believed was the opposite of the actual relationship (p. 124). Importantly, for not one of the cues involving gaze, eye blinks, or various movements did perceived indicators correspond to actual indicators. The only agreement was the fact that frequency of smiles is not diagnostic.

Yet this class of indicators is the one most commonly included in prominent interrogation training manuals (Gordon & Fleisher, 2002; Inbau et al., 2001; Macdonald & Michaud, 1992; Rabon, 1992; Yeschke, 1997; Zulawski & Wicklander, 2002). Corresponding to lay beliefs, for example, all training manuals emphasize that gaze aversion indicates deception, whereas no actual relationship exists (Vrij, 2008, p. 128). They further describe a variety of movements of the trunk, head, hands, legs, and feet as indicating deception that are actually unrelated to deception or that decrease when deceptive (e.g., gestures, hand, leg, and foot movements) when deceptive.

Vrij and his colleagues (Vrij, 2008; Vrij, Fisher, et al., 2010; Vrij, Granhag, & Porter, 2010) reviewed substantial evidence that lie detection is a very difficult task, highly prone to error. They pointed to seven common errors among would-be lie detectors, particularly police: (1) examining the wrong cues, (2) undue emphasis on nonverbal cues, (3) overinterpretation of signs of nervousness as indicating deception,

(4) use of simplistic rules of thumb, (5) neglect of inter- and intrapersonal differences, (6) strategies advocated in interrogation manuals actually impair detection of deception, and (7) the overconfidence of professionals in their own ability to detect deceit. Generally, the first five cause the sixth, but the apparently professional "sciencey" nature of the training contributes to the seventh.

We would add to these the significant subjectivity in assessment of the various alleged indicators. As David Lykken noted with respect to the polygraph: "Whatever format examiners use—and whichever instrument they employ for recording the subject's reaction—they may arrive at their final judgment either through clinical evaluation or through objective numerical scoring of the polygraph (or voice analyzer) records alone. Examiners who use clinical evaluation allow themselves to be influenced not only by the instrumental findings but also by the respondent's demeanor and behavior symptoms, the case facts and other sources of intuitive insight" (Lykken, 1998, p. 44).

The many alleged behavioral indicators of deception taught by interrogation trainers are likewise not assessed objectively, by uninvolved scorers blind to any evidence of truth beyond the suspect's behaviors. They are most commonly assessed by the same detective who has investigated the case, perhaps witnessed horrific aftermath of the crime, and who has targeted the suspect for investigation for any of a variety of reasons, and who may experience intense emotions of anger or disgust toward the suspect. Thus, he is likely to possess a significant presumption of guilt even as he allegedly engages in an unbiased assessment designed in theory to filter out and prevent interrogation of the innocent. And, even within the prescribed indicators, there is no quality control to ensure that all are allotted equal attention and weight, or that greater attention and weight is given to stronger indicators (should they exist). The assessments are conducted rapidly, online, during the interview, rather than carefully coded from recordings. Thus, a given detective may focus only on a small subset of indicators, arriving at rapid heuristic judgments in the context of preexisting expectations of deception.

Given these various considerations, it is not surprising that substantial evidence exists to support the conclusion that police training and experience does not result in superior lie detection abilities. Indeed, in reviewing this evidence, Vrij and his colleagues noted that no lie detection tool based on analysis of verbal or nonverbal behavior is accurate (Vrij, Granhag, et al., 2010). Rather, such tools impair accuracy relative to untrained controls, while simultaneously increasing confidence in judgments

(DePaulo & Pfeifer, 1986; Garrido, Masip, & Herrero, 2004; Kassin, 2005; Meissner & Kassin, 2002; Porter, Woodworth, & Birt, 2000). Moreover, Porter et al. (2000) found that while professional experience with lie detection is associated with increased overconfidence in judgments, it is not associated with increased accuracy.

Perhaps as the result of their misleading training, the absolute level of accuracy in lie detection among police is poor. In his review of 28 lie detection studies with police and parole officers, Vrij (2008) found that on average police accurately classified only 56 % of statements as truthful or deceptive, not a significant improvement over a simple coin toss! Finally, specific investigations of the effects of training in the "Behavior Analysis Interview" developed and promoted by Inbau, Reid, and colleagues in their manuals and training materials and seminars have shown that the training decreases accuracy relative to untrained controls (Kassin & Fong, 1999).

This situation has thoroughly thwarted the original goal of interrogation reform to provide an accurate and validated scientific method to screen out the innocent and to subject only the guilty to interrogation. Instead, the misguided assumption and inflated confidence of interrogators that they can accurately diagnose guilt prior to interrogation and subject only the guilty to interrogation has furthered the long-standing guilt-presumptive nature of interrogation, and therefore has encouraged the coercive features of the interrogation proper.

As shown by Kassin and his colleagues, for example (Kassin & Fong, 1999; Kassin, Goldstein, & Savitsky, 2003; Meissner & Kassin, 2002; Narchet, Meissner, & Russano, 2011), police and students trained in the BAI are less accurate than untrained controls, and police are biased toward finding deception. Yet police are more confident in their judgments, and even when interrogating an innocent suspect, fail to recognize that innocence, and subject these innocent suspects to more forceful interrogation. This, in turn, leads the innocent suspect to appear more deceptive to uninvolved observers. The confident misclassification of innocents as guilty, in effect, leads the officer to try harder to get the innocent to admit guilt, and in doing so increases the suspect's anxiety, defensiveness, and appearance of guilt.

Though such processes can unfold for any criminal suspect, this may be particularly likely for suspects suffering identity threat during interrogation (Davis & Leo, 2012a, 2012c). As noted earlier, stereotypes linking members of one's social group to crime in general (such as race) or to specific crimes (such as stepfathers accused of

molesting stepchildren) can lead the person to feel increased arousal and anxiety during interrogation. In turn, this can lead to enhanced risk of being perceived as deceptive, and therefore of being subjected to a coercive interrogation in which the detective cannot detect the suspect's innocence and persists in deploying ever more tactics to elicit a confession (Davis & Leo, 2012a, 2012c; Najdowki, 2011).

It is also important to note that misclassification of innocents as deceptive may occur as the simple result of cultural differences in nonverbal behavior (such as the tendency of blacks to look away when speaking), which can be a significant problem when white police interrogate black suspects (Najdowki, 2011). Similar problems can occur when the suspect's English is poor. The increased difficulty and cognitive load imposed by efforts to communicate can lead to increased anxiety and the appearance of deception (Berk-Seligson, 2009). The use of interpreters presents another layer of issues that have been largely unaddressed in either science or practice. These and other cultural issues can go unrecognized and feed misperceptions of deceptiveness.

Clearly, behavioral detection of deception is unreliable at best, misleading at worst, and shown as such by a large body of science. Ironically, the polygraph can sometimes detect deception at marginally better than chance levels (Lykken, 1998; National Research Council of the National Academies, 2003), and better than behavioral methods such as the BAI. Yet, it has been sufficiently criticized as to render it inadmissible as evidence in most circumstances. In contrast, interrogators are free to testify to their subjective assessments of guilt based on the BAI or other behavioral assessment techniques. But as we have shown in this section, these techniques can first lead to a misclassification of an innocent as guilty, and subsequently to a coercive interrogation that may produce a false confession that is later bolstered in trial by the detective's testimony that the defendant's demeanor clearly indicated guilt by valid scientific standards of assessment.

V. THE "MISCLASSIFICATION ERROR" AND THE PATH TO FALSE CONFESSION

Leo (Leo, 2008; Leo & Davis, 2010; Leo & Drizin, 2010) has argued that the error of misclassification of innocents as likely suspects is the fundamental error on the path to interrogation- induced false confession and wrongful conviction. This misclassification occurs for a variety of reasons. Intuitive profiles or stereotypes associating a specific class of persons with specific crimes may lead police to suspect

an innocent in the absence of any evidence linking him to the crime—as when a husband may be automatically suspected of his wife's death (Davis & Follette, 2002, 2003). The source of suspicion may also be circumstantial, such as motive or opportunity; or may be the result of association with other suspicious suspects. Apparently strong evidence, such as mistaken witness identifications or the presence of forensic match evidence, may also put an innocent under suspicion.

But by the time the detective has decided to interview the suspect, there is typically a presumption of guilt, however strong, that tends to promote his continuing classification of the suspect as deceptive, notwithstanding objective performance in the BAI or other assessments of deception. Thus, regardless of the innocence of the suspect being questioned, there is significant risk that he will be judged as deceptive and subjected to interrogation. Once this judgment is made, the interrogator's purpose is no longer one of diagnosis of guilt. Rather, it is the intent to elicit evidence of guilt in the form of explicit incriminating admissions and narrative confessions sufficient to ensure conviction. Toward this end, the tools of interrogation are powerful weapons of influence designed to induce the suspect to comply with the interrogator's demands to confess. In effect, the first error of "misclassification" justifies the second error of "coercion" that Leo and colleagues have identified as crucial on the path from police interrogation to wrongful conviction. Though interrogation manuals and trainers deny the coercive nature of modern interrogation, as we show in the next section, they incorporate less physically brutal but nevertheless very powerful incentives demonstrably capable of eliciting false, as well as true, confessions. Further, though the methods as they are contained in the manuals and incorporated in training are almost entirely psychological, interrogators can and do cross the line, often with impunity. As illustrated by Ochoa's case with which we began the chapter and many like it, modern interrogators sometimes still employ a mix of third degree physical confrontation and explicit threats with modern psychological methods.

For the most part, however, modern interrogators do eschew forbidden tactics of physical coercion and explicit threats and promises in favor of the new methods of persuasion and psychological trickery. Thus, the powerful forces of modern interrogation have transformed from the obvious brutal coercion of the third degree to more sophisticated and subtle forces of influence invisible to the untrained eye—likely to remain unrecognized, unchallenged, and misjudged by those who must later assess the validity of the accounts they elicit. And, although the lie detection methods we have reviewed in this section are both "sciencey" and yet actually unscientific pseudoscience, the methods of the interrogation proper fully incorporate a large set of the most powerful and thoroughly empirically supported strategies of social influence identified and tested by science. As such, they are very effective in inducing suspects

to confess, with the unintended consequence that some such confessions are necessarily going to be false. But how, exactly, is this done?

VI. LIES AND DAMNED LIES: MODERN INTERROGATION IS INHERENTLY MISLEADING

Recall that the goal of the interrogator, once he begins the interrogation itself, is to induce the suspect to confess. The detective's weapons of influence are deployed for the express purpose of inducing the suspect to provide incriminating statements sufficient to ensure his conviction. Further, the detective typically has a well-developed idea of *what* happened, as well as at least hypotheses about how and why it happened. He therefore has the even more specific goal to induce the suspect to provide an account consistent with what the detective currently knows and believes about the commission of the crime.

Suspects are known to confess (truly or falsely) primarily for two reasons: distress intolerance and the need to escape the aversive interrogation notwithstanding the consequences, and/or the mistaken belief that confession is either entirely without negative consequences or that it will achieve the best available legal (or other) outcomes (Kassin, 1997; Ofshe & Leo, 1997a, 1997b). The challenge for modern interrogators, then, has been to avoid legally impermissible infliction of physical or emotional distress, while nevertheless more subtly promoting anxiety, distress, and the need to escape: and simultaneously, to avoid the impermissible use of explicit threats and promises contingent on confession, while nevertheless promoting the perception that confession is the best way to achieve the most desirable legal outcomes. Unavoidably, these constraints render the resulting strategies deceptive, both for suspects and for those who judge the confessions they provide. The nature of interrogation-related coercion has gone "underground" (so to speak), so that it is more subtle and likely to remain unrecognized by those who judge, but felt very strongly and thus very effective among those who experience it. The process unfolds largely as follows [as taught in the Reid and similar methods (e.g., Inbau et al., 2001; Zulawski & Wicklander, 2002)].

To facilitate the impulse to confess to escape the interrogation, the interrogator is directed to encourage anxiety and discomfort for the suspect throughout the interrogation through use of a physically uncomfortable interrogation room (uncomfortable seating and temperature) and through encouraging emotions such as guilt and anxiety during the interrogation. Further, the interrogator is free to (and often will) continue the interrogation as long as the suspect fails to demand that it stop or to

invoke his *Miranda* rights. Inevitably, the need to escape progressively increases as the interrogation continues, and the suspect becomes more fatigued or distressed. It remains to convince him that confession is the best way to escape, ideally while also convincing him that confession will be benign or beneficial.

If done according to the recommended methods, the interrogator will not explicitly state that the suspect cannot escape the interrogation unless he confesses, that what he will be charged with, what plea bargains he will be offered, what sentence he will receive or any other legal outcome will depend upon whether or not he confesses. Such explicit bargaining is grounds for exclusion of the confession from trial evidence. Although interrogators often cross this line, and nevertheless the confession is admitted at trial, in most cases the exact same messages are implied rather than explicitly stated by the interrogator, conveyed indirectly through the process of pragmatic implication (see Davis & Leo, 2012b for review).

To successfully accomplish such deceptions, the interrogator attempts to cast himself as a benevolent ally, rather than malevolent enemy. He is trained to establish rapport with the suspect, flatter him, and explicitly state his desire to help the suspect (invoking the influence principles of liking and reciprocity). In this context, he will engage in a number of tactics specifically designed to convey the messages that (a) there are choices to be made concerning whether and with what the suspect will or will not be charged, and (b) the interrogator can influence these choices. In doing so, he will deploy the RASCLS [an acronym provided by Air Force Col. Steven Kleinman for Cialdini's (2008) six basic principles of influence]: reciprocity, authority, scarcity, consistency, liking, and social proof, among others.

This first occurs (according to protocol) toward the end of the BAI, before the suspect is explicitly accused of the crime, as part of the process of "establishing the perceived flexibility of consequences"—explicitly identified by interrogation manuals as an important precursor to the tactics designed to convince the suspect that confession will achieve the best of these potential consequences. At this point, the interrogator is to ask the suspect what he thinks should happen to the person who committed the crime. Should he just go to jail, perhaps receive counseling, or be given a second chance. Why ask such a question, after all, if there are no options? As the interrogators intend, our research has shown that the use of this question increases the perceived options of the detective in choosing whether and what charges can be filed, whether the suspect can receive counseling and jail, and so on (i.e., his authority: Davis, Leo, & Follette, 2010).

The detective next proceeds to the first stage of the interrogation proper, in

which he confidently states that the evidence clearly shows that the suspect committed the crime in question. He may also cite various forms of evidence against the suspect at this point and throughout the interrogation. This can include true (e.g., an actual eye-witness ID), false (falsely informing the suspect that he failed the polygraph), and nonexistent (references to DNA not collected) evidence—all legally permissible. The intent of this process is to instill a sense of hopelessness in the suspect, convincing him that there is no way that anyone will believe in his innocence, that he is hopelessly caught, and that the only question is what will happen as a result (Ofshe & Leo, 1997a, 1997b). In this way, the suspect's attention will be turned to the issue of how to minimize the consequences of his involvement in the crime. This "evidence ploy" has been strongly implicated in real life true and false confessions (Drizin & Leo, 2004), and has been shown effective in a number of laboratory studies of interrogation tactics (Russano et al., 2005). The practice of lying about evidence has been strongly implicated as a cause of real life false confessions and the conviction of the innocent (see Kassin et al., 2010b; Leo, 2008).

Recognizing that if the suspect is so thoroughly incriminated by the evidence there is no apparent need to continue the interrogation, the interrogator is taught to next provide a "pretext" (Inbau et al., 2001) for the remainder of the interrogation. Thus, the interrogator will tell the suspect that the purpose of the interrogation is not to discover whether the suspect did the crime, but rather to discover why the crime occurred and what kind of person the suspect is, which are "important to know" (as if these issues mattered for legal outcomes). The suspect is encouraged to "help himself" by "explaining" what happened, how it happened, and why. All such messages promote the illusion that there are choices of how to deal with the suspect, and that what happens *during the interrogation*, whether he "explains" himself (and how) will affect those choices. Further, this strategy incorporates the influence principle of "arguing against self-interest," by implying that the interrogator's interests will not be benefitted by continuing the interrogation, and instead that he will be spending unnecessary time for the benefit of the suspect (thereby also invoking reciprocity).

Making use of the influence principles of scarcity, reciprocity, authority, and liking, the interrogator typically then reiterates his earlier sympathy and flattery, reminding the suspect that he likes and wants to help him, but he can only "help" if the suspect tells the truth during the interrogation, stating or implying that those to come (the DA, judges, and juries) will no longer be listening. We have dubbed this tactic the "sympathetic detective with the time-limited offer," and have shown in our experimental studies that it successfully conveys the messages that the detective likes and wants to help the suspect, as well as strengthens the perception that he has the authority to do so (Davis et al., 2010).

The interrogator then turns to the process of "theme development," (Inbau et al., 2001), in which he suggests "explanations" of how and why the crime was committed that appear noncriminal (such as self-defense), or less serious than other potential versions (e.g., accident versus intent; initiated by the victim or others rather than by the suspect; for noble motives such as protecting or helping others versus for personal gain, and many more). These scenarios are tailored to the type of crime as well as to the interrogator's view of the suspect, and interrogation manuals provide a large number of examples for specific crimes (for examples, see Inbau et al., 2001; Jayne & Buckley, 1999; Senese, 2005). As shown in laboratory tests of their impact, the use of such themes is highly effective in eliciting both true and false confessions, but the diagnosticity of the confession (the probability of guilt given the confession) is reduced by their use (for review see Kassin & Gudjonsson, 2004; Kassin et al., 2010b). The more powerful the tactics of influence the more effectively they will elicit false confessions as well as true.

While the process of theme development is designed to minimize the perceived seriousness of the crime, if any, and thereby lower the perceived costs of confession, it may be supplemented with tactics of "maximization," whereby the perceived costs of failing to confess are raised. The interrogator may suggest that the suspect will be implicated in a more serious role if he fails to confess: for example, when he refuses to "explain" himself, and therefore the claims of others about him must be believed (e.g., he was the shooter rather than the get-away driver). He may raise the issue of how the judge or jury will react to someone who insists on lying rather than taking responsibility for what he has done. And he may allude to the potential of the death penalty (which we have seen in many cases, despite prohibitions against it).

When the interrogator feels the time is right, he is taught to try to prompt the first admission from the suspect through the use of the "contrast" principle of influence incorporated in the tactic known as the "alternative question" (Inbau et al., 2001). The interrogator offers two versions of the crime, one more apparently legally serious than the other (such as self-defense versus unprovoked attack), and asks the suspect which of the two was what happened. This can be very effective in prompting a first admission, as the suspect who is convinced that no one will believe he is completely innocent may view the version of the incident suggested by the less serious scenario to be noncriminal and without consequences (e.g., self-defense). Therefore, it appears wise to him to admit to this minimally culpable scenario as a mechanism to achieve innocuous consequences.

Unfortunately for the suspect, this is only the beginning of what Inbau et al. (2001) refer to as the “stepping stone” approach to eliciting a more incriminating account (otherwise known as the “foot-in-the door” or “low balling” strategies of influence). The interrogator will express appreciation that the suspect is finally being honest, but indicate that he knows this is not the fully correct story. He may confront the suspect with evidence inconsistent with the minimized account, and suggest a somewhat more serious version of the incident. The process then repeats, as the interrogator moves the suspect closer and closer to the account he believes is correct. Once he elicits what he believes is the most accurate account, or one that he believes is the best he will get from the suspect, he then begins the process of getting a full narrative confession (described in the next section).

During this process, the interrogator is admonished to prevent suspects from voicing their innocence or evidence supporting it, to interrupt with his own statements and themes, to maintain the attention of the suspect through invasion of personal space if necessary, and to generally control the interaction completely. It is not until the interrogator becomes convinced that the suspect is approaching readiness to provide admissions that he allows the suspect to talk more freely. These intrusive behaviors add to the aversiveness and stress of the situation, and contribute to the suspect’s conviction that he will not be believed.

These tactics are extremely effective, eliciting confessions from approximately 42–76 % of suspects in American and English field studies involving actual criminal acts (Gudjonsson, 2003; Thomas, 1996) and in as many as 100 % in laboratory studies involving non-criminal acts (e.g., Kassin & Kiechel, 1996). Unfortunately, however, the quality of the information is suspect. Many details of the confession are likely to be inaccurate, even if the suspect did commit the crime. The body of the interrogation consists of suggestion in many forms. The interrogator may provide fully developed suggestions of what occurred as part of the process of theme development. Eventually, the suspect will be encouraged to admit to the lesser version of the crime depicted in the “alternative question.” Though the interrogator will shape these themes in part to accounts offered by the suspect, they are largely his creation.

In addition to providing initial suggestions, the interrogator may discuss evidence, recount the statements and claims of witnesses or co-perpetrators, and use them along with logic and other evidence to repeatedly challenge the denials or specific admissions of the suspect. He is likely to reinforce the suspect when he provides statements the interrogator believes and accuse the suspect of lying when he offers denials or less believed accounts, thus selectively shaping and reinforcing the interrogator’s preferred account of the crime and the suspect’s role in it. He may also

insist that the suspect provide details such as how many times he committed an offense (such as the instances in which he touched a child's privates) in order to support more counts in the charges to come. But the initial numbers are likely to be challenged, as are the suspect's initially stated motives and intentions, among many other details. All the while, the interrogator will remind the suspect that he cannot "help" him if he fails to tell the "truth." But what this means is if the suspect fails to tell the truth *as the interrogator perceives it,* the accusations, implied threats, and promises continue until the suspect provides an account the interrogator approves of or assumes is the best he can get. This process can produce many versions of the suspect's story, and renders it very difficult to evaluate the validity of the details of the confession, in addition to its general validity, as we discuss more fully in the next section.

A. Taking the Confession and Making It Stick

A confession taken by a skilled interrogator is a very carefully constructed attempt to ensure the conviction of the suspect, not an uncontaminated item of evidence. The goal is to ensure that no effort to contest the validity of the admissions will be effective with those who must judge them. Thus, as Leo (2008) describes in detail, detectives attempt to ensure at least the following five elements are incorporated into the confession "(1) a coherent, believable story line, (2) motives and explanations, (3) crime knowledge (both general and specific), (4) expressions of emotion, and (5) acknowledgments of voluntariness." (p. 168). These elements produce a very credible and compelling story of the crime that can include detailed descriptions of how and why the crime was committed, intense emotional expressions of anger, shame, or remorse, apologies to the victims or their families, and sometimes very detailed physical reenactments of the crime. The suspect may also include detailed explanations of why he is confessing that emphasize reasons such as guilt or remorse and the apparently voluntary decision to confess. These features make even false confessions very compelling.

In addition to recommendations for what should be included in a narrative confession, interrogation manuals also include additional recommendations to enhance the appearance of validity and voluntariness: such as having the suspect write the confession in his own handwriting, making deliberate mistakes in typed confessions that the suspect must correct in his own hand, having women in the room to undermine claims that physical coercion prompted the confession, and others.

This detailed compelling confession, developed to incorporate the precise

features that will make it credible and uncontestable, is the embodiment of what Leo and colleagues (Leo & Davis, 2010; Leo & Drizin, 2010) have specified as the third error leading from interrogation to wrongful conviction—that of contamination. That is, the confession, as it moves forward through the justice system, will include a variety of features that misrepresent its validity: misguiding those who judge it, and virtually assuring the conviction of both innocent and guilty confessors.

This situation is most damaging when there is no recording of the interrogation preceding the interrogation. Although less common today, this was the situation for much of the history of American interrogation (see our review of this below). Without this record, only the accounts of the suspect and the interrogator exist to inform those who must judge the confession of the context in which it occurred. Unfortunately, the essential elements of the interrogation that seem so compelling are heavily shaped by the interrogator—who has in mind both the credibility and persuasiveness of the confession and the legal charges it will support. To elicit the desired information and emotional expressions, the interrogator will ask about all the elements, sometimes suggesting specific answers. If the suspect first offers a version acknowledging less intent, fewer instances (such as "counts" of sexual abuse), less responsibility or other less serious or persuasive versions, the interrogator may allude to how the DA, judge, or jury will be harder on someone denying culpability and other incentives to tell a more desirable story. The suspect's version of the confession may change many times before he arrives at the final version the interrogator considers sufficient. This, in many cases, is when the recorder goes on.

A related issue concerns the "misleading specialized knowledge" (MSK) included in the confessions of many innocents—referring to crime knowledge that should only be possessed by the true perpetrator (such as the murder weapon, the nature of wounds, aspects of the crime scene, and many others). The confessions of the proven wrongfully convicted have widely included such apparently incriminating knowledge, raising the issue of how it crept into their confessions. Although in some cases it came from media or other sources, most came from police who fed the suspect the information in the context of the interrogation. By suggesting how the crime occurred as part of theme development, by challenging and correcting the incorrect accounts of the confessor who did not actually know what he was talking about, by showing him crime photos of the victim and scene, and other mechanisms the detectives conveyed this knowledge to suspects who later incorporated it into their final confessions.

Brandon Garrett recently analyzed the records and trial transcripts of false

confessors who had been wrongfully convicted and later exonerated, showing that whereas police in 27 of 38 cases testified on the witness stand that they had NOT fed such MSK to the suspects, it was nevertheless incorporated into their confessions (Garrett, 2010, 2011). Clearly police did convey the incriminating knowledge to the innocent suspects, but either could not accurately remember doing so or deliberately lied. In the absence of recording, the testimony of police and suspects will be an imperfect representation of who first mentioned any crime details during the course of potentially very long and exhausting interrogations. Even honest attempts to recreate the source and order of information conveyed in such a long event will be subject to the many vagaries of memory for conversation, and particularly for order (see Davis & Friedman, 2007 for review).

VII. THE CHALLENGE OF ASSESSMENT

Once a suspect has provided a confession, it must be repeatedly assessed as it moves forward through the legal system—first by the police who elicited it, and later by prosecutors, defense attorneys, judges, juries, and appellate courts. The issue of whether the confession was voluntary and therefore admissible as evidence in trial is often litigated before trial and is also sometimes subsequently raised in post-conviction appeals. The issue of validity is faced at all levels; by attorneys who must decide whether to prosecute or how to defend the case, as well as by jurors and appellate courts. Both judgments are more difficult and error prone than many recognize, accounting in part for failures to discover false confessions when they occur (see Davis & Leo, 2012d for review). In the following sections, we raise the many issues relevant to judgments of voluntariness and validity and consider evidence of whether those who must make these judgments possess the knowledge necessary to do so accurately. Specifically, we address three broad problems compromising such judgments, including (1) selectivity and distortion in available evidence, (2) failures of relevant knowledge, and (3) the impact of expectations and emotions among those who must judge.

VIII. SELECTIVITY AND DISTORTION IN AVAILABLE EVIDENCE: THE PROBLEM OF HIDDEN CONTEXT

In order to reasonably judge either the validity or the voluntariness of information obtained through interrogation, the observer must have available and understand the implications of the relevant context for evaluation of the confession, including the personal context of the suspect during interrogation, the interrogation itself, and the remainder of relevant evidence of guilt. Much such relevant information

is uncollected, unavailable to those who must judge the confession, or misunderstood by them.

A. Relevant Evidence of Guilt

From the beginning of police investigation for any given case, a progressive and inevitable constriction in the availability of relevant evidence occurs as the case moves forward through the justice system to trial, and possibly post-conviction appeal. This occurs immediately, when police selectively notice, attend to, or follow up on specific evidence while neglecting other evidence that may also be relevant. Part and parcel of this is the result that evidence pointing to other suspects can be unnoticed and uninvestigated. In some cases additional suspects may eventually be recognized, such as when DNA thought to be the suspect's is later linked to another. But often, the failure to investigate immediately can render exculpatory evidence or evidence pointing to other suspects forever inaccessible to all parties. Moreover, even if police do initially have other suspects or theories of the crime that are investigated, these are often not presented or considered at all by the time the case reaches trial, where the suspect and evidence related to his guilt are the focus.

Sometimes the suspect will be targeted soon after the crime has been committed, and long before significant investigation has taken place. This can occur, for example, when family members are immediately suspected, and possibly immediately interrogated, for the murder of a wife, husband, or child. In such cases, a confession may be obtained from the suspect prior to any further investigation. Eighteen-year-old Peter Reilly, for example, returned home to find his mother murdered. He contacted police, only to have them immediately take him to the police station and subject him to a long and grueling interrogation that, after more than 18 hours, led Reilly to offer a detailed false confession of killing his own mother (Connery, 1977).

As in Reilly's case, once the confession is in, the investigation tends to either stop, or to become restricted to gathering evidence supporting the guilt of the confessor. Exculpatory evidence, if it does arise, tends to be discounted or misinterpreted to sustain the perception of the confessor's guilt. This constriction in evidence resulting from the selective focus of the police investigation is continued as the case moves forward, when prosecutors and defense attorneys selectively present and emphasize evidence to one another, and in hearings and trial. In addition, of course, evidence is filtered through the memories of the police and other witnesses who later testify in court.

Any restriction in available evidence can be severely damaging to the case of

the false confessor attempting to establish innocence despite his confession. The jury will necessarily base its verdict on their evaluation of the interrogation and confession in the context of other relevant evidence of guilt. Moreover, most interrogation scholars recommend that in order to assess the validity of the confession, it should be compared to the actual evidence (Leo, 2008; Leo & Davis, 2010). A false confessor who did not actually commit the crime is likely to make more errors in describing what happened. The more complete the evidence and the more detailed the confession, the more useful such a comparison may be (although recall our discussion of contamination of the confession).

Though the nature of the evidence supporting guilt versus innocence is vitally important, it perhaps pales in comparison to full understanding of the context in which the confession was obtained. Unfortunately, this can vary between no available context at all (as when only the confession itself is recorded) and full context: including full records of the events preceding the confession, the condition of the confessor preceding and during the interrogation, the events of the interrogation itself, and external influences that might affect the motive to confess (such as threats by other parties, desire to protect others, etc.).

B. The Personal Context of the Confessor

A wide range of personal contextual information for the suspect is relevant for understanding why his will may have been overborne by the interrogation, and/or why he may have falsely confessed. This includes factors preceding the interrogation that may affect his acute mental and physical condition, as well as chronic vulnerabilities due to personality, intelligence, mental or physical health, or others. Much of this relevant information may be hidden, not assessed, or unrecorded.

Relevant pre-interrogation factors, for example, may not be assessed or recorded, but nevertheless vital to understanding the vulnerability of the suspect to interrogative influence. If the suspect is interrogated shortly after the crime, he may be suffering significant stress due to the nature and consequences of the crime—such as when the crime entails the death of a loved one. He may be severely sleep-deprived, still intoxicated, hung over, suffering withdrawal, physically injured, or otherwise mentally or physically compromised. Such information may or may not be recorded, and may or may not later be presented to judges and juries who judge the confession.

In addition to acute vulnerabilities induced by pre-interrogation physical or psychological stressors, the suspect may suffer chronic vulnerabilities affecting his ability to resist the pressures of the interrogation. These include mental or physical characteristics affecting the ability to tolerate distress, to think clearly and to rationally evaluate the interrogator's claims and arguments, or to resist compliance to the demands of an authority. A number of such vulnerabilities have been identified by interrogation scholars, including youth, low intelligence, mental illness, disorders entailing impulsivity, personality traits associated with compliance, difficult life histories, and others (Follette, Davis, & Leo, 2007; Gudjonsson, 2003, 2010; Kassin et al., 2010a).

Such personal vulnerabilities tend to be those considered most important by the judiciary and by many experts called in support of motions for suppression of the confession, or to testify to the jury about causes of false confession (Kamisar, 1980; Watson, Weiss, & Pouncey, 2010; White, 1998). They may or may not be raised for individual defendants, however, depending upon whether the defendant's counsel recognizes the defendant's vulnerability, tries to establish it and introduce it into evidence, and is able to obtain financing to hire an appropriate expert to do the necessary evaluations and present them to the court. The court may also refuse to allow expert testimony on how the suspect's enhanced vulnerability may have compromised the voluntariness or validity of the confession, although this appears to be rarer than refusal to hear testimony regarding the coercive nature of interrogation tactics themselves (Fulero, 2010a; Watson et al., 2010).

These issues, if presented to the judge or jury, must of necessity be evaluated in light of the full nature of the interrogation. Unfortunately, while vital, this information is often hidden—seemingly deliberately so for most of the history of American police interrogation. We review this issue in some detail, as (1) awareness of the full nature of the interrogation is crucial to judging the voluntariness and validity of the statements obtained, (2) the recording and preservation of this evidence is fully under the control of law enforcement, and yet (3) such recordings have been completely absent or selective and misleading for all but the most recent history of police interrogation in America.

C. The Invisible Interrogation

Police custodial interrogations have always been "invisible or 'back room' events" taking place in the presence of only the suspect and his interrogators, isolated from the view of attorneys (mostly), family or other members of the public, and, until recent decades, unpreserved other than in the memories of the detectives and suspect (Leo, 2004, 2008). This has created a situation where the primary evidence of what occurred in the interrogation was the word of the suspect versus that of his interrogator(s), which is, of course, subject to problems of both memory and honesty.

During the era of the third degree, although police routinely inflicted severe physical harm and psychological distress upon their suspects, and although reports of these third degree tactics routinely appeared in the press, the response of the police was to deny the existence of such practices altogether, attributing the reports to sensationalistic journalism, shyster defense attorneys, private detectives, and dishonest suspects (Leo, 2004). As third degree tactics became less common, the events of the interrogation room were nevertheless still subject to misrepresentation or denial, both intentional and unintentional.

In earlier years, the very existence of the confession could be subject to dispute, in that the only record was in the form of the claims of the interrogator and defendant as to whether any confession actually occurred, as well as to its specific contents. This is still the case in a minority of criminal prosecutions, where the only record of a confession may be the detective's written report of suspects' statements. For the most part, however, as would naturally be the case, law enforcement has recognized the advantage of having the confession clearly on the record, in a form that could be undeniably attributed to the suspect— such as in his own writing, or on audio or videotape. Thus, for the bulk of the twentieth century, a common practice was to record, in some form, the suspect's confession, but to leave unrecorded the interrogation that elicited it (Sullivan, 2010).

This, of course, is the most damaging of practices for the suspect who must try to explain why he had falsely confessed on the record, in such detail, to sometimes horrific acts, incorporating the misleading specialized knowledge that should only be known to the perpetrator, and including the apologies, motives, emotions, and other elements discussed earlier that make the confession so compelling. This became particularly dire with the advent of videotape, where the confessor's accounts could seem much more compelling. An article in *Time* magazine in June of 1983, for example, described the then new practice of videotaping suspects' confessions, noting that videotaping had "resulted in a guilty-plea rate of 85 % and a conviction rate of almost

100 % (“Smile, You’re On,” p. 61).” Since that time, many a proven false-confessor has been shown on videotape offering fully developed detailed false confessions, often complete with physical demonstrations of the commission of the crime, with no available record of the interrogation preceding it (Leo, 2008).

This practice is slowly being replaced by that of fully recording all interviews, interrogations, and suspect confessions in felony cases, as recently reviewed by attorney Thomas Sullivan (2010). Perhaps surprisingly, recording was first mandated by the Alaska Supreme Court in 1985, when it required that for custodial confessions to be admitted into evidence, the entire interview must be recorded (*Stephan v. State*, 1985). Though the Minnesota Supreme Court offered a similar mandate in 1994 (*State v. Scales*, 1994), other state courts addressed the issue and supported, but did not mandate, recording in the interim. The next requirement for recording came from the state of Illinois in 2003, when the Illinois senate enacted legislation sponsored by now US President, Barack Obama, requiring that custodial interviews be recorded. Since then, at least ten states have enacted similar statutes, and at least three state Courts have issued opinions supporting recording. Some other jurisdictions record voluntarily.

Support for required recording of suspect interviews has also been widespread among interrogation scholars, legal scholars, and legal organizations in America as well as abroad (see Sullivan, 2010 for review), and the practice is steadily growing among police departments. Thus, unless interrogated by the FBI (where there is a policy against recording interviews or interrogations), for perhaps most modern criminal suspects, the complete interviews preceding any incriminating statements or confessions they make, and the confessions themselves, are now available as context for those who judge them.

Unfortunately, however, the purportedly full context of the interrogation is still generally only partial. As demonstrated in a long line of research by Daniel Lassiter and his colleagues, video recorded interrogations tend to be positioned such that only the suspect is in view (or such that the suspect’s face is in view but only the back of the interrogator’s head). This minimizes the availability and perceptual salience of the interrogator’s expressions and physical behaviors, and leads reliably to a bias toward perceiving the confessions as voluntary and valid (see Lassiter, Ware, Lindberg, & Ratcliff, 2010 for review).

IX. THE PROBLEM OF OBSERVER KNOWLEDGE

A. The Problem of Denial

Clearly, to avoid false confessions in the first place, or to successfully detect them when they occur, one must first believe that false confessions do occur, with some frequency, even for the most terrible of crimes, and under conditions representative of those documented to produce them. But, lack of relevant knowledge concerning false confessions is common among those who generate and judge them, and either outright denial of their existence or severe underestimation of their likelihood is pervasive.

Police receive poor and misleading training about the risks of interrogation-induced false confessions. The widely cited Inbau and Reid manual, for example, did not discuss the problem of police-induced false confessions until its fourth edition in 2001, when a chapter on the subject was added. Still, the authors continue to insist that the methods it advocates are not "apt to lead an innocent person to confess" (Inbau et al., 2001: xvi). Some erroneous beliefs about what behaviors reflect deception lead police to inaccurately classify anxiety as deception—and therefore to misinterpret innocent behavior as reflecting guilt (Kassin & Gudjonsson, 2004; Vrij, 2008). Others, such as denial that prominent interrogation methods can induce false confessions, lead them to use the techniques without concern, and to believe in the accuracy of the confessions they produce. For example, some forms of "minimization," (called "theme development") which is one of the cornerstones of the Reid technique (Inbau et al., 2001), have clearly been shown to convey expectations of leniency, and to be implicated as causes of false confession in both real-world case studies and laboratory experiments (see Leo, 2008; Kassin & Gudjonsson, 2004 for reviews). Yet, the Inbau manual continues to deny that "theme development" either conveys promises of leniency or would lead an innocent person to confess. Such erroneous beliefs may lead police to fail to question the validity of the confessions they obtain, or to fail to follow up with further investigation or careful comparison of the details of the suspect's post-admission narrative to the evidence.

B. But, Even if It Does Happen, It Takes a Moron…(NOT)

Although many recognize in theory that a normal person can falsely confess, in practice judgments tend to reflect the idea that even if some do falsely confess, it is only the retarded or insane. This is reflected, for example, in the tendency of judges to suppress a confession—or to allow expert testimony regarding causes of false

confession— primarily in cases involving a mentally compromised defendant (Watson et al., 2010). Nevertheless, in clear contradiction to this assumption, the published data indicate that most false confessions are given by mentally normal, not insane or cognitively impaired, adults (Drizin & Leo, 2004; Kassin & Gudjonsson, 2004; Leo & Ofshe, 1998). Indeed, some false confessors are mentally gifted, such as Derek Tice (of the Norfolk Four), whose IQ was estimated between 148 and 164 points (at or higher than that of Einstein).

The failure to recognize the potential of normal and gifted persons to falsely confess is partly a function of the subtle and unrecognized coercive forces of the interrogation, and the sources of acute vulnerability of suspects to failures of impulse control and rational decision-making under stress. Failing to understand how easily a suspect's ability to suppress acute impulses and think rationally can be undermined, and failing to understand the many weapons of influence incorporated in interrogation practices, observers are likely to focus on the behavior of confessing itself and to view it as voluntary.

C. But How Do I Defend This?!

Misleading or absent knowledge also appears to be pervasive among criminal defense attorneys, many (and perhaps most) of whom have never read an interrogation manual, attended an interrogation course, been exposed to important reviews of the scientific literature on interrogation and confession, or received training or instruction on how to defend a false confession case. Of course, similar problems of knowledge occur among trial and appellate judges, and arguably most pervasively among jurors (Blandon-Gitlin, Sperry, & Leo, 2011; Chojnacki, Cicchini, & White, 2008; Costanzo, Shaked-Schroer, & Vinson, 2010; Henkel, Coffman, & Dailey, 2008; Leo & Liu, 2009). Thus, expert testimony can offer an important mechanism of education for attorneys, judges, and fact finders (Costanzo & Leo, 2007; Kassin et al., 2010a) but is often not sought by defense attorneys or admitted as evidence by judges—who may view it as unnecessary, prejudicial, or as not supported by sufficient science (Fulero, 2010b).

D. The Problem of Mistaken Cues of Deception and Guilt

One of the most important failures of relevant knowledge is that of how to read

deception, as discussed in the earlier section on lie detection. Many of the same mistakes in assumptions regarding how to detect deception taught in police manuals are also prevalent among attorneys, judges, and jurors. Moreover, all concerned have been shown to possess theories about the display of emotion that mislead their judgments: such that displays of too little or too much emotion can be each taken as indicators of guilt.

Reflecting such problems, studies of detection of deception have shown attorneys, judges, and jurors to perform equivalently, at roughly chance, but to believe themselves able to perform much better (see Vrij, 2008 for review). Thus, the many misleading cues of arousal and anxiety discussed earlier can lead all who judge the confessor to view him as deceptive and guilty for the wrong reason; and several studies have specifically shown that observers cannot differentiate true from false confessions (see Kassin & Gudjonsson, 2004; Vrij, 2008 for reviews).

X. THE COMPLICATING ROLE OF THE CONTENT OF THE CONFESSION

Observers deploy their general beliefs about how to read deception in the context of other damaging misleading beliefs concerning the nature of what could and could not be included in a confession if it were false. Earlier we discussed the way police elicit confession narratives that include motives, detailed crime knowledge, emotional expressions, apologies, and sometimes elaborate videotaped reenactments of the crime, along with acknowledgments of voluntariness that would, on their face, seem unlikely or impossible if the person did not commit the crime. In the absence of preexisting knowledge of how the process of interrogation can implant this contaminating material into the confession—and in the absence of expert testimony to explain—most observers' judgments will be overwhelmed and almost completely guided by it.

XI. THE PROBLEM OF ASSESSING VOLUNTARINESS: INDIVIDUAL VULNERABILITY AND SITUATIONAL POWER

"The line between proper and permissible police conduct and techniques and methods offensive to due process is, at best, a difficult one to draw, par-

ticularly in cases in which it is necessary to make fine judgments as to the effect of psychologically coercive pressures and inducements on the mind and will of an accused"

Haynes v. Washington, 1963

It is important to note that judgments of the voluntariness of the confession pose unique and difficult problems for the judges who must decide whether the confession should be admissible evidence at trial. Judgments of the validity and the voluntariness of a confession are clearly overlapping, but yet distinct. A confession can be involuntary, even beaten out of the suspect, and yet still be true. On the other hand, it can be completely false, yet given entirely voluntarily, for reasons of the suspect's own, with or without any interrogation. Nevertheless, a confession is admissible into evidence at trial only if it was given "voluntarily." If the suspect suffers defects of personality or capacity that might undermine his ability to resist pressures toward self-incrimination, and/or if the nature of the interrogative pressures may have been sufficient to override the suspect's will, the defense may challenge the voluntariness of the confession and seek to have it excluded from trial. The trial judge will then conduct a hearing to determine whether the pressures of the interrogation were sufficient to override the will of the suspect in question, given his physical and mental status at the time. This determination, however, is in many respects more difficult and complicated than that of whether the confession is false.

In part, this difficulty is the result of the vague and nonspecific nature of legal standards for what may be considered voluntary. The current standard for determination of voluntariness is a "totality of the circumstances" test, in which the judge may consider all evidence he or she considers relevant to whether the suspect's will was overborne. Although the use of explicit threats and promises of leniency contingent on confession are explicitly forbidden, and although failure to obtain a knowing and intelligent waiver of *Miranda* rights is sufficient grounds for suppression of the confession, the remaining specific issues to be assessed are not fully listed or defined, thus leaving the judge considerable latitude to subjectively assess what factors are relevant, what impact they may have, and how much weight to give each in arriving at his or her determination of voluntariness. These ill-defined considerations may be relevant to determination of whether a valid waiver of rights was obtained as well as whether any admissions subsequently obtained were or were not voluntary.

The very nature of the concept of "voluntary" is quite different from that familiar to social scientists, who must abide by the standards set by the Nuremberg Code developed in response to WW II experimental atrocities, which defines it in this way:

> The voluntary consent of the human subject is absolutely essential. This means that the person involved should have legal capacity to give consent; should be so situated as to be able to exercise free power of choice, without the intervention of any element of force, fraud, deceit, duress, overreaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him to make an understanding and enlightened decision. This latter element requires that before the acceptance of an affirmative decision by the experimental subject there should be made known to him the nature, purpose, and duration of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonably to be expected; and the effects upon his health or person which may possibly come from his participation in the experiment.

Interrogation, in virtually every respect, violates these principles. It is deceptive in most every respect, including the effects on the suspect should he choose to confess. What, then, does it mean to, in legal terms, have one's "will overborne?" Trickery and deceit are acceptable under the Supreme Court's ruling in *Frazier v. Cupp* (1969), arguably rendering the issue of a "knowing and intelligent" waiver of one's *Miranda* rights an apparent oxymoron. The interrogation consists of misleading and deceiving the suspect to believe confession is in his best interests, thereby constituting fraud and negating the "free power of choice" as defined above. The law gives little guidance as to what voluntary means and concentrates on the prohibition of physical abuse, explicit threats and promises, the vulnerability of the suspect, and the vague concept of whether or not, all things considered, the will was or was not overborne (Wrightsman, 2010). This ambiguity in the standard makes it difficult to understand where the line of voluntariness is drawn, and whether it was or was not crossed.

Given these difficulties, it is not surprising that judicial consideration of the issue has largely defaulted to the chronic personality and mental status of the suspect, tending to suppress confessions most often on these grounds and to more frequently allow expert testimony on issues of individual vulnerability than on the coercive forces of the interrogation (Fulero, 2010b; Watson et al., 2010). Though in part the result of the vague standards of voluntariness, this is also in part the result of failures of the judiciary to appreciate the impact and ability of pre-interrogation and interrogation-related stressors

to undermine the capacities of the suspect to resist immediate impulses to confess in order to terminate the interrogation and to rationally understand and evaluate his options and resist the deceptive arguments of the interrogator.

We have recently reviewed in detail the importance of physical and mental stamina for self-regulation of thoughts, emotions, and behavior, the surprising ease with which self-regulation can be compromised, and the sources and implications of self-regulation failures in interrogation (Davis & Leo, 2012a, 2012c; Follette et al., 2007). Many features of interrogation have been empirically associated with decline in self-control of impulses and of cognitive performance, including memory, rational thinking, resistance to persuasion, and effective decision-making. These include fatigue, sleep deprivation, glucose depletion, emotional distress, frustration, efforts to manage threats to identity or self-esteem, difficult verbal interactions, and many others. The sheer exertion of self-regulatory capacity undermines further self-regulation, and thus the longer the interrogation lasts and the more self-regulatory capacity is depleted the more vulnerable to interrogative influence the person becomes. These influences operate on normal persons, though the catastrophic drop-off in self-regulatory control can occur sooner or more readily in those already compromised by poor mental abilities or health. But even in normal persons, significant decrements in thinking and control of impulses occur in laboratory studies, within short order and in response to relatively minor and insignificant prior depletions of self-regulatory resources. Much greater effects will occur in response to the many stressors preceding and during police interrogation. This potential of interrogations to substantially undermine self-regulatory capacity (i.e., the knowingly and intelligent exertion of will) remains unrecognized and underappreciated in the judicial system, whether among judges, juries or attorneys—resulting in the continuing admission into evidence of confessions extracted from highly emotionally distressed suspects through many hours or days of aversive interrogation.

XII. THE END RESULT: WRONGFUL CONVICTION AND FAILURES OF POST-CONVICTION RELIEF

As former U.S. Supreme Court Justice William Brennan observed, “no other class of evidence is so profoundly prejudicial” as a confession (*Colorado v. Connelly*, 1986: 182). Once a suspect has given a false confession, “the confession operates as a kind of evidentiary bombshell which shatters the defense” (California Supreme Court; *State of California v. Cahill*, 1993: 497). The many forces identified in the previous sections tend to obscure, contaminate, divert attention from, and overwhelm evidence of coercion and innocence; to promote and maintain perceptions that the confession was

voluntary and true; and to result in harsher legal outcomes at all levels as the case proceeds through the justice system.

Confession evidence defines and becomes the centerpiece of the case against the defendant, usually overriding any contradictory information or evidence of innocence (Leo & Ofshe, 1998). When false confessors subsequently retract their confessions, they are highly unlikely to be believed, and their retractions are often perceived as further evidence of their deceptiveness and thus guilt (Ofshe & Leo, 1997a). Each part of the system is subsequently stacked against the confessor (Leo, 1996), and as the case against a false confessor moves from one stage to the next in the criminal justice system, it gathers more force and the error becomes increasingly difficult to reverse.

This process typically starts with the police. Once they obtain a confession, they typically close their investigation, deem the case solved, and make no effort to pursue any exculpatory evidence or other possible leads—even if the confession is internally inconsistent, contradicted by external evidence, or the result of coercive interrogation (Leo, 1996; Ofshe & Leo, 1997a, 1997b). Even if other case evidence emerges suggesting or even demonstrating that the confession is false, police tend to disregard or misinterpret evidence of innocence and to continue to believe his confession valid (Drizin & Leo, 2004; Leo & Ofshe, 1998). Moreover, the presence of a confession creates its own set of confirmatory and cross- contaminating biases (Findley & Scott, 2006; Kassin, 2012; Kassin, Dror, & Kukucka, 2013), leading police, and later others, to interpret all other case information in the worst possible light for the defendant. For example, a weak and ambiguous eyewitness identification that might have been quickly dismissed in the absence of a confession will instead be treated as corroboration of the confession's validity (Hasel & Kassin, 2009). As the many documented cases of false confessions have demonstrated, even exculpatory DNA evidence is sometimes disregarded or reinterpreted as consistent with other forms of involvement in the crime (such as conspiracy to commit rape rather than as the rapist).

The presumption of guilt and the tendency to treat those who confess more harshly extend to prosecutors, who rarely consider the possibility that an innocent suspect has falsely confessed: therefore tending to charge him with the highest number and types of offenses; to oppose his pretrial release more strongly; and to pursue higher bail. They are far less likely to initiate or accept a plea bargain to a reduced charge, and in many cases persist in pursuing the prosecution even when exculpatory evidence has unequivocally established the defendant's innocence (Cassell & Hayman, 1996; Kassin & Gudjonsson, 2004; Leo & Ofshe, 1998).

Even the defendant's attorney is likely to believe the confession as true, an assumption that short-circuits or undermines the vigorous pursuit of claims of innocence. But if the attorney does believe such claims, he or she will nevertheless often pressure confessors to accept a guilty plea to a lesser charge in order to avoid the higher sentence that will inevitably follow from a jury conviction (Leo, 2008; Nardulli, Eisenstein, & Fleming, 1988; Wells & Leo, 2008). As documented by the previously reviewed studies of the wrongfully incarcerated, many false confessors have taken this advice, and pled guilty rather than risk trial (see Garrett, 2011; Redlich, 2010 for review).

If the case proceeds to trial and involves a claim that the confession is coerced, judges rarely suppress the confession, even if highly questionable and involving coercive tactics or a severely compromised suspect (Givelber, 2000). Many wrongfully convicted false confessors attempted, but failed, to have clearly coerced confessions suppressed: for example, those lasting for many hours or across days, involving repeated threats of harsh punishment, and/or involving juveniles or mentally retarded suspects (Drizin & Leo, 2004; Garrett, 2011).

Given this situation, when the cases of false confessors go to trial, the jury is highly likely to learn of the confession, and, even in the absence of other inculpatory evidence, and even if the confession is elicited through a clearly coercive interrogation, the defendant is highly likely to be wrongfully convicted. Studies of proven false confessors have shown that jury trials resulted in conviction in 73–81 % of cases—each a story of police, prosecutors, judges, and juries who failed to recognize the coercion of the interrogation and the invalidity of the confession (Drizin & Colgan, 2004; Leo & Ofshe, 1998, 2001). This rate of wrongful conviction becomes even larger when incorporating the number of false confessors who plead guilty rather than take their cases to trial (78 and 85 %, for the two studies, respectively). Most Americans simply accept confession evidence at face value. Randall McFarlane, for example, the jury foreman in the trial of Derek Tice—who, along with three others, falsely confessed to the murder and rape of the young wife of a Navy colleague—subsequently explained that Tice's confession "just washed everything else away…That was the supernova circumstance of the entire trial. It overwhelmed everything else" (Wells & Leo, 2008: 228).

Laboratory studies of the impact of confession evidence have likewise demonstrated the power of confession evidence to overwhelm judgment. Mock jurors find confession evidence more incriminating than eyewitness identification, for example, which also tends to overwhelming result in conviction (Hasel & Kassin, 2009;

Kassin & Neumann, 1997; Miller & Boster, 1977)—and fail to appropriately discount a false confession, even when the defendant's confession was elicited by coercive methods and the other case evidence strongly supports his innocence. In one such study, for example, Kassin and Sukel (1997) found confessions to greatly increase the conviction rate even when mock jurors viewed them as coerced.

False confessors continue to experience more negative outcomes at all points subsequent to conviction. Confessors who dispute their confessions tend to receive harsher sentences, as trial judges may punish defendants with harsher sentences for their claims of innocence, for the consequent costs to the state in time, effort, and resources, and for failing to express remorse or to apologize (Leo, 2008). Confessions likewise compromise efforts at post-conviction relief, in that the system provides no regular mechanisms for reviewing the substantive basis of convictions, *officially* presumes the defendant's guilt after he is convicted, treats the jury's verdict with deference, and interprets any new evidence in the light most favorable to the prosecution—rendering the correction of any mistaken conviction unlikely (Gudjonsson, 2003; Leo, 2008; Medwed, 2004). Appellate courts overwhelmingly uphold the conviction, often citing to the convincing nature of a confession and the incorporation of details apparently unknowable to any but the perpetrator. Despite the exponential rise in exonerations of innocent prisoners and the increasing number of documented proven wrongful convictions in the last two decades, criminal justice officials and courts still tend to presume the validity of confession-based convictions.

XIII. CONCLUSIONS

Police interrogation in America remains a procedure with considerable risk to elicit false confessions from the innocent. The reforms that characterized the progression from third degree tactics in the 1930s and beyond retained two problematic features that facilitate the elicitation of false confessions (1) an assumption of guilt that promotes the misclassification of innocent suspects as likely guilty, and (2) the still-coercive nature of interrogation tactics that include strong incentives promoting confession as the mechanism to achieve the best legal outcomes, and that contaminate the content of the confessions they elicit. At the same time, the appearance of coercion has been lessened by the elimination of third degree tactics, while the actual nature and power of the new strategies to promote confession have become more subtle and less recognizable to observers. Thus, the risks of coercion and false confessions remain, but the challenge of recognizing them is greater.

Although reforms have been enacted in Europe, and are beginning in other countries such as Canada, the USA seems entrenched in the practice and acceptance of Reid and Reid-like interrogation methods. It remains to be seen whether the flood of documented false confessions and wrongful convictions can overcome the widespread preeminence of concerns for crime control over those for due process and further the evolution of our still-coercive interrogation practices toward the more evidence-gathering strategies adopted in European reforms.

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Chapter 5 A critical appraisal of modern police interrogations[1]

Saul M. Kassin

I. INTRODUCTION

Let me begin with a story that already has historic value in the annals of wrongful convictions. This was an infamous case that took place in 1989 in New York City. Known as the 'Central Park jogger case', it involved a young woman, an investment banker, who was beaten senseless, raped and left for dead. It was a heinous crime that horrified the city. The victim's skull had multiple fractures, her eye socket was crushed and she lost three quarters of her blood. Defying the odds, she survived; but to this day, she is completely amnesic for the incident. Soon thereafter, solely on the basis of police-induced confessions taken within 72 hours of the crime, five African- and Hispanic-American boys, 14–16 years old, were convicted of the attack and sentenced to prison. There were no physical traces of the defendants at the crime scene and no traces of the scene on them. At the time, however, it was easy to understand why detectives aggressively interrogated the boys, some of whom were 'wilding' in the park that night.

Four of the five jogger confessions were videotaped and presented to the juries at trial. The tapes (which showed only the confessions, not the precipitating 14½–30 hours of interrogation) were compelling, as the boys described in vivid detail how the jogger was attacked, when, where and by whom, and the role that they played in the process. One boy physically re-enacted the way he allegedly pulled off the jogger 's running pants. A second boy said he felt peer- pressured to join in his 'first rape' and he expressed remorse. These confessions, portions of which were aired on television, fooled not only two trial juries but an entire city and nation – including myself, a native New Yorker who followed the case closely when it broke. Thirteen years later, Matias Reyes, in prison for three rapes and a murder committed after the jogger attack, stepped forward with a voluntary, accurate, independently corroborated confession supported by

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DNA evidence (semen found on the victim's body and socks excluded the boys as donors in 1989; the district attorney prosecuted the boys solely on the basis of the confessions and argued to the jury that just because police did not capture *all* the perpetrators does not mean they did not get *some* of them). As the result of a painstaking and thorough re-examination of the case, including an analysis of the original confessions, the Manhattan District Attorney's Office joined a defence motion to vacate the boys' convictions, which was granted in 2002 (*New York* v. *Wise et al.* 2002).

The assault on the Central Park jogger was a horrific, violent act. Yet the case also now stands as a shocking tale of five false confessions resulting from a single investigation. Despite its notoriety, this case illustrates a phenomenon that is not new or unique. The pages of history reveal many tragic miscarriages of justice involving innocent men and women who were prosecuted and wrongfully convicted solely on the basis of false confessions. I would not hazard an estimate as to the prevalence of the problem, which is unknown. Within the recent population of post-conviction DNA exonerations, 20–25 per cent had confessions in evidence (Scheck *et al*. 2000; http://www. innocenceproject.org).[2]

Notably, these tragic outcomes occurred because innocent people were interrogated, because they confessed, and because prosecutors, judges and trial juries believed their false confessions. Indeed, when false confessors plead not guilty and proceed to trial, the jury conviction rate is 81 per cent, a figure that led Drizin and Leo (2004: 959) to lament that confession evidence is 'inherently prejudicial and highly damaging to a defendant, even if it is the product of coercive interrogation, even if it is supported by no other evidence, and even if it is ultimately proven false beyond any reasonable doubt'. This sobering result suggests that there are not adequate safeguards in the criminal justice system to catch the mistakes – which increases the pressure on police to ensure that their practices elicit accurate outcomes.

The jogger case also points to a sequence of three potential problems to watch for in a police investigation: 1) that innocent people are often targeted for interrogation, despite a lack of evidence of their involvement, based solely on an interview-based

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[2] This percentage is even higher in homicide cases. In fact, as many false confessions are discovered before there is a trial, are not reported by police and are not publicized by the media, it is clear that the known cases represent the tip of a much larger iceberg (Drizin and Leo 2004; Gross et al. 2005).

judgment; 2) certain interrogation techniques can cause innocent people to confess to crimes they did not commit; and 3), afterwards, it is difficult for investigators, attorneys, judges and juries to distinguish between true and false confessions. I will argue that there are risks of error inherent in each link of this three-step chain of events – from the pre- interrogation interview, to the interrogation that elicits an admission, to the full confession that is so difficult for trial judges, juries and others to assess.

Before launching into a critique of current interrogation practices, let me put my predispositions on the table. First, I know that most police investigators are well intended, well trained and competent, so it is not my intent to paint an unflattering portrait of the profession. But performance can be improved at every step in the process. Secondly, I am not an ideological zealot looking to handcuff cops in their pursuit of criminals. I think everyone would agree that the surgical objective of interrogation is to secure confessions from suspects who are guilty but not from those, misjudged, who are innocent. Hence, I think everyone would also agree that the process itself should be structured to produce outcomes that are diagnostic, as measured by the observed ratio of true to false confessions. Adopting this strictly pragmatic position has two implications. The first is that I recognize that society's relative tolerance for false-positive and false-negative errors may well shift as a function of contextual factors (e.g. one could reasonably argue that the fundamental value, rooted in Blackstone's *Commentaries on the Laws of England,* that it is better to acquit ten guilty people than to convict one who is innocent, may have to be 'tweaked' in extreme conditions, as in the questioning of terrorism suspects who pose an imminent threat). Secondly, whilst the exclusion from evidence of involuntary confessions serves a number of important values – such as the desire to ensure that these statements are reliable, to protect a defendant's due process rights and to deter repugnant police conduct that undermines the public's trust in government – the research I will talk about is driven by cold, pragmatic concerns for reliability.

II. THE PRE-INTERROGATION INTERVIEW: A PLATFORM FOR BIAS AND ERROR

The first problem is that innocent people are often targeted for interrogation, despite the absence of any evidence of their involvement, based solely on an investigator 's hunch. Consider, for example, the military trial of *U.S.* v. *Bickel* (1999), in which I testified as an expert witness. In this case, the defendant confessed to rape as a result of interrogations by five agents. There was no independent evidence against the defendant. So, when asked why they interrogated him so forcefully, one investigator

said that Bickel behaved in a deceptive manner:

> His body language and the way he reacted to our questions told us that he was not telling the whole truth. Some examples of body language is that he tried to remain calm but you could tell he was nervous and every time we asked him a question his eyes would roam and he would not make direct contact, and at times he would act pretty sporadic and he started to cry at one time.

Correctly, I think, this defendant was acquitted by a jury of military officers.

Numerous other examples illustrate the problem. In Florida, Thomas Sawyer was interrogated for 16 hours for sexual assault and murder because his face flushed red and he appeared embarrassed during an initial interview, a reaction seen as a sign of deception. What the investigators did not know at the time was that Sawyer was a recovering alcoholic and also had a social anxiety disorder that caused him to sweat profusely and blush in public situations. Ultimately, the charges were dropped. Then there was the California case of 14-year-old Michael Crowe, falsely accused in the murder of his sister Stephanie. Michael confessed after intense interrogations, but the charges were dropped when a drifter in the area was found with the victim's blood on his clothing. According to the detectives in this case, Crowe became a prime suspect in part because they felt that he had reacted to his sister's death with inappropriately little emotion.

The first problem can be traced to the pre-interrogation interview. As per the Reid Technique, the police do not commence interrogation until and unless they have made an initial, interview-based judgment that the suspect is lying. Sometimes that judgment is reasonably based on reports from witnesses or informants, or on other forms of extrinsic evidence. At other times, however, that judgment is based on nothing more than a hunch, a clinical impression that detectives form during a non-confrontational interview. In *Criminal Interrogation and Confessions*, for example, Inbau *et al*. (2001) advise investigators to look for behavioural symptoms or indicators of truth and deception in the form of verbal cues (e.g. long pauses, qualified or rehearsed responses), non-verbal cues (e.g. gaze aversion, frozen posture, slouching) and behavioural attitudes (e.g. unconcerned, anxious, guarded). They also recommend the use of various 'behaviour provoking questions' designed to elicit responses that are presumed diagnostic of guilt and innocence (e.g. 'What do you think should happen to the person who did this crime?' 'Under any circumstances, do you think the person who committed

this crime should be given a second chance?'). In these ways, they claim, investigators can be trained to judge truth and deception at an 85 per cent level of accuracy – an average that substantially exceeds human lie-detection performance obtained in any of the world's laboratories.

As this initial judgment becomes a pivotal choice-point in a case, determining whether a suspect is interrogated or sent home, it is important to determine scientifically how – and how well – that judgment is made. As an empirical matter, there are reasons to be sceptical. Over the years, large numbers of psychological studies involving thousands of subjects from all over the world have consistently failed to support the claim that groups of individuals can attain such high average levels of accuracy at judging truth and deception. Rather, this research has shown that people perform at no better than chance level; that training produces, at best, small and inconsistent improvements compared with control groups; and that police, judges, customs inspectors, psychiatrists, polygraph examiners and other experts perform only slightly better than chance, if at all. In general, professional lie catchers exhibit accuracy rates in the range from 45 to 60 per cent, with a mean of 54 per cent (for reviews, see Vrij 2000; Memon *et al*. 2003; Granhag and Strömwall 2004).

One might argue that performance in these laboratory experiments is poor because participants are asked to detect truths and lies uttered in relatively low involvement situations, which can weaken deception cues. But forensic research on the detection of high-stakes lies has thus far produced mixed results. One might also argue that professionals would be more accurate when they personally conduct the interviews than when they observe sessions conducted by others. But research clearly does not support this notion either. In short, there is no scientific evidence to support the claim that professionals, trained or not, can distinguish truths and lies simply by observing a person's interview behaviour. This result is not particularly surprising in light of the kinds of deception cues that form the basis for training. For example, Inbau *et al*. (2001) focus on several visual cues – such as gaze aversion, non-frontal posture, slouching and grooming gestures– that are not empirically predictive of truth and deception (for a comprehensive meta-analysis of deception cues, see DePaulo *et al*. 2003).

In studies that illustrate the point, my colleagues and I have examined the extent to which special training in deception detection increases judgment accuracy in a specifically forensic context. In one study, Kassin and Fong (1999) randomly assigned some college students but not others to receive training in the Reid Technique using videotapes and written materials on the behavioural symptom analysis. Next they

created a set of videotapes that depicted brief interviews and denials by individuals who were truly guilty or innocent of committing one of four mock crimes. As in past studies in non-forensic settings, observers were not proficient at differentiating between truthful and deceptive suspects better than would be expected by chance. In fact, those who underwent training were less accurate than naïve controls – but more confident. Closer inspection of the data revealed that the training procedure itself produced a response bias towards guilt.

From a practical standpoint, this study was limited by the fact that the observers were college students, not police detectives, and their training was condensed, not offered as part of professional development to those with prior experience. To address these issues, Meissner and Kassin (2002) conducted a meta-analysis and a follow-up study to test the performance of experienced investigators. Looking at past research, they found that police investigators and trained participants, relative to naïve controls, exhibited a proclivity to judge targets in general as deceptive rather than truthful. Next, they used Kassin and Fong's videotapes to compare police and college student samples and found that the police exhibited lower, chance-level accuracy, a response bias towards judgments of deception and significantly more confidence. Within our sample of investigators, both years of experience and special training correlated significantly with the response bias – but not with accuracy. It appears that special training in deception detection may lead investigators to make pre-judgments of guilt, with high confidence, that are biased and frequently in error.

Let me be clear that I am not prepared to claim that it is impossible to increase the accuracy of judgments made in this domain. High average levels of lie-detection accuracy may be rare, but some individuals are intuitively and consistently better than others (Ekman *et al*. 1999). It is also clear that lying leaves behavioural traces that may provide clues as to how to improve performance (DePaulo *et al*. 2003). Hence, it may be necessary to reconceptualize the current approach. Following traditional models of polygraphic lie detection, professionals tend to search for behavioural cues that betray stress (e.g. gaze aversion), a presumed symptom of deception. But this approach may be misguided. Indeed, after shadowing homicide detectives for a year in Baltimore, Simon (1991: 219) may have captured the essence of the problem:

> Nervousness, fear, confusion, hostility, a story that changes or contradicts itself – all are signs that the man in an interrogation room is lying, particularly in the eyes of someone as naturally suspicious as a detective. Unfortunately, these are also signs of a human being in a state of high stress.

Recent research suggests the possibility of an alternative approach that focuses on the fact that lying is an effortful cognitive activity. In one study, Newman *et al*. (2003) asked subjects to lie or tell the truth about various topics (including, in one study, the commission of a mock crime) and found that when people lie, they use fewer first-person pronouns and fewer 'exclusive' words such as *except, but* and *without*, words that indicate cognitive complexity, which requires effort. In a second study, Walczyk *et al*. (2003) instructed subjects to answer various personal questions truthfully or deceptively and found, both within and between subjects, that constructing spontaneous lies – which requires more cognitive effort than telling the truth – increases response time. Perhaps because lying is effortful, observers would be more accurate if asked to make judgments that are indirect but diagnostic. In a third study, Vrij *et al*. (2001) found that subjects made more accurate discriminations of truths and lies when asked 'How hard is the person thinking?' than when asked 'Is the person lying?'

As an empirical matter, it is also possible that certain 'behaviour-provoking questions' suggested by the Reid Technique, and others of a similar nature, will enhance an investigator 's ability to discriminate between truthful and deceptive suspects. For example, Inbau *et al*. (2001) suggest that police ask suspects for an opinion of what should happen to the person who committed the crime, whether that person should get a second chance and what the results of forensic tests will show about their own involvement – the assumption being that innocents will not hesitate in their responses to be punitive, uncompromising and self-confident. Of potential relevance in this regard is recent research indicating that innocent people are more likely than perpetrators to waive their rights to silence, to counsel and to a line-up – co-operative acts, like a willingness to undergo a polygraph, physical examination, or house search, that may betray a naïve phenomenology of innocence (Kassin 2005).

In short, when it comes to making accurate discriminations, it remains a reasonable goal to seek future improvements in training as a way to make police more effective interviewers and lie detectors (Bull and Milne 2004; Granhag and Stromwall 2004; Vrij 2004). For now, however, it is vital that police be mindful of their own limitations and stay vigilant whilst they interrogate to the possibility that their first impressions were mistaken.

III. INTERROGATION: A GUILT-PRESUMPTIVE PROCESS OF INFLUENCE

In the past, the police often practised 'third degree' methods of custodial interrogation – inflicting physical or mental pain and suffering to extract confessions and other types of information from crime suspects. Amongst the methods used were prolonged confinement and isolation; explicit threats of harm or punishment; deprivation of sleep, food and other needs; extreme sensory discomfort (e.g. shining a bright, blinding strobe light on the suspect's face); and assorted forms of physical torture (e.g. suspects were tied to a chair and smacked to the side of the head or beaten with a rubber hose, which seldom left visible marks). The use of such methods declined precipitously from the 1930s to the 1960s and was replaced by a more professional approach to policing and by interrogations that are more psychological in nature, as in the Reid Technique (for a review, see Leo 2004).

Despite this historic and seismic paradigm shift, modern interrogations continue to put innocent people at risk to confess to crimes they did not commit. To begin with, the two-step approach – in which an interview generates a judgment of deception, which, in turn, sets into motion an interrogation – is inherently flawed. Inbau *et al*. (2001: 78) advise that 'The successful interrogator must possess a great deal of inner confidence in his ability to detect truth or deception, elicit confessions from the guilty, and stand behind decisions of truthfulness'. Thus, interrogation is by definition a guilt-presumptive process, a theory-driven social interaction led by an authority figure who has formed a strong belief about the suspect and who measures success by the ability to extract an admission from that suspect. For innocent people who are initially misjudged, one would hope that police would remain open-minded and reevaluate their beliefs over the course of the interrogation. But the two-step approach makes this an unreasonable expectation. Over the years, research has shown that once people form a belief, they selectively seek and interpret new information in ways that verify that belief even in the face of contradictory evidence. This problem contributes to the errors committed by forensic examiners, whose assessments of handwriting samples, ballistics, and other 'scientific' evidence are often corrupted by prior beliefs, a problem uncovered in many DNA exoneration cases (Risinger *et al*. 2002). To complicate matters further, people unwittingly create behavioural support for their beliefs, producing a self-fulfilling prophecy. This effect was first demonstrated by Rosenthal and Jacobson (1968) in their classic report on the effects of teachers' expectancies on students' performance. Similar results have been obtained in military, business and other organizational settings (McNatt 2000).

In a story that illustrates how investigators can be blinded by the guilt-presumptive lens they wear, a man confessed to his wife's murder after 19 hours of interrogation when police 'bluffed' him into thinking they had DNA evidence to be tested (*Missouri* v. *Johnson* 2001). During interrogation, it is common for police to bluff in this manner about having independent evidence on the assumption that the suspect, whom they presume guilty, will realize the futility of denial and capitulate. What they cannot see, however, is that to an innocent but beleaguered person, who is naïve about the use of this tactic, the 'threat' of DNA may be construed as a promise of future exoneration – ironically making it easier to confess. In this case, the defendant – who was instantly acquitted by a jury – explained afterwards that he confessed because he was exhausted and knew that the test results would show his innocence.

The process of interrogation is not only guilt presumptive but powerful in its impact. Inbau *et al*. (2001) advise interrogators to remove the suspect from familiar surroundings and place him or her in a small, barely furnished, soundproof room housed within the police station. Against this physical backdrop, a nine-step process begins with the positive confrontation and the development of alternative themes – and ends with a full written or oral confession. Conceptually, this approach is designed to get suspects to incriminate themselves by increasing the anxiety associated with denial, plunging them into a state of despair and minimizing the perceived consequences of confession. Glossing over the specifics, interrogation is reducible to an interplay of three processes: *isolation* for some indefinite period of time, which increases stress and the incentive to relieve that stress; *confrontation*, in which the interrogator accuses the suspect of the crime, expresses certainty in that opinion and blocks all denials, sometimes citing real or manufactured evidence to support the charge; and *minimization*, in which the sympathetic interrogator morally justifies the crime in the form of an alternative version of events (e.g. that it was spontaneous, accidental, provoked or peer pressured), which can lead a suspect to infer that he or she will be treated with leniency. The net effect is to trap the suspect so that he or she sees confession as the most effective means of 'escape'.

In the interrogation room, as in other settings, some individuals are more vulnerable to manipulation than others, particularly if they are characteristically prone to exhibit social compliance or interrogative suggestibility. Youth, naïvete, a lack of intelligence, cultural upbringing, and social anxiety and various psychological disorders that impair cognitive and affective functions, present unique sources of vulnerability to watch for (see Gudjonnsson 1992, 2003). Certain situational factors can also increase the risk of a false confession, even amongst suspects who are not by nature vulnerable. One such risk factor is time: as a tactical matter, interrogators isolate suspects in custody

– but for how long? Prolonged isolation is likely to be accompanied by fatigue, feelings of helplessness, and a deprivation of sleep, food and other biological needs, mental states that impair complex decision-making. Yet whereas most interrogations last 1–2 hours (Leo 1996), and whilst 3–4 hours is generally sufficient (Inbau *et al*. 2001), a study of documented false-confession cases in which interrogation time was recorded showed that 34 per cent lasted 6–12 hours, 39 per cent lasted 12–24 hours, and the mean was 16.3 hours (Drizin and Leo 2004). Following the Police and Criminal Evidence Act 1984 in Great Britain, police should be trained to set time limits on the process, or at least flexible guidelines, as well as periodic breaks from questioning for rest and meals.

A second problem concerns the presentation of false evidence. This tactic often takes the form of outright lying to suspects – for example, about an alibi that allegedly failed to corroborate the suspect's story; an eyewitness identification that was not actually made; fingerprints, hair or blood that was not found; or polygraph tests they did not really fail. The presentation of false evidence is implicated in the vast majority of false confession cases that have been documented for analysis. In addition, laboratory research shows that it increases the risk that innocent people would confess to acts they did not commit and, at times, internalize guilt for outcomes they did not produce (e.g. Meyer and Youngjohn 1991; Kassin and Kiechel 1996). Especially disconcerting in this regard is the role that the polygraph has played. The polygraph is best known for its use as a lie-detector test but, because it is not admissible in most courts, police use it primarily to induce suspects to confess. Far too often, however, false confessions have been extracted by police examiners who told suspects they had failed a lie-detector test. This tactic is so common that Lykken (1998: 235) coined the term 'fourth degree' to describe it. This problem recently led the National Research Council Committee to Review the Scientific Evidence on the Polygraph to warn of the risk of polygraph-induced false confessions (National Research Council 2003).

A third potential problem concerns the use of minimization, the process by which the police suggest to a suspect that the crime in question was provoked, an accident or otherwise morally justified. By design, minimization tactics lead people to infer that they will be treated with leniency if they confess – even when no explicit promises are made (Kassin and McNall 1991). In the laboratory, this tactic led 18 per cent of innocent college students to confess that they cheated on a problem that they were supposed to solve without assistance (Russano *et al*. 2005). Although more work is needed to compare the different alternative themes and the conditions under which this tactic puts innocent people at risk, it appears that minimization – by communicating leniency 'under the radar ' – may at times induce confessions in suspects who are beleaguered and feeling trapped, even if innocent.

Taking stock of what psychological science has, and has not, achieved when it comes to police interrogations, it is clear that researchers have thus far sought to identify the risks, with an eye towards reducing the number of false confessions and wrongful convictions. To develop fully a science of interrogation, however, researchers must also help the police to build a better mousetrap. The surgical objective is simple: develop interrogation techniques that are 'diagnostic' to the extent that they increase the observed ratio of true to false confessions.

This objective brings with it some important implications. First, because the decision to confess is largely influenced by a person's expectations of the consequences, both guilty and innocent people are most likely to capitulate when they believe that there is strong evidence against them (Moston *et al*. 1992). As the police are more likely in nature to have direct and circumstantial proof of guilt against perpetrators than against innocent suspects who are falsely accused, the practice of confronting suspects with real evidence should increase the diagnosticity of the confessions that are ultimately elicited. To the extent that the police are permitted to misrepresent the evidence, however, and lie to suspects, the guilty and innocent become equally trapped and similarly treated, reducing diagnosticity. On the question of how to confront suspects with real evidence for maximum impact, recent research suggests that it may be easier to 'trap' those who are guilty into betraying their culpability by strategically delaying the disclosure of crime details rather than disclosing details early, as part of a positive confrontation. In a study involving a mock crime and investigation, Hartwig *et al*. (2005) found that when they disclosed facts at the outset, both guilty and innocent suspects managed to shape their responses in ways that were consistent. When the disclosures were delayed, however, guilty suspects seeking to evade detection held back in describing what they knew but were more likely than innocents to contradict the facts that were withheld – inconsistencies that betrayed attempted deception. More work is needed, but this initial study suggests that the timing of disclosures can be used to differentiate between guilty and innocent suspects.

IV. NARRATIVE CONFESSIONS AS HOLLYWOOD PRODUCTIONS

Confession evidence is powerful in court and hard to overcome. To safeguard against the wrongful convictions they elicit and their consequences, therefore, it is vitally important that confessions be accurately assessed prior to the onset of court proceedings. We have seen that people are poor lie detectors and cannot readily distinguish between true and false *denials*. But can people in general, and law

enforcement officers in particular, distinguish between true and false *confessions*?

One could argue that even if the process of interrogation is psychologically coercive, and even if innocent people sometimes confess, there is no problem to solve to the extent that the errors are ultimately detected by authorities and corrected. Essential to this presumed safety net is a commonsense assumption, built on blind faith, that 'I'd know a false confession if I saw one'. There are three reasons for concern about whether people can detect as false the confessions of innocent suspects. The first is that generalized common sense leads us to trust confessions the way we trust other behaviours that are not tainted by self-interest. Reasonably, most people believe they would never confess to a crime they did not commit and they cannot imagine the circumstances under which anyone else would do so. A second reason for concern is that people are typically not adept at deception detection. We saw earlier that neither lay people nor professionals can accurately separate truths from lies. The question remains as to whether they can distinguish true and false confessions. Kassin *et al*. (2005) examined this question in a study on the performance of police investigators and lay people. First, we recruited male prison inmates in a state correctional facility to take part in a pair of videotaped interviews. Each inmate was asked to give a full confession to the crime for which he was in prison. Each free narrative was then followed by a standardized list of questions concerning who, what, when, where, how and other details. In a second interview, each inmate was instructed to concoct a false confession on the basis of a one- or two-sentence description of a crime committed by a different inmate. Using this procedure, we created a videotape that depicted ten different inmates, each giving a single true or false confession to one of five crimes: aggravated assault, armed robbery, burglary, breaking and entering, and automobile theft. The tape was shown to college students and police investigators (two thirds of whom had received training in interviewing and interrogation). The result: neither group was significantly more accurate than would be expected by chance, but the investigators were more confident in their judgments and more likely to commit false-positive errors, trusting the false confessions.

There are two possible explanations for why the investigators were unable to distinguish the true and false confessions and why they were less accurate on average than college students. One is that training and experience introduce a bias that systematically reduces judgment accuracy. This is not terribly surprising in the light of the kinds of behavioural deception cues that form part of the basis for training (e.g. such visual cues as gaze aversion, non-frontal posture, slouching and grooming gestures are not correlated with truthtelling or deception; see DePaulo *et al*. 2003). A second possible explanation is that the police in our sample were impaired by our use of a paradigm in

which half the observed confessions were false – a percentage that is likely far higher than the real-world base rate for false confessions. To the extent that law enforcement work leads investigators to presume most confessions true, then the response bias imported from the police station to the laboratory may have proved misleading for a study in which half the confessions were false. To test this latter hypothesis, we conducted a second study in which we neutralized the response bias by instructing all subjects prior to the task that half the confessions were true and half were false. This manipulation did reduce the overall number of 'true' judgments amongst investigators, but they were still not more accurate than students or chance performance, only more confident.

When it comes to the assumption that 'I'd know a false confession if I saw one', there is a third reason for concern: real-life false confessions, when elicited through a process of interrogation, contain content cues that people associate with truth-telling. In most documented false confessions, the statements ultimately presented in court are compelling, as they often contain vivid and accurate details about the crime, the scene and the victim – details that can become known to an innocent suspect through the assistance of leading interview questions, overheard conversations, photographs, visits to the crime scene and other second-hand sources of information invisible to the naïve observer. To further obfuscate matters, many confessions are textured with what I call 'elective' statements. Often innocent suspects describe not just what they allegedly did, and how they did it, but *why* – as they self-report on revenge, jealousy, desperation, capitulation to peer pressure and other prototypical motives for crime. Sometimes they add apologies and expressions of remorse. In some cases, innocent suspects will correct minor errors that appear in the written statements that are derived from them, suggesting that they read, understood and verified the contents. To the naïve spectator, such statements appear to be voluntary, textured with detail and the product of personal experience. Uninformed, however, this spectator mistakes illusion for reality, not realizing that the taped confession is much like a Hollywood drama – scripted by the police theory of the case, rehearsed during hours of unrecorded questioning, directed by the questioner and ultimately enacted on paper, tape or camera by the suspect.

The Reid Technique offers advice on how to create these illusions of credibility. Inbau *et al*. (2001) recommend that interrogators insert minor errors (such as a wrong name, date or street address) into written confessions so that the suspect will spot them, correct them and initial the changes. The goal is to increase the perceived credibility of the statement and make it difficult for the defendant later to distance him or herself from it. Because only perpetrators should be in a position to spot these errors, this technique appears to have great potential. However, Inbau *et al*. advise that, to play it safe, 'the

investigator should keep the errors in mind and raise a question about them in the event the suspect neglects to do so' (p. 384). Similarly, they advise detectives to insert into written confessions irrelevant personal history items known only to the 'offender '. 'For instance, the suspect may be asked to give the name of the grade school he attended, the place or hospital in which he was born, or other similar information' (p. 383). Of course, for the suspect who is not the offender but an innocent person, the insertion of neutral, crime-irrelevant biographical details from his or her own life has no diagnostic value. Like the error correction trick, however it merely creates a false illusion of credibility.

V. THE *POST HOC* ASSESSMENT OF CONFESSIONS

In theory, the police, prosecutors and others can assess suspects' statements with some degree of accuracy through a genuine effort at corroboration. A full confession contains both an admission of guilt and a post-admission narrative in which suspects recount not just what they did but how, when, where and with whom. Evaluating such a statement should involve a three-step process. The first step requires a consideration of the conditions under which the statement was made and the extent to which coercive techniques were used. As in the 'totality of circumstances' approach that American courts use to determine voluntariness, relevant factors in this inquiry include a consideration of suspect characteristics such as age, intelligence and mental state; the physical conditions of detention; and the use of stated or implied promises, threats and other social influence tactics used during interrogation. Still, whilst the presence of personal and situational risk factors cast doubts on a confession, they do not invalidate it. Coerced confessions may well be true; innocent people sometimes confess voluntarily, without prompting. The second step requires a consideration of whether the confession contains details that are accurate, not erroneous, in relation to the verifiable facts of the crime. A confession can prove guilt or at least guilty knowledge (or it may fail to do so) to the extent that it is 'generative', furnishing the police with crime facts that were not already known or leading to evidence that was not already available. An often overlooked but necessary third step concerns a requirement of *attribution* for the source of the details contained in the narrative confession. A confession has diagnostic value if the accurate details it contains were knowable only to a perpetrator and were not derivable from such second-hand sources as news accounts, overheard conversations, leading interview questions, photographs or visits to the crime scene (see Ofshe and Leo 1997; Hill 2003).

This three-step analysis can be illustrated in the videotaped false confessions in the Central Park jogger case described earlier. On tape, these defendants confessed to a gang rape in statements that seemed vividly detailed, voluntary and the product of

personal experience. But examination of the conditions under which the statements were made reveals the presence of troubling risk factors. The boys were 14–16 years old, and at the time of their videotaped statements, they had been in custody and interrogation by multiple detectives for a range of 14–30 hours. The passage of time may not be visible to the naïve consumer of the final product, but it brings heightened pressure, a dogged refusal to accept denials, fatigue, despair and often a deprivation of sleep and other needs. As to other aspects of the situation, the detectives and suspects disagreed in significant ways about what went on during the many unrecorded hours of questioning. They disagreed, for example, over whether the parents had access to their boys, whether threats and physical force was used and whether promises to go home were made.

The conditions of interrogation contained classic elements of coercion, but that does not absolve the guilty or invalidate their confessions. The Central Park jogger confessions were compelling precisely because the narratives contained highly vivid details, including an on-camera physical re-enactment. From start to finish, however, the narratives were riddled with inconsistencies and factual errors of omission and commission. When asked about the jogger's head injury, one boy said she was punched with fists; then when prompted to recall a blunt object, he said they used a rock; moments later, the rock turned to bricks. Across the defendants, the statements diverged. Each and every defendant minimized his own role in the assault, placing 'them' at centre stage. When two of the suspects were taken to the crime scene and asked to point to the site of the attack, they pointed in different directions. Factual errors were also numerous. One suspect said the jogger wore blue shorts and a T-shirt; she wore long black tights and a long-sleeve jersey. Another said the jogger and clothes were cut with a knife; there were no knife cuts. A third suspect did not seem to know the victim bled; she bled profusely. A fourth said that one of the boys he was with ejaculated; yet no traces of that boy's semen were found. None of the defendants knew the location of the attack, that the jogger was left at the bottom of a ravine, that her hands were tied or that she was gagged with her own shirt.

Pointing to the presence of accurate details in these statements, the naïve spectator will see the confessional glasses as half full, not half empty. In the light of all that is known about the problems with eyewitness memory, it is not reasonable to expect perfection in the accounts of crime suspects. This assertion, however, invites a third analytical step, an attribution as to the source of the accurate details. A confession can prove guilt if it contains details knowable only to the perpetrator, details not derivable by second-hand sources. Yet in the jogger case, after dozens of collective hours of unrecorded questioning, and amidst disputes as to what transpired, there is no way to

know whether crime facts were furnished to the defendants, wittingly or unwittingly, through the process. Indeed, one need not stray from the videotaped confessions to hear the prosecutor ask leading questions that functioned not only to elicit information *from* the suspects but to communicate information *to* the suspects. Without apparent regard for the ownership of the facts being extracted, she steered one boy's story through a broken but persistent sequence of leading questions: 'Medical evidence says something other than a hand was used … what?' and 'Don't you remember someone using a brick or a stone?' In a move that grossly undermined all opportunity to get a confession indicative of guilty knowledge, the detectives inexplicably took one suspect on a supervised visit to the crime scene *before* taking his videotaped confession. The district attorney then showed him graphic photographs of the victim. For diagnostic purposes, it makes no sense to contaminate a suspect's confession by spoon feeding him information in these ways, rendering the source of his subsequent knowledge ambiguous. Whether he was there or not, the visit and photographs endowed him with key visual facts about the victim, crime and place – facts fit for a full confession. Importantly, Inbau *et al*. (2001) advise police to withhold key crime details so that they can ask suspects to corroborate their admissions.

Crime perpetrators have the unique capacity to reveal information about their actions that the police did not already know and produce evidence that police did not already have. Yet the statements of the Central Park jogger defendants – individually and collectively – were not generative in these ways. Lacking such corroboration, the case against the five defendants was like a house of cards, with each boy's confession built squarely and solely upon the foundation of the others' confessions. In December 2002, this house of cards collapsed under the weight of an imprisoned serial rapist who voluntarily confessed to the attack, who furnished the police with crime facts that proved accurate and not previously known, and whose semen was present on the jogger.

VI. TOWARDS THE VIDEOTAPING OF INTERROGATIONS

To assess accurately the incriminating value of confessions, the police, prosecutors and fact finders must have access to a videotape recording of the entire interview and interrogation. In Great Britain, the Police and Criminal Evidence Act 1985 mandated that all suspect interviews and interrogations be taped. In the USA, Inbau *et al*. (2001) have long opposed the videotaping of interrogations, only recently changing course. The FBI continues to prohibit the practice. Today, a handful of states require electronic recording in custodial settings and others do so on a voluntary basis (for an excellent historical overview of this practice, see Drizin and Reich 2004).

There are a number of presumed advantages to a policy of videotaping interviews and interrogations in their entirety, all of which should provide for a more effective safety net. First, videotaping will deter the police from using overly guilt-presumptive, duplicitous and forceful interrogation tactics. Secondly, videotaping will deter frivolous defence claims of coercion where none existed. Thirdly, a videotaped record provides an objective and accurate account of all that transpired during interrogation, an all-too-common source of dispute in the courtroom (e.g. about whether rights were administered and waived; whether detectives yelled, intimidated, threatened, made promises or lied to the suspect; and whether the details in a confession came from the police or suspect). All this should increase the fact-finding accuracy of judges and juries. For the tapes to be complete and balanced, however, entire sessions should be recorded and the camera should adopt a 'neutral' or 'equal focus' perspective that shows both the accused and his or her interrogators (Lassiter *et al*. 2001).

In the USA, the videotaping experience has been well received wherever it has been used. Several years ago, a National Institute of Justice study revealed that amongst those police and sheriff's departments that videotaped interrogations, the vast majority found the practice useful (Geller 1993). More recently, Sullivan (2004) interviewed officials from 238 police and sheriff's departments in 38 states who voluntarily recorded custodial interrogations and found that they enthusiastically favoured the practice. Amongst the reasons cited were that recording permits detectives to focus on the suspect rather than take copious notes, increases accountability, provides an instant replay of the suspect's statement that reveals information initially overlooked and reduces the amount of time detectives spend in court defending their interrogation conduct. Contradicting the most common criticisms, respondents in this study reported that videotaping interrogations did not prove too costly or inhibit suspects from talking to police.

The Central Park jogger case revealed a sequence of three problems: innocent people are often targeted for interrogation on the basis of judgments of deception that are frequently in error; certain processes of interrogation can cause people to confess to crimes they did not commit; and it is difficult for the police, attorneys, judges and juries to identify false confessions once they occur. The risks inherent in this chain of events suggests that there are not adequate safeguards in the criminal justice system. One would hope that recent advances in DNA testing and forensic-psychological research will bring together collaborative groups of law enforcement professionals, attorneys, social scientists and policy-makers to scrutinize current practices – the goal being to increase the effectiveness of interviews and interrogations, as measured by the diagnosticity of the outcomes they produce.

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Chapter 6 Confessional to Professional - A brief history of interviewing with suspects in England and Wales[1]

This paper will describe the three key stages of an evolution within British police interviewing, an evolution that has transformed this key custodial process through significant changes to both legislation and police practice. This evolution was started by revolutionary legislation that severely curtailed previous practice that allowed officers to interview detainees for extended periods without legal representation. Such a change was deemed necessary by the exposure of suspect maltreatment by the police. The police were wholly ill equipped to respond to this change and took a number of years to respond. However, the response, when it came was meaningful in that senior leadership implemented the first, and only national training programme for every officer in the country. This was the second stage of the evolution and the paper will show that it took some time for the benefits of this investment to be seen. The third and most recent stage of the change saw the basic training programme develop into a more sophisticated and scientific model with different levels of training, supported by research findings and even officers conducting research. The changes have seen public and judicial confidence in the process rise to a point where interviews are rarely challenged and the evidence they provide is accepted by both prosecution and defence.

I. THE PERIOD LEADING UP TO LEGISLATIVE CONTROL

The concept of a pre-trial interview of a suspect is a comparatively recent development. In the United Kingdom, from the early 18th century, when examining magistrates sat in judgement in courts to hear criminal complaints defendants had the right to remain silent at trial. The role of the police in interviewing suspects commenced with the formation of the London Metropolitan police in 1829, after which the police gradually took over the pretrial investigation process from the examining magistrates, presenting evidence gathered at trial. However, it was not until the Judges' Rules of 1906 that any formal control was applied to the admissibility of the product of police interviews. The Judges' Rules were actually no more than administrative guidance but continued to be the only control on the admissibility of interviews with suspects until the advent of the Police and Criminal Evidence Act (PACE 1984), brought about by the 1981 Royal Commission on Criminal Procedure (RCCP).

Under the Judges' Rules police officers were permitted to conduct interviews and then present their recollection of the interview in Court from their own notes made 'as soon as practicable' after the interview. Suspects were not allowed legal

[1] Originally published as Griffiths, A. (2010). *Confessional to Professional. Investigative Interviewing in the UK.* Invited presentation, Australian Psychological Society. Sydney, November.

representation and confessions were a central pillar of the prosecution case. This remained the case until growing concern about the role of police in the investigation of offences, particularly their treatment of suspects, and the reliability of confessions obtained in high profile cases, resulted in the 1981 Royal Commission on Criminal Procedure[2]. One case that had caused particular disquiet was the murder of Maxwell Confait in 1972, where three juveniles who were arrested and interviewed by police confessed to his murder and were subsequently convicted. However, an appeal quashed the convictions as unsafe. The subsequent enquiry by Sir Henry Fisher[3] concluded that the defendants had been subjected to unfair and leading questioning by the police, which affected the reliability of their confessions[4]. Public feeling about police conduct was expressed through a public survey on policing amongst Londoners at that time which showed that a significant percentage of the public felt that threats and unfair pressure during questioning were widespread and that the police fabricated evidence[5].

The worst possible confirmation of the concerns felt by both government and community came in two of the most significant appeals ever to come before the Court of Appeal[6]. The appeals concerned the convictions of two separate groups of individuals at two separate trials in 1975 following terrorist bombings committed a year earlier. In 1989 the appeal of the Guildford Four came before the Court of Appeal for the second time following an earlier unsuccessful appeal in 1977. Confessions allegedly made to the police during interviews had been central to the Guildford Four's convictions. The appeal, which followed years of campaigning in the public eye, proved that the confessions put forward by the police were unreliable and that four innocent people had spent over 14 years in jail for crimes they did not commit. This case was followed in 1991 by the acquittals on appeal of the Birmingham Six. Once again the confessions that had key factors in their convictions were shown to be unreliable and, in some cases, coerced. On this occasion six innocent men had spent 16 years in jail as a result. Gudjonsson[7] argues that these cases were the worst miscarriages of justice in Britain in the last century but, in all, lists 22 landmark Court of Appeal cases in Britain which revolve around disputed confessions, most of which

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[2] Williamson, T. (2006). Towards greater professionalism: Minimising miscarriages of justice. In T. Williamson (Ed.), *Investigative interviewing: Rights, research, regulation* (1st Ed.),(pp. 147-166). Cullompton: Willan.

[3] Fisher, S. H. (1977). *The Confait case: Report of an enquiry into the circumstances leading to the trial of three persons on charges arising from the death of Maxwell Confait.* London: HMSO.

[4] Fisher, *ibid*: Gudjonsson, G. H. (2003). *The Psychology of interrogations and confessions*. (2nd Ed.) Chichester: John Wiley and Sons Ltd.

[5] Smith, D. J. (1983). *A survey of Londoners.* (Rep. No. 1). London: Policy Studies Institute.

[6] Gudjonsson, G. H. (2003). *The Psychology of interrogations and confessions*. (2nd Ed.) Chichester: John Wiley and Sons Ltd.

[7] Gudjonsson, ibid, p439.

originate from this period.

The Royal Commission (Royal Commission on Criminal Procedures 1981) commissioned several academic studies to examine police interviews with suspects. The initial study conducted at a single police station over six months[8] represented the first time any police force in England and Wales had given unrestricted access to an independent researcher. This study revealed that a variety of manipulative and persuasive tactics were commonly used by police officers; these were: (i) pretending the police had more evidence than they actually had, (ii) pointing out the futility of denial and the 'benefits' of confession, and (iii) manipulating the suspect's self esteem. A second, larger study at four police stations[9] concluded that the interviewers were generally fair to the suspects. However, the study still identified the use of persuasion by police officers in 60% of the interviews, telling the suspects that the police had overwhelming evidence against them in 13% of the cases and bluffing about extra evidence in 15% of the cases, as well as minimising the seriousness of the offence in 6% of the cases.

The results of the Royal Commission led to the new legislation (PACE, 1984) that covered every part of the custodial process. The Act was designed to give detainees defined legal rights while in custody and ensure that future miscarriages resulting from police abuse of powers were prevented. Clauses within the act provided suspects with -

- A limit on police detention of 96 hours (reviewed periodically after 6 hours)
- Set rest periods and meals
- Free access to an independent legal advisor
- Right to be accompanied by legal advisor at interview
- All detention to be overseen by independent police officer
- Free access to medical practitioner

The Act, introduced as a direct result of concerns over the police techniques observed during the research studies introduced mandatory audio recording of all suspect interviews and provided the first legal definition for an interview with a suspect:

> *"The questioning of a person regarding his involvement or suspected involvement in a criminal offence which is required to be carried out under*

[8] Irving, B. (1980). Techniques of interrogation. *Legal Action Group Bulletin*, 1, 254-256.

[9] Softley, P., Brown, D., Forde, B., Mair, G., & Moxon, D. (1980). *Police interrogation : An observational study in four police stations.* London: HMSO.

caution" (PACE, 1984)

As a result of this legislation the United Kingdom became the first country in the world to mandate audio recording, and this change alone altered the whole nature of police interviews with suspects and influenced the two subsequent stages of evolution.

II. IMPLEMENTATION OF A NATIONAL TRAINING PROGRAMME

The mandatory recording of interviews with those suspected of crime allowed a comprehensive picture of police interviewing practices to be developed, and saw the start of and police officers working together on these issues. A large study of over 1000 interviews, with suspects for crimes ranging from minor theft to murder[10], found that in the majority of cases the officer's aim was to obtain a confession during the interview. This aim was based on the officers' pre-interview assumption of the suspects' guilt. Examination of the actual interviews conducted revealed that 42% of the suspects did confess but that the factors affecting the probability of confession were the strength of the evidence against the suspect, the seriousness of the offence and advice given by a solicitor. The interview skill of the officer was not a factor that affected the outcome of the interview. Further, regardless of the skill of the interviewer, few changed from their initial stance of denial.

Such studies confirmed that in the early 1990s, despite significant and very public miscarriages of justice associated with confession evidence, most police officers still operated under the belief that the suspects they were interviewing were guilty and, as a result, set out to prove it. Academics also observed[11] that the emphasis placed on the importance of confessions also reduced the effectiveness of the interview because officers ignored the opportunity to seek effective corroborative evidence.

III. FREQUENCY AND CAUSES OF FALSE CONFESSIONS

The emphasis placed by the police on confession evidence, and shared by other parts of the criminal justice system[12], needs to be put into perspective against the literature on the reliability of confessions made during police interviews. The problem

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[10] Moston, S., Stephenson, G. M., & Williamson, T. (1992). The effects of case characteristics on suspect behaviour during police questioning. *British Journal of Criminology*, 32, 23-39.

[11] Stephenson, G. M., & Moston, S. (1994). Police interrogation. *Psychology, Crime and Law, 1*, 151-157.

[12] Emson, B. (1999). Admissions. In B. Emson (Ed.), *Evidence* (pp. 183-217). Basingstoke: Macmillan Press Ltd.

of false confessions is widely recognised through individual examples (e.g. Birmingham Six, Guildford Four). However, the frequency of false confessions can only be estimated. Senior academics Kassin and Gudjonsson[13] recently highlighted 157 cases in the USA where DNA evidence has exonerated people who have confessed to the most serious of crimes. Kassin[14] further reports that estimates of false confessions in America range from 35 to 600 per year, a very small number when viewed against the number of interviews that are be conducted in America. Twelve per cent of convicted prisoners in a study of Icelandic prisoners claimed to have falsely confessed to police, either to protect somebody else or to escape police pressure[15]. Gudjonsson[16] also reports that the figures within the Icelandic study equate to a false confession rate of less than 1% for all police interviews. However, although the rate of false confession appears to be low, the effect of one wrongful conviction on both the individual and wider society is immense as it undermines trust in the criminal justice system.

Perhaps of greater relevance to this thesis than their frequency are the causes of false confessions as they relate to interviewing. Gudjonsson[17], who was involved in both the Guildford Four and Birmingham Six cases, showed that certain individuals, particularly those with reduced cognitive ability (i.e. a learning disability) were more suggestible than the general population and were particularly susceptible to questioning which is leading or confirmatory[18]. The danger of this situation is that this type of disability is not always obvious, particularly in borderline cases. Therefore, the risk of such people being arrested and subjected to leading questioning raises the chance of false confession that could lead to a miscarriage of justice. Gudjonsson[19] identified three distinct types of false confession made by those interviewed by the police. These were:

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[13] Kassin, S. M., & Gudjonsson, G. H. (2004). The psychology of confessions: A review of the literature and issues. *Psychological Science in the Public interest*, 5(2), 33-67.

[14] Kassin, S.M. (1997). The psychology of confession evidence. *American Psychologist*, 52, 222-233.

[15] Sigurdsson, J. F., & Gudjonsson, G. H. (1996). The relationship between types of claimed false confession made and the reasons why suspects confess to the police according to the Gudjonsson Confession Questionnaire. *Legal and Criminological Psychology*, 1, 259-269.

[16] Gudjonsson, G. H. (2003). *The Psychology of interrogations and confessions*. (2nd Ed.) Chichester: John Wiley and Sons Ltd.

[17] ibid.

[18] Clare, I. C. H., & Gudjonsson, G. H. (1993). Interrogative suggestibility, confabulation and acquiescence in people with mild learning disabilities (mental handicap): Implications for reliability during police interrogations. *British Journal of Clinical Psychology, 32*, 295-301.

[19] Gudjonsson, G. H. (2003). *The Psychology of interrogations and confessions*. (2nd Ed.) Chichester: John Wiley and Sons Ltd.

Coerced compliant confessions. This type of false confession does result from pressure during the interview. Rather than being voluntary it is brought about by the pressure exerted by the interviewers. The interviewee makes the confession due to a perceived immediate instrumental gain such as a belief that he or she will be released from custody. The suspect may have an awareness of the consequences of the confession but has rationalised that the short-term gains of the escape from intolerable pressure outweigh the less certain long- term consequences. The suspect may also believe that the 'truth will out' in the long run, either through natural justice or the efforts of their solicitor.

Coerced-internalized confessions. This type of false confession is where the suspect comes to believe during interrogation that they have committed the crime for which they are being interviewed even though they have no actual memory of committing it. This category can be divided into sub-categories: suspects who have no memory of committing the offence due to amnesia (or substance abuse induced amnesia), and suspects who commence the interview with a clear recollection that they did not commit the alleged offence but who gradually begin to distrust their memory due to the leading or suggestive nature of the interview.

Voluntary false confessions. This type of false confession is made without any external police pressure and often involves voluntary attendance at the police station, and can have any one of six causal factors. The first five[20] are a morbid desire for notoriety, feelings of guilt over previously unpunished wrongdoings, an inability to distinguish fact from fantasy, a desire to protect the real criminal, and the hope for leniency, and the sixth[21] is the desire to take revenge on another. Police interviewing does not directly affect this type of confession.

When reviewing the different types of false confession it is easy to make a connection to the increased chances of such an occurrence through poor interviewing and the interviewing environment itself.

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[20] Kassin, S.M., & Wrightsman, L.S. (1985). Confession Evidence. In S.M.Kassin and L.S. Wrightsman (Eds.), *The psychology of evidence and trial procedures (pp 67-94).* London: Sage. Cited in G.H. Gudjonsson (2003) *The psychology of interrogations and confessions* (2nd Ed). Chichester: Wiley.

[21] Gudjonsson, G. H. (2003). *The Psychology of interrogations and confessions*. (2nd Ed.) Chichester: John Wiley and Sons Ltd.

IV. LACK OF SKILL

As well as guilt bias being evidenced by academic research, a lack of skill in the approaches of interviewing officers was also found in the post-PACE era. A study[22] of interview tactics employed by police interviewers and found that the manipulative interrogators observed during the Royal Commission had largely vanished, only to be replaced by officers that lacked the necessary skill to question with suspects who did not confess at an early stage of the interview. This finding was corroborated in a major study[23] that examined over 600 interviews. Although 63% of the interviews were judged satisfactory, four general types of flaw were identified in the sample:

General ineptitude. This was characterised by a lack of interview planning. Even in straightforward cases there was no real structure to the interview and the officers appeared to lack both interview skills and the ability to communicate generally. The interviewers were nervous and lacked confidence.

Assumption of guilt. This was shown by leading and repetitive questioning and a general attitude of 3 towards the suspect from the outset of the interview. These interviews were also characterised by premature closure of the interview following a confession and the failure of the interviewer to seek corroborative detail.

Poor interview technique. This was evidenced by poor communication skills and failure to establish facts. Interviewers failed to listen to the replies given by suspects and frequently interrupted suspects' replies. Even with co-operative suspects the interviewers failed to establish the points to prove of the offence and became unsettled by hostile suspects or assertive third parties (solicitors or appropriate adults).

Undue pressure. This was defined as unfair and unprofessional questioning. There were two main approaches in this category, one where officers were aggressive towards suspects, and one where officers offered what appeared to be inducements to suspects. In both types of approach the practice of quoting the length of sentence the suspect might receive was frequently noted.

This same study also exploded the myth that interviews were lengthy, tense

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[22] Moston, S. & Engleberg, T. (1993). Police questioning techniques in tape recorded interviews with criminal suspects. *Policing and Society,* 3, 223-237.

[23] Baldwin, J. (1993). Police interview techniques. *The British Journal of Criminology, 33,* 325-352.

confrontations reporting that "most were short and surprisingly amiable discussions in which it seemed the officers were rather tentative in putting the allegations to a suspect"[24]. Furthermore, in only 20 out of the 600 interviews did the suspects alter their account during the course of the interview and only in nine of these cases was this felt to be attributable to the skill of the interviewer. A further study three years later[25] found a similar picture in their examination of 161 police interviews where suspects were only challenged over their account in 20% of interviews. Research therefore has consistently found that the most significant factor which affected whether a suspect confessed to a crime was the strength of the evidence presented to the suspect and not the skill of the interviewer[26].

V. THE END OF PERSUASIVE INTERVIEWING

The flaws in an interview strategy consisting of a confession-driven interrogation conducted by unskilled and untrained interviewers are summed up in one watershed case that finally ended persuasive interviewing in Britain: the Heron Case[27]. In October 1992 Thomas Heron, a 23 year old man confessed to the murder of a 7 year old girl during lengthy interviews conducted by senior detectives. The interviews were judged to be oppressive and were excluded by the trial judge. This led to Heron's acquittal. In this case the officers were criticised for misrepresenting the strength of the evidence against the suspect, specifically a description of a man seen with the victim shortly before she disappeared was 'overplayed'. The Court also disapproved of the officers' repeated assertions of Heron's guilt and suggestions that it was in his interests to confess.

The significance of the Heron case was that the false confessions in earlier cases such as the Birmingham Six and Guildford Four had been obtained through threats, violence and fabrication of interview notes when the suspects had no legal advisers present and the interviews were not audio or video recorded. The Heron interviews *were* tape-recorded and took place in the presence of a solicitor. As a result, the Heron judgement extended the definition of oppression to include tactics such as overstating evidence and emphasising the benefits of admitting the offence. While no-one could disagree with the verdict in Heron, part of the reason for the techniques employed by the interviewers could have been the lack of clear direction within PACE

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[24] Ibid, p331.

[25] Pearse, J. & Gudjonsson, G. H. (1996). Police interviewing techniques at two south London police stations. *Psychology, Crime and Law*, 3, 63-74.

[26] Baldwin, J. (1993). Police interview techniques. *The British Journal of Criminology, 33,* 325-352: Moston, S., Stephenson, G. M., & Williamson, T. (1992). The effects of case characteristics on suspect behaviour during police questioning. *British Journal of Criminology*, 32, 23-39:

[27] Clark, M. (1994). The end of an era. *Police Review,* 29th July, pp 22-24.

as to what techniques are permissible within an interview[28]. Even the judge in the Heron case had said that officers were not prohibited from being 'persistent, searching and robust' in their questions[29]. However, there appeared to be a fine line between what was permissible and what was not. It was accepted of course that physical violence was unacceptable but, for example swearing, or misleading a suspect were grey areas.

Despite generally criticising police officers' interview skills Baldwin acknowledged this point when he said:

> Interviewers are operating in a sea of uncertainty. It is not possible for them to know what sort of conduct, short of physical violence or intimidation, the courts would be prepared to tolerate[30] (p,345).

The short-sighted approach of the RCCP (1981), who did not feel it necessary to recommend what did represent acceptable tactics, was probably responsible for some ill-conceived techniques that sprung up in the period between PACE and the inception of a national interview model, as officers struggled to produce interviews under the increased stringency of new custody procedures. Due to the Royal Commission's oversight, it was left to the Court of Appeal to define parameters of acceptable behaviour within interviews with suspects. Of course the problem with this approach was that it was reactive and required a miscarriage of justice in order for the Lords to pass comment. The Court of Appeal frequently passed down judgements that defined which activities were not permissible in interview. Examples are: (i) the case of R v Blake (Criminal Law Review, 1991) in which the conviction was quashed after officers informed the suspect his voice had been recognised on a tape when it had not; (ii) R v Mason (CLR, 1988) in which the Law Lords made it clear that lying to a suspect as to the presence of his fingerprints was unacceptable. The judge in granting the appeal made it clear that the practice of such deception on a suspect was wholly unacceptable; and (iii) R v West, where an officer repeatedly interrupted a suspect during an interview, shouting at him and using an obscenity to indicate that the suspect

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[28] Brown, D. (1997). *PACE ten years on: A review of the research.* London: Home Office: Bull, R., & Cherryman, J. (1995). *Helping to identify skills gaps in specialist investigative interviewing: Enhancement of professional skills literature review*. London: Home Office: McKenzie, I. (1994). Regulating custodial interviews: A comparative study. *International Journal of the Sociology of Law,* 22, 239-259.

[29] Police (1994). Oppressive interviewing and how to avoid it. *Police,* 26, 30-31.

[30] Baldwin, J. (1993). Police interview techniques. *The British Journal of Criminology, 33, 325-352*

was lying[31]. This conviction was also quashed.

VI. EARLY APPROACHES TO TRAINING

With the benefit of hindsight it seems easy to suggest that the lack of training and guidance was the core problem faced by the police service and it is ironic that this issue was commented on by the 1981 Royal Commission but not addressed. It is worth emphasising once again that even at a time when the police service focused so heavily on the interviewing of or interrogating of suspects there was no consistent training investment in this skill and it was generally learnt by watching others[32] In the vacuum left by a lack of service- wide training there were individual efforts to change this position.

Walkley, a serving police officer in England did produce an interrogation manual [33] that was based on a best-selling book about American interrogation techniques[34]. The technique described by Inbau and partners is a 'persuasive' interview model that promotes confession by the suspect based on the interviewer's prior *assumption* of the suspect's guilt. The serious concerns with this technique[35] are: (i) trickery and deceit are a pillar of the method and make false confessions more likely, particularly from the vulnerable; (ii) the method is unethical because it includes lying to the suspect; (iii) the pressure used may leave suspects feeling aggrieved and may influence future contact with the police; (iv) bluffing to a suspect damages the credibility of the interviewing officer; (v) use of trickery and deceit in the interview context may encourage officers to lie at other times, and (vi) the method is heavily reliant on using nonverbal cues to deception in identifying a guilty suspect. Contrary to popular belief few people are skilled at this and most score little better than chance in detecting deception, as consistently supported by research findings[36]. It does not appear that Walkley's manual was widely adopted. The timing of publication, coming

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[31] National Crime Faculty. (1998). *A practical guide to investigative interviewing*. Bramshill, National Police Training College

[32] Norfolk, G. A. (1997). *Fit to be interviewed by the police*. Harrogate: Association of Police Surgeons

[33] Walkley, J. (1987). *Police interrogation: A handbook for investigators*. London: Police Review Publication

[34] Inbau, F. E., Reid, J.E., & Buckley, J.P. (1986). Criminal interrogation an confessions (3rd Ed.). Baltimore: Williams and Watkins

[35] Memon, A., Vrij, A., & Bull, R. (2003). *Psychology and Law: Truthfulness accuracy and credibility* (2nd Ed.) Chichester: John Wiley and Sons Ltd

[36] For example, DePaulo, B. M., & Pfeifer, R. L. (1986). On the job experience and skill at detecting deception. *Journal of Applied Social Psychology,16,* 249-267, and Köhnken, G. (1987). Training police officers to detect deceptive eyewitness statements. Does it work? *Social Behaviour,* 2, 1-17.

soon after the implementation of PACE and not long before the successful appeals of the Birmingham Six and Guildford Four, may have been the cause of this.

Other authorities[37] who promulgated 'conversation management' offered an alternative to Walkley They directly opposed the confession strategy approach with 'ethical interviewing'[38], which was based on an open minded, information gathering approach, requiring interviewers to:

Create an across relationship. This was achieved by posing questions, listening and responding appropriately and sharing equitable time with the interviewee, whether suspect or witness.

Make sense of the situation. This was achieved by monitoring oneself and others constantly, being mindful of the risky nature of person perception, the mechanics of conversation and the psychological pressures of the situation.

Make decisions prior to interview. This involved planning appropriately, identifying any extra information needed, and gathering that information. Also by identifying objectives for the interview, physically preparing for the interview, and mentally setting parameters for the initial question after rapport has been established.

Structure, manage and respond to the communication flow. This was achieved by applying the GEMAC principles (see below).

Shepherd's approach had been developed at the request of one UK police force after the implementation of PACE (1984) and was known as GEMAC, an acronym which stood for Greeting, Explanation, Mutual activity and Closure[39]. The greeting phase of the approach sent relationship messages of equality by establishing an agreed mode of address at the start of the interview. The explanation phase defined the

[37] Shepherd, E., & Kite, F. (1989). Teach 'em to talk. *Policing, 5,* 33-47.

[38] Shepherd, E. (1994). Only ethics will do. *Police Review*, 12th August, pp. 14-15.

[39] Shepherd, E., & Griffiths, A. (2013) Investigative Interviewing: The Conversation Management Approach (2nd Edition). Oxford University Press, Oxford.

working relationship at the outset of the interview, a concept borrowed from psychotherapy where resistant individuals were commonplace. Mutual activity referred to the monitoring and assertion elements of the main part of the interview where the interviewer would pay close attention to the account of the interviewee and probe the account offered systematically through productive questioning and active listening. The closure phase involved summarising the interviewee's account to check back on the detail provided. GEMAC summarised the effective steps that facilitated maximum disclosure from someone treated as an equal[40], and was at variance with traditional police culture, requiring a high level of self- and other awareness by interviewers. It was also intellectually demanding, requiring application of academic psychology.

The interview situation in England and Wales in 1990 could be described as three way split[41]. The majority of forces still used the traditional admission- based approach, consistent with a negative view of PACE and dominant interviewer behaviour. The ethos of Walkley, using 'lie signs' and 'buy signs' to detect deception and obtain confessions from the 'guilty', was apparent in this approach. A minority of forces used an ethical model promulgated by Shepherd through training programmes and other forces used an "impossible hybrid of both approaches" [42].

The overall situation regarding interviews with suspects by the early 1990s can be summed up as one where high profile cases had deeply affected confidence in the police due to flawed confession evidence, much of it originating from before PACE. This issue was acknowledged at the highest level of the police service -

> The conviction of an innocent person does not, and cannot ever, serve our cause. Publicity in high profile cases is having a serious effect on how we are regarded. And poor standards of interviewing are losing us cases that we ought to be winning. In most interviews the problem is not with the interviewee - it is with the interviewer[43] (p.30).

This position could not be allowed to continue and the Association of Chief Police Officers (ACPO) had to act. A working party was set up to improve the situation.

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[40] Shepherd, E. & Griffiths A., (2013) Ibid.

[41] Mortimer, A. (1994c). *Cognitive processes underlying police investigative interviewing behaviour.* Unpublished Phd thesis. University of Portsmouth

[42] ibid, p43-44.

[43] Crew, T. (1994). Bad interviewing lets guilty go free. *Police, 26,* 30-32

This led to the implementation of a national interview training programme for both suspect and witness interviews.

VII. THE IMPLEMENTATION OF PEACE

In March 1992, following a period of research and consultation, the ACPO working group and the Home Office published the principles of investigative interviewing[44] , which were distributed to all police forces. The publication of the principles was a declaration of commitment by ACPO on behalf of the police service and drew a line in the sand between the past and the future. The principles were to be applied to the interviewing of all victims, witnesses and suspects and stated: (i) that the role of investigative interviewing is to obtain accurate and reliable information from suspects, witnesses and victims in order to discover the truth about matters under police investigation; (ii) that investigative interviewing should be approached with an open mind. Information obtained from the person being interviewed should always be tested against what the interviewing officer already knows or what can reasonably be established; (iii) that when questioning anyone a police officer must act fairly in the circumstances of each individual case; (iv) that the police officer is not bound to accept the first answer given. Questioning is not unfair merely because it is persistent; (v) that even when the right of silence is exercised by a suspect the police still have a right to put questions; (vi) that when conducting an interview, police officers are free to ask questions in order to establish the truth; except for interviews with child victims of sexual offences or violent abuse which are to be used in criminal proceedings, they are not constrained by the rules applied to lawyers in court and (vii) that vulnerable people, whether victims, witnesses or suspects, must be treated with particular consideration at all times.

The publication of the principles represented a big risk for ACPO. The principles were a bold public statement and promised a cultural change within the police service in England and Wales. However, ACPO needed to translate the rhetoric into reality. If further miscarriages of justices were reported through the courts, and poor interviewing practice continued to be highlighted through recorded interviews with suspects it would only further tarnish the reputation of the police service.

The solution that was offered by ACPO was the PEACE interview training programme. This was a one week training course designed to train every officer in England and Wales of Inspector rank and below to interview both suspects and witnesses according to the principles of investigative interviewing. According to the Police Staff College briefing document PEACE was to steer officers away from psychological techniques focused on trickery and concentrate instead on three areas based on empirical research. These were: solid interviewing skills, communications

[44] ACPO (1992). *Principles of Investigative Interviewing* (HOC 22/1992). London: Home Office

skills and the effect of human memory on recall.

VIII. THE PEACE MODEL

PEACE is a mnemonic for the phases of the interview process: Planning and Preparation, Engage and Explain, Account, Closure, and Evaluation. The PEACE model has remained the bedrock of the overall ACPO interview strategy from 1992 to the present day. It also underpins the advanced suspect training course, and a comparison of the content of the PEACE interview course and advanced interview course is undertaken in chapter 2 of this thesis. This current section will explain each element of the original PEACE model as published in 1992, examine its underlying theory and then highlight developments in the course to the present day.

Figure 1.1 depicts the five phases of the PEACE interview model[45] which are then described. The PEACE model is depicted as a linear interview model that spans the process from before the interview (planning and preparation) until after the interview (evaluation). The three phases of the model which encompass the actual interview are also shown as connected by dotted lines which indicate that the interviewer should remain flexible and can move backwards and forwards between the phases as required. For example, if the interviewer gets to the closure part of an interview and the interviewee mentions some new information, then the interviewer can return to the account phase and question the interviewee about the information.

[45] National Crime Faculty. (1996). *A practical guide to investigative interviewing*. Bramshill, National Police Training College

P E A C E

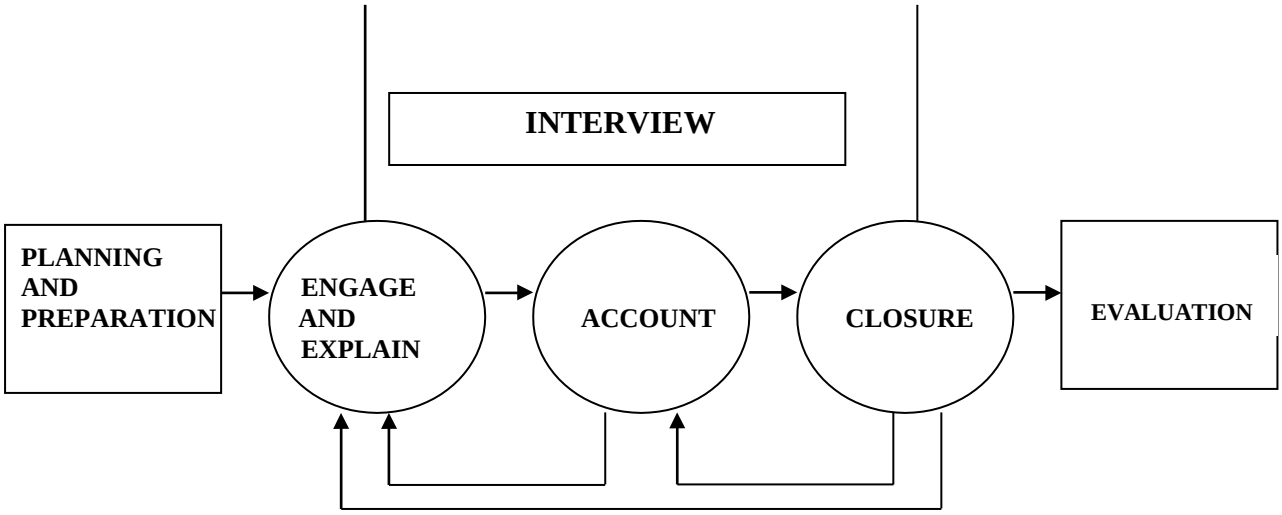

Figure 1.1 - The PEACE model (NCF, 1996, p.21)

Planning and Preparation (P) In this section planning was described as the mental process of getting ready to interview, while preparation was described as the administration of the interview such as the equipment and environment. In the mental process of planning officers were advised to think about the purpose of the interview, the objectives of the interview, the evidence to hand, the points to prove and defences of the offence(s) under investigation, and consider a flexible approach. Officers were given tips such as visiting the scene of the crime, speaking to the arresting officer, examining exhibits and making use of intelligence. In the preparation section officers were advised to check the interview room prior to use, to clear away old paperwork which may have been left lying around and to ensure they had all the necessary forms for the opening and closure of the interview.

Engage and Explain (E) In the 'engage' sub-section officers were given advice about the importance of a good first impression and how the opening of the interview was crucial to its success. The officers were reminded to be courteous to all interviewees. The importance of establishing a name preference to personalise the process, particularly with victims and witnesses, was emphasised. Specific reference to appropriate language was covered in the guide and officers were warned to avoid police jargon. In the 'explain' subsection officers were reminded to be flexible in their approach in order to avoid appearing wooden and impersonal. It was recommended that officers cover the reason for the interview, including the reason for arrest if the interviewee was a suspect, or the fact that the interviewee was understood to have witnessed an incident if a witness. The interviewer was also advised to explain the

routines that would be followed in the interview including any notes that would be taken, the introduction of any exhibits and the writing of any statement required. The guide also suggested that the interviewer give a basic outline of the interview including its estimated duration.

Account (A) This section of the guide was divided into two and dealt with the conversation management and cognitive approaches, advising officers that they had the choice of using either approach as they saw fit. If officers used the cognitive approach they were to use one, two or even three free recall attempts, including a change perspective recall before questioning the interviewee on relevant subjects. If officers used the conversation management approach, they were to obtain an initial account and then sub-divide this account into a number of sections in order to probe for further detail. The guide contained detailed advice about the two different approaches including the previously mentioned guidance on question types, particularly leading and negatively phrased questions. The officers were reminded to summarise the account of the interviewee and check their comprehension on what had been said through the use of such summaries. Specific guidance was given with regard to lies in the section concerned with suspects. This stated that where a suspect was believed to be telling lies, he or she should be allowed to continue and should not be challenged prematurely. When a challenge was made it should be made using evidence and in a positive and confident manner.

Closure (C) In the closure section the emphasis was on planning the closure of the interview so that both interviewer and interviewee had a clear understanding of what had taken place and what would happen after the interview. In particular, when dealing with witnesses and victims officers were advised to spend a considerable time closing the interview, reinforcing thanks for the effort made by the interviewee and the time spent being interviewed. Further advice was given in relation to victims, especially victims of sexual assault where it was advised to ensure the interviewee was supported at the end of the interview. The advice in terms of suspects was rather more circumspect and consisted of ensuring the legal rules for closing the interview were complied with and that the appropriate prompt card (which was included within the book) was used.

Evaluation (E) The evaluation phase was common to both suspect and witness interviews and consisted of three phases: firstly, evaluating the information obtained during the interview; secondly, re-evaluating the whole investigation in the light of the interview; and lastly, the interviewer evaluating their own performance across the interview process. Much of the evaluation was linked to the planning and preparation phase, where the interviewer was asked to consider whether they had achieved the objectives set prior to the interview and whether the information obtained during the interview altered the course of the overall investigation. In terms of self-evaluation, the guide asked the interviewer to be objective and to be analytical about their performance in all areas of the process, including asking a colleague or supervisor to be part of this process.

The PEACE course was designed as *experiential* learning; it was intended that students would spend time practising interviews in order to improve their practical skills rather than be simply lectured on the theories of interviewing. In line with this aim the project team developed a complete set of training materials as part of the course documentation. This consisted of a trainer's manual, witness and suspect interview exercises, a planning and preparation exercise and student briefing notes[46]. The overall design of the course was that the students were generally given a block session of theory relevant to either a compliant or resistant interviewee and then participated in practicals related to the theory. In the practicals one student would play the part of the interviewee while two others would play lead and second interviewer. The aim was that by the end of the course every student would have played the part of lead interviewer, second interviewer and interviewee. Students also gave peer feedback when they were not involved in the interview practicals.

IX. THE DEVELOPMENT OF PEACE

Although the PEACE interview course was designed centrally it was delivered locally (i.e. in individual training units across individual police forces). This led to differences in the way the PEACE course was taught across forces[47]. One consistent theme was that the five-day course emphasised suspect interviewing over witness interviewing with the majority of practice time spent on suspect interview role play. The historical context surrounding the implementation of PEACE, i.e. the miscarriages of justice associated to confession-driven interviews with suspects and the burgeoning legislation surrounding interviews with suspects, appears to be responsible for this. During a five-day PEACE course, usually two days were used to deliver the theory surrounding both the conversation management and cognitive interview models and three days were taken up with interview role plays of suspects (two days) and witnesses (one day). However, the general impact of the five-day course and the effect of changes in the law upon the students' performance are not easily quantified outside of the research studies that have been carried out, because the design of the five-day PEACE course did not contain any formal assessment process and no assessment was made of an officer's interviewing ability, either prior to or at the end of the course.

The national evaluation of PEACE[48] found that interviews with suspects had improved since the implementation PEACE but that further development was still necessary. The interviews examined did not show the general ineptitude found in

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[46] Clarke, C. (2005). *A national evaluation of PEACE investigative interviewing.* Unpublished PhD thesis: University of Portsmouth

[47] Clarke, C., & Milne, R. (2001). *National evaluation of the PEACE investigative interviewing course* (Rep. No. PRAS/149). London: Police Research Award scheme

[48] Clarke, C., & Milne, R. (2001). *National evaluation of the PEACE investigative interviewing course* (Rep. No. PRAS/149). London: Police Research Award scheme

earlier but the major improvements were in the legal compliance aspects of the interview. Improvements were still required in officers' communication skills. Of course, it is the skilled use of questions that will produce more reliable information from interviewees. Therefore, it appears that the real value of the original PEACE interview model has been as a safety net to prevent further miscarriages of justice in relation to interviews with suspects.

It is highly significant that of the list of 22 landmark false confession cases[49] not one has occurred since the implementation of PEACE in 1992. While it is true that the majority of these landmark cases also occurred before PACE (1984) there were still miscarriages of justice due to interviewing between 1986 and 1992 (e.g. R v Miller 1990).

X. THIRD STAGE OF EVOLUTION

The main criticism of PEACE as an effective interview model is that it was devised as a 'one size fits all' training course for officers regardless of their skill or experience, or of the crime under investigation. As a result, in the years after PEACE was implemented, some forces sought to offer a higher level of training and quickly developed advanced interview courses for detectives involved in major crime[50]. This training focused initially on the interviewing of suspects and consisted of a more intensive training course open only to selected detective officers.

The main differences between the PEACE course and the advanced course are the training delivery and the assessment regime. The advanced course was three weeks long (15 days) and dealt solely with suspect interviews. The trainers were detective officers who specialised in training interview skills (they were also qualified PEACE trainers) and did not teach other subjects. They combined their training role with an operational role, which meant they were training skills that they used regularly and they had current operational experience of serious crime interviews with suspects. This credibility appeared to be important to both trainers and students. The content of the advanced course focused on serious crime (e.g. rape and murder) whereas the PEACE course dealt with volume crime (e.g. theft, minor assault and burglary). Patrol officers were not eligible for the course, since officers had to successfully complete detective training and pass an assessment to gain a place. The assessment consisted of a

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[49] Gudjonsson, G. H. (2003). *The Psychology of interrogations and confessions*. (2nd Ed.) Chichester: John Wiley and Sons Ltd. (p.439)

[50] Griffiths, A., & Milne, R. (2005). Will it all end in tiers? In T. Williamson (Ed.), *Investigative Interviewing; Research rights and regulation* (pp167-189). Cullompton: Willan

simulated interview with a suspect, which evaluated the officer's interview skills. The officer was required to plan, prepare and conduct a PEACE interview with a suspect for an offence such as theft, assault or deception (see materials, later in this chapter). Assessors used a range of PEACE criteria from the individual elements of the PEACE model to mark an officer's performance, concentrating on structure and communication skills. The officer was required to reach a particular standard in order to gain a place on the advanced interview course. The detectives were motivated to apply for this process due to a policy change within the force, which was that only qualified advanced-trained officers would be permitted to interview suspects in cases of murder and rape. The development of the course and the policy change were part of an overall strategy to improve the standard of investigative interviews within the force.

The advanced course divided the PEACE model into sections with individual lessons on each part. The teaching approach on the advanced interview course was in contrast with the basic PEACE course, which delivered the theory in one block, followed by role-play interviews where officers conducted one whole interview themselves and also watched several others. Arguably the advanced course design was more in keeping with the theory of experiential learning[51] (Kolb, 1984) because it allowed the students to develop their skills using a building block approach which included multiple practice and feedback sessions. One theory session, for example the engage and explain elements involved in the introduction, preceded role-play practice for each officer in this one area. This pattern was repeated until officers built up their skill level for all elements. When the officers did conduct a complete interview they were tasked to use feedback they had received in earlier sessions to enhance their performance.

The general similarity between the subject matter of the PEACE course and the advanced interview course, as can be seen in Table 2.1, does make a direct comparison of the skills of advanced-trained officers and PEACE-trained officers possible.

Table 2.1 - *Comparison of PEACE and advanced interview course*

[51] Kolb,

factors

	PEACE	Advanced interview
Duration	One week (five days)*	Three weeks (15 days)
Attendees	All officers	Detectives only
Subject	Suspect/witness	Suspect only
Crime type	All**	Serious crime only
Training staff	General police trainers	Dedicated trainers
Pass/fail	No entry/exit criteria	Entry and exit test
Role players	Other officers	Actors
Materials	Centrally provided	Locally written course

* Average of three days spent covering suspect interviews

**Although the PEACE model covered all crime types, the scenarios provided for mock interviews on the course all relate to volume crime

In addition to sessions focused directly on the constituent elements of the PEACE model, the timetable included lessons on questioning, suggestibility, resistance and miscarriages of justice. A session on objective self-assessment was also included in the timetable, and time was devoted to communication skills with listening tests linked to sessions on confirmation bias.

Over the duration of the course the officers conducted a minimum of five role-play interviews. Instead of solely using police trainers, the advanced course also involved outside experts, i.e. a psychologist and a lawyer. The former delivered a non-police perspective on psychological issues associated with interviewing and the latter offered a defence perspective on police tactics and their effectiveness. The last four days of the course saw each officer conduct a simulated interview with an actor playing the part of a suspect in a serious case (see the post-training interviews description later in this chapter). Officers who passed the course were then effectively licensed to interview suspects for the most serious criminal cases.

It is important to clarify that advanced interviewing is not a new model of interviewing. It is a further development of the PEACE model that uses a longer training course to teach the theory underpinning PEACE and to introduce new skills to enhance effective use of the model. It can be compared in much the same way as an advanced driving course can be compared to a basic driving course. The same elements are recognisable within advanced driving and basic driving, such as the coordination of accelerator and clutch to change gear but the advanced course develops the basic elements and adds new skills to take driving to a higher level, e.g. simultaneous braking and accelerating to generate maximum speed and stability through a bend. Advanced driving is also more applicable to certain situations – it may not be needed simply to drive to the shops! In a similar way, the advanced interviewing course tailors the PEACE structure towards the interviewing of suspects in serious crime cases. The selection process identifies those officers with the *potential* to be advanced interviewers. The advanced course then develops the officers' knowledge of the underpinning theory of each part of the model in order to improve their practical application of the skills required for the interview process. A system of multiple role-play practices linked to feedback is used to embed these skills, and a final pass/fail assessment at the end of the training course is used to test ability prior to real life deployment.

A evaluation of one of the first advanced suspect interview courses[52] showed that the training significantly improved officers' interview skills and transferred successfully from training to the workplace, but that over time some of the more complex skills acquired through training diminished.

The successful development of the earlier advanced training courses led to adoption of the model as national policy. By 2002, a decade after the initial PEACE model was implemented senior police leadership in the United Kingdom had adopted a tiered model where the advanced training sat above foundation training with operational deployment to the most serious crimes restricted to those with advanced training. With this system firmly established senior officers focused on witness interviewing and followed a similar model where academic research was used to highlight both the deficiencies of current approaches and to provide solutions. This approach was supported by new legislation that recognised the needs of vulnerable people and mandated certain processes to assist such people coming into the criminal justice system. This third stage of the evolution is ongoing with regular developments designed to improve the quality and reliability of criminal justice interviews.

This paper has adopted a chronological approach to catalogue the major developments in police interviewing in the United Kingdom. The timeline over three

[52] Griffiths, A. (2008). An examination into the efficacy of police advanced investigative interviewing. Unpublished PhD thesis. University of Portsmouth.

phases shows how police interviews have developed from unscientific, confession based interrogations conducted by untrained officers to professional interviews. Police interviews with suspects are now conducted transparently, with each one being recorded, and conducted by trained officers. The ethos is that the more serious the crime, the higher the level of training. This approach has naturally extended into witness interviews, following the logic that you cannot conduct effective suspect interviews without reliable witness information. The interview process in the UK now seeks to gain reliable information from both suspects and witnesses in order that a court may adjudicate matters properly and fairly.

Chapter 7 Will it all end in tiers? Police interviews with suspects in Britain[1]

Andy Griffiths and Rebecca Milne[2]

I. INTRODUCTION

The interviewing of witnesses and suspects is a core function of policing across the world. In Britain, historically there was no formal interview training for police officers and officers learnt from watching others (Moston and Engleberg 1993; Norfolk 1997). The concept of training officers to interview witnesses was unheard of, confessions obtained from interviews with suspects were seen as the best evidence of guilt and 'good' interviewers were those who could persuade suspects to confess to crimes. In 1992, the Association of Chief Police Officers for England and Wales published the first national training programme for interviewing. This was designed to train police officers to interview both witnesses and suspects (Central Planning and Training Unit, 1992). It was known as the PEACE interview model (see p. 172). A decade later an updated five-tier interview strategy is in the process of being implemented as the latest step in the evolution of police interviewing within the UK. The strategy has built upon the foundation laid down by the PEACE model. It has developed the original single model into a more comprehensive approach drawn from academic research in the subject and fresh developments in the criminal justice system. The new approach is designed to cater for officers at different stages of their careers and for dealing with different types of crimes. Tier one is an introduction to interviewing for new police officers, probationers or police recruits. Tier two is a development of this and is aimed at more experienced officers engaged in dealing with everyday crime such as theft and assault (similar to the original PEACE course). Tier three is designed to equip officers to deal with complex and serious crime and is an umbrella term encompassing separate courses for interviewing 1) suspects (see later for a full description); 2) witnesses (the enhanced cognitive interview: see Milne and Bull 1999 for a full description); and 3) witnesses who may be vulnerable or intimidated (Youth Justice and Criminal Evidence Act 1999; Home Office and Department of Health 2001). Tier four deals with monitoring and supervision of the quality of

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[1] The term 'Britain' or 'British' has been used throughout the chapter for ease of reading. However, it should be noted that England and Wales have different laws from Scotland and Northern Ireland. Comments about historical cases relate to England and Wales only. However, police forces within Scotland and Northern Ireland are adopting the five-tier strategy and so comments regarding the development of interviewing are relevant to all four countries.

[2] Griffiths, A., & Milne, R. (2005). *Will it all end in tiers?* In T. Williamson (Ed.), Investigative Interviewing; Research rights and regulation (pp167-189). Cullompton: Willan.

interviews and tier five introduces the role of the interview coordinator for complex and serious crime. This chapter is concerned with what is now known as tier three suspect interviewing but what was previously described as 'advanced' interviewing.

Most of the identified problems with police interviews prior to PEACE were due to miscarriages of justice linked to false confessions. Although subsequent legislative changes (for example, the mandatory audio tape recording of all interviews with suspects and the right for a suspect to have a legal representative present) should prevent a repetition of these cases, they caused significant damage to the reputation of the police. The modern transparency of the suspect interview process has seen attention switched more recently to the evidence of key *witnesses* in major criminal trials and how the police conduct these interviews and present the evidence from them. Witness interviewing had not received this level of public scrutiny previously because it had not resulted in dramatic acquittals but the steady growth of research targeted at this area and certain key cases such as the murder of a young boy in London where the evidence of a key witness was discredited (Laville 2002; Tendler 2002) have raised the awareness of problems in this area in much the same way as interviewing of suspects prior to 1992 (see Bull and Milne 2004 for a review).

The history of interviewing in England and Wales shows that interviewing needs to be both effective and ethical. This is especially true in the investigation of serious crime because of the implications of wrongdoing. This chapter concentrates on interviews with suspects and initially provides a brief summary of that recent history. It then traces the birth of advanced interviewing from the original PEACE model and outlines the key differences between the two. Finally, the chapter describes a study undertaken to evaluate the effectiveness of advanced interviewing and presents the preliminary results from this empirical research. The chapter culminates with a discussion on how interviewing will progress.

II. A RECENT HISTORY OF POLICE INTERVIEWS WITH SUSPECTS

Prior to 1984 police interviews in England and Wales were governed by Judges' Rules. These 'rules' were merely administrative guidance that originated in the early part of the twentieth century. Officers were permitted to conduct interviews unrecorded and then to write an account of the interview from memory. The officer's recollection of the interview was then presented in court from the notes. Disquiet over this approach began to grow in the late 1970s.

A small research study conducted as part of the Royal Commission on

Criminal Procedure (1981) observed sixty interviews with suspects at one police station in England. The observers reported a large number of persuasive and manipulative tactics used by interviewers to obtain confessions (Irving and Hilgendorf 1980). The full commission report resulted in the government passing the Police and Criminal Evidence Act 1984 (PACE). This Act made significant changes to the detention and treatment of those suspected of criminal offences in England and Wales. It introduced the right to have a legal adviser present throughout the interview process and phased in the mandatory audio recording of interviews with suspects held in police stations. The existence of a permanent and accurate record of an interview exposed frequent failings in police interviews. The changes brought about by PACE also allowed researchers a window into the interview room. As a result a plethora of work examining police interviewing practices began. For the first time people other than the police officer and the suspect could hear an accurate record of the interview. The resultant research confirmed that police interviews were in need of revision but not just in the areas identified by the Royal commission (Moston *et al*. 1992; Baldwin 1993; Mortimer 1994a, 1994b; Pearse and Gudjonsson 1996). Baldwin's study of 400 interviews found interviewers who were 'nervous and ill at ease'. Officers were also found to have an accusatory mindset when interviewing. For example, one study examined 1,000 interviews and found the overwhelming aim of the interviewers to be securing a confession (Moston *et al*. 1992). Officers were also seen to be using coercive techniques that were consistent with unethical American interview styles (e.g. *Criminal Interrogation and Confessions*, Inbau *et al*. 1986; see Mortimer 1994a for a summary of this approach). The later case of *Heron* (see below) highlighted the fact that confessions elicited through this style of interviewing would not be admitted in a court of law in England and Wales. Yet, where confessions did occur other research found this had little to do with the skill of the officer but rather factors such as the strength of the evidence (Moston *et al*. 1992; Baldwin 1993; Stephenson and Moston 1994; Pearse and Gudjonsson 1996).

Around the same time as this research was being conducted a series of miscarriages of justice attributable to false confessions began to appear. In October 1989 a group of terrorist suspects, known as the 'Guildford Four' who had been convicted of some of the worst bombings committed on mainland Britain in modern times, were acquitted on appeal. The confessions that had been central pillars of their convictions in 1975 were shown to be unreliable and, in some cases, fabricated. The group had spent years in jail as a result. In 1991, in a separate case, six suspects convicted of other terrorist bombings (the Birmingham Six) were released when confession evidence that had secured their convictions in 1974 was also discredited (Gudjonsson 2003). In 1993, Thomas Heron, who was on trial for the murder of a young girl, was acquitted when the interviews which led to his confession were dismissed by the trial judge as 'oppressive'. Unlike the Guildford Four and Birmingham Six where the interviews were not tape recorded (having taken place before this was a legislative requirement), the *Heron* interviews *were* tape recorded. Also, whereas the terrorist suspects alleged that threats and violence were used to extract their confessions, Heron's confession was obtained by tactics such as overstating evidence and emphasizing the benefits of admitting the offence. The judgment extended the definition of oppression to include these

manipulative tactics as well as overt violence. The *Heron* case has been described as a watershed in police interviewing which marked the end of persuasive interview techniques in England and Wales (Clarke 1994). The successful appeals of the Guildford Four and Birmingham Six and the acquittal of Heron received widespread publicity and brought heavy criticism of the police and affected public opinion. A contemporary survey of the general public reported that 73 per cent of the participants believed that the police broke the rules to obtain convictions (Williamson 1991). By 1993 police interviews were described as a grave concern (Shepherd 1993). More recent statistics show acquittal rates at trial rising to an all time high of 43 per cent by 2001 (Robbins 2001). One of the reasons put forward for this poor interviewing was the absence of officially approved interview techniques and a lack of standardized training.

As a consequence of this situation, the Association of Chief Police Officers acted. The result was the development of the seven principles of investigative interviewing (see Milne and Bull 1999 and Chapter 8, this volume) and a national model for investigative interviewing known as PEACE (also Chapter 8, this volume, and below). The intention was to train every officer in England and Wales of inspector rank and below. In accordance a huge training operation was initiated over the next five years. The most recent evaluation of PEACE found that interviews with suspects had improved since its inception but that further development was still necessary (Clarke and Milne 2001). Nevertheless, PEACE was a significant step forward and an attempt to end miscarriages of justice. It was devised as a 'one size fits all' training course for officers regardless of skill, experience or the offence under investigation.

III. TIER 3: ADVANCED SUSPECT INTERVIEW TRAINING

In the period before the implementation of PEACE individual police forces in Britain had responded to the criticism of the judiciary and academics by seeking to develop their own interview techniques in the absence of national guidance. The development of advanced interviewing has replicated that pattern. In the years following the implementation of PEACE certain forces recognized that the 'one size fits all' model was not sufficient to cater for all needs. In particular, serious crime demanded a higher level of interview technique that was both ethical and effective if convictions were to be obtained. PEACE fulfilled an important role in limiting oppressive interviews but there was still a need to develop further effective interview techniques.

This led, specifically, to the development of the concept of 'advanced interview' training for detectives investigating serious crime in certain forces. During the same period defence legal advisers improved their own training that in turn created a further need for increased professionalism by investigating officers. Added to this, legislative changes encompassed within the Criminal Justice and

Public Order Act 1995 also made the subject of interviewing more complex for both officers and legal advisers. For example, this act introduced a change to the right of silence in that if a suspect failed to account for certain evidence at the time of interview a court may be allowed to draw an inference of guilt from this silence.

After this period of unilateral development of advanced interviewing by some police forces and in the light of the research examining the 'effectiveness' of PEACE training (Clarke and Milne 2001), the National Investigative Interview Strategic Steering Group representing ACPO decided to review the level of police interview training. After national consultation the original PEACE model was further developed into the current five-tier strategy outlined previously. As a result what started as 'advanced interviewing' is now more accurately referred to as 'specialist interviewing'.

IV. COMPARISON OF COURSE CONTENT: PEACE AND ADVANCED TRAINING

The original PEACE interview course lasted one week. It was designed to teach officers to interview both witnesses and suspects. The content was a combination of theoretical input and practical application achieved through role-play interviews between students. The PEACE model of interviewing puts forward a five-stage approach to all interviews. A summary of each stage as applied to suspect interviews appears below:

- *Planning and preparation* deals with both the legal and logistical issues of interview preparation. Under 'legal' an officer would prepare an interview plan encompassing the points to prove and defences to an offence plus the subject areas to be covered in the interview. Logistical considerations would include preparing the interview room, assembling equipment and arranging the attendance of other professionals.

- *Engage and explain* covers the opening phase of an interview. It ensures that legal requirements, such as reiterating the detainee's right to legal advice, are covered and also deals with explaining the interview process to the suspect.

- *Account and clarification* covers the obtaining of a suspect's account of the incident. This includes an initial or first account followed by more in-depth probing of areas from that account plus areas identified by the interviewer's preparation as relevant. If the account obtained identifies discrepancies with other evidence this culminates in 'clarification' or 'challenge' using that evidence.

- *Closure* deals with the end phase of the interview. There are legal

requirements in the closing of an interview as there are at the start. It also includes explanations to the suspect of what may happen after the interview.

• *Evaluation* is a post-interview phase defined as assessing the information obtained in the interview *and* the interviewer's own performance within the interview. This is with a view to future development.

The advanced interview course is three weeks long and aims to train students to interview suspects for the most serious of offences, including murder. The advanced interview course combines theory and practice but the amount of each completed over a three-week period is naturally much higher than the one-week course. There is a higher balance of theoretical input in the early part of the course but this alters as the course progresses and the students focus heavily on interview practicals where peer feedback is used to assist development. The skills taught build upon those underpinning the PEACE course. Therefore, there is no conflict between this type of course and the PEACE model which remains the bedrock of British police interviewing. Rather, the advanced course is a development of the PEACE model and aims to further students' knowledge of questioning, interview planning and legal matters associated with interviewing. A major difference is that instead of focusing on crimes such as theft and minor assault which were the basis of the PEACE course, the students concentrate on interviews for crimes such as murder, rape and serious assault.

One major difference between the PEACE course and the advanced course is assessment. The PEACE course has no access test to gain entry to the course. Neither does it conclude with a formal assessed interview. The 'advanced' course has both. Prior to attending the course candidates will conduct an assessed role-play interview on a case such as theft or minor assault. If successful they attend the course where, at the end, they have to plan, prepare and conduct a role-play interview for an offence such as rape or serious assault. This interview is assessed against set criteria. Only when successful are officers permitted to interview suspects for the most serious of cases. Each part of the PEACE model is dealt with in more detail. During sessions concerning 'preparation and planning', methods of analyzing information are discussed and practised. Officers are trained to focus on setting objectives for each interview and ensuring they are achieved. Interview planning has been significantly affected by the most important legal changes of recent years mentioned previously is the amendment to a suspect's right to silence. This is where suspects still have the right to refuse to answer questions but if they then give an explanation at court the honesty of this may be questioned. This has had the effect of making the amount of information made available to the suspect prior to interview critical. Legal advisers in England and Wales are entitled to certain information prior to interview but officers have discretion as to what information to disclose beyond this. The decision over which information to disclose and what to withhold has become pivotal to a successful interview.

'Engage and explain' as taught on the one-week course is a functional process. Officers read from a prompt card to ensure they cover all legal requirements. On the advanced course building rapport with suspects within the legal constraints is deemed crucial to conducting an effective interview. A significant amount of time is spent within the first week of the course explaining the importance of rapport and encouraging officers to develop their own style. The students are also taught to cover all necessary legal issues without the use of cue or prompt cards. Students are encouraged to dispel cultural assumptions of guilt as such assumptions produce biased questioning designed to establish guilt as opposed to an account (Moston *et al*. 1992; Mortimer 1994a). Having dealt with the preparatory and introductory phases in the first few days of the course the students move on to the 'account' phase of the interview. Training in the 'account' stage encompasses the need to structure the obtaining of information from a suspect and the use of appropriate questioning techniques in order that the information obtained is reliable and accurate. A large amount of time is spent on this phase developing the officers' ability to obtain and probe a suspect's account using productive questioning techniques. This skill forms a key area of development for most officers. This extends to the clarification or challenge phase. Students are taught not to be judgemental or inappropriate when putting evidence that contradicts a suspect's account even where it seems obvious that the suspect is lying. The 'evaluation' of the interview is addressed by introducing students to models of feedback and assessing their ability both to assess themselves and to deliver objective feedback to their peers. The assessment of the post interview product is also addressed in great detail. Students analyze the answers given to their detailed questions in order to identify inconsistencies in a suspect's account.

V. DOES ADVANCED TRAINING WORK?

The advanced interview course represents an intensive investment in individual officers and so the key question is 'does it work?' Over the last three years Griffiths and Milne have been conducting research examining this very question. Fifty students who have successfully completed the course have agreed to participate in the study. Data collection for the study is complete but what follows is a discussion of preliminary findings based on a sample of 15 of the advanced interviewers (60 interviews). The purpose of the research is to establish:

- whether students who complete the course improve as interviewers;
- if they do improve in what ways they demonstrate this improvement; and
- whether these improvements transfer to the workplace and persist over time.

Audio tapes of four interviews by each of the officers have been collected. These have been marked against a set of criteria that was developed from a scale

used by Clarke and Milne (2001). Individual elements of the interview process are broken down into 120 criteria. Examples include compliance with legal requirements at the start and finish of the interview plus behaviours such as rapport building and summarizing the interviewee's account at periodic points within the interview. The use of questions by the interviewers is the subject of a specific range of criteria. Eight different categories of question (open, probing, appropriate closed, inappropriate closed, leading, multiple, forced choice and opinion/statement) are evaluated in each interview by the use of the Griffiths Question Map (GQM). This tracks the chronology of question usage to identify the most productive strategies. Improved ability in this area is critical in establishing whether advanced interviewers have succeeded in moving away from the 'confession'-based approach criticized by both courts and psychologists to a more open-minded approach based upon obtaining an account from a suspect. The criteria are either scored on a yes/no basis for simple criteria such as 'gave time and date' or a five- point Likert scale for more complex criteria such as 'development of rapport'. In this scale '1' represents very poor and '5' excellent. The first two interviews collected are the role-play interviews conducted by the student to gain access to the course (interview A) and the assessed interview at the end of the course (interview B). The third interview is an interview conducted with a real suspect shortly after the student's graduation from the course (interview C). The fourth and final interview is another real-life interview conducted up to one year later (interview D). Interviews C and D (real life) concern interviews for crimes such as rape and murder. Offences carrying life imprisonment as a maximum penalty make up 75 per cent of this part of the sample. (A separate control of 30 interviews conducted by PEACE-trained officers has also been collected and scored against identical criteria.) The discussion below concerns the sample of advanced trained interviewers.

Figure 9.1 shows the comparative results across the sample of 15 detective officers in terms of their overall performance in four assessed interviews (60 interviews). Interview A is the role-play interview that officers conduct to gain access to the course. The average performance of the sample in this interview is assessed as 2.25. The marking guide for the scale suggests '3' as PEACE standard and so this result indicates a poor overall standard. This is especially true when one considers that the figure represents only successful applicants for the course. This result is significant because officers have time to prepare for the assessment and attend as volunteers seeking access to the course. Interview B, the final assessed interview undertaken at the conclusion of the training course, shows there is a significant improvement in the overall standard of interviews conducted across this group. The mean score of the group is 4.1. This is classified as 'skilful' within the marking guide. This score is achieved under similar test pressure as the first interview in that the officers have

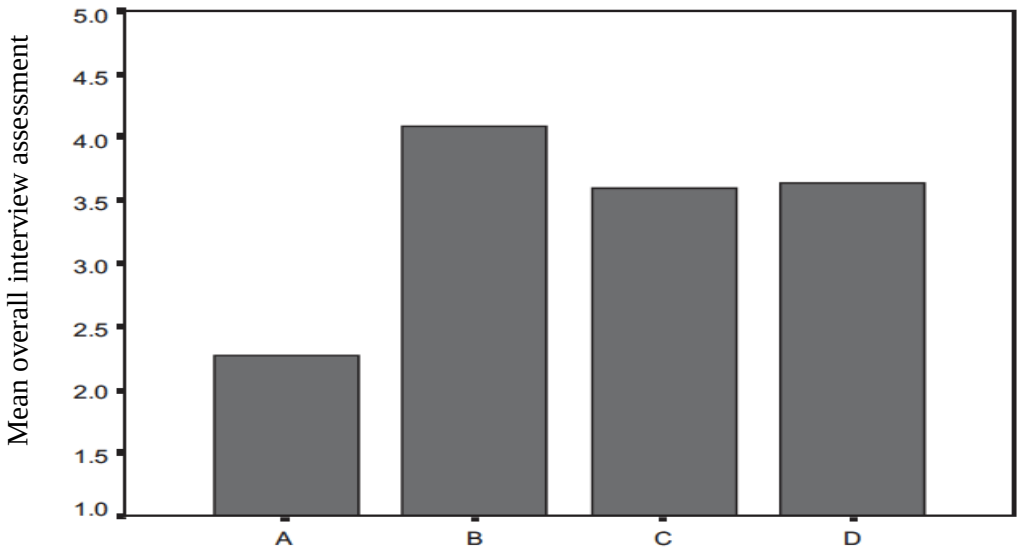

Figure 9.1 The overall interview assessment

to pass the interview to graduate from the course. However, the interview concerns a more complex offence than the entry test and so the level of performance achieved clearly shows that the officers' skills have developed as a result of the intensive training. As before the figure only shows officers who successfully complete the course. The interviews conducted after return to the workplace C and D show some erosion in overall skill but still demonstrate a higher level of skill than *prior* to training. This erosion could be accounted for by the fact that the interviews assessed are 'real' and not simulated or the fact that they take place under 'real' conditions. For example, some of the interviews collected take place late at night when officers have been on duty for an extended period. The most telling comparison is the difference between the last interview (D) and the first interview (A). This indicates that even after some time has elapsed there is an appreciable improvement in the overall level of skills displayed by the sample since they were assessed before the course.

Figure 9.2 shows mean scores for the same sample but focuses on one criterion; the ability to deliver the caution or right to silence. This is the conditional caution referred to earlier. The wording of this caution is: 'You are not obliged to say anything. But it may harm your defence if you do not mention when questioned something you later rely on in court. Anything you do say may be given in evidence.'

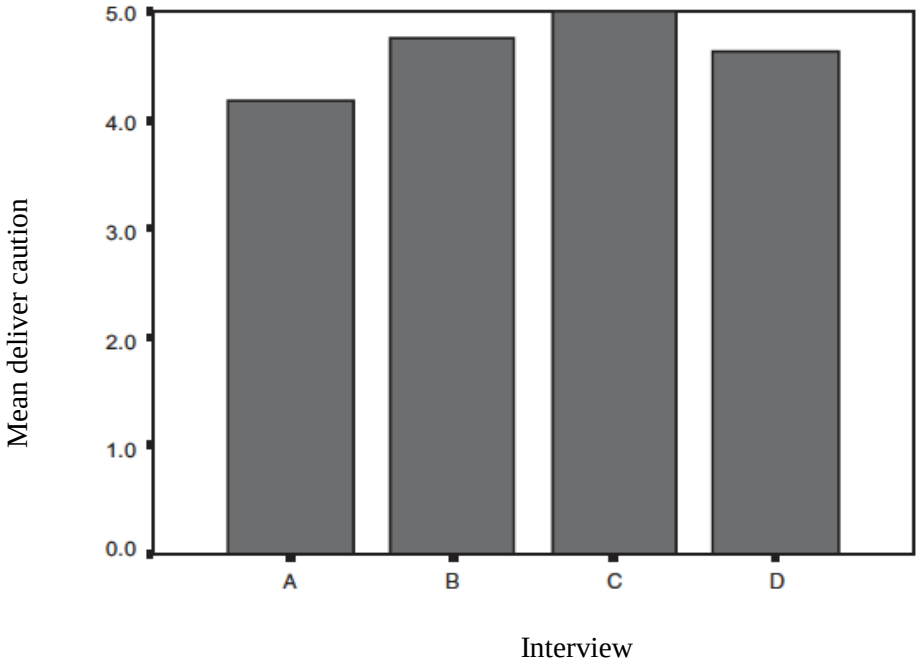

Figure 9.2 Assessment of the delivery of the caution

Whilst many officers read the words from a card advanced interviewers are expected to deliver the caution without prompts. The cue cards are removed from the interview room for the assessment interviews (A and B). The criterion is assessed on the officer's ability to deliver the caution word perfect at an appropriate pace. The results from the sample show that even prior to training, competence in this area was high with an average score of 4.2. The level of performance for this criterion is preserved over time with a mean score of 4.6 for the last interview (D). The ability to quote the caution verbatim is important because the wording is a legal requirement and could result in a case being lost if given incorrectly. It is also a simple area to assess because it is easy for an assessor to spot errors in the words used. Other criteria (for example, structure of topics) present greater problems because there is a greater subjective element to evaluating this skill. The delivery of the caution improves to a high standard after training and remains at this level in the first workplace interview. However, it is worthy of note that the overall difference between the mean performance of the sample prior to training and after is less than one point on the scale.

Figure 9.3 represents a more complex skill. This is the explanation of the caution or right to silence. When this caution was introduced in 1995 it was more complicated than the previous version. The law (PACE 1984) also required that officers ensured that a suspect understood this fundamental human right. Guidance was issued to officers and the first interview (A) scores indicate that officers explained the right to an acceptable standard prior to extra training. However, it should be noted that any of the criteria within the introductory phase of the

interview can be practised as an officer knows they will arise during every interview. Therefore the respectable mean score of 3.8 might not be a realistic portrayal of officers' practical ability but rather their preparation for the test. When assessing the performance of the sample against this criteria it can be seen that there appears to be a greater improvement after training than in the simpler 'delivery of the caution criterion' but also a more marked decline in the skill level displayed after return to the workplace (C and D). The ability to explain this important legal point in clear, concise language is seen as important in building trust and rapport with a suspect. Whereas the caution itself has one form of words the explanation of it can be approached in several ways and it may be this factor which produces the difference in performance over time. Listening to the audio tapes shows certain officers cutting down the explanation in interview D. This may be the result of them making their own decisions as to the importance of the explanation or experimenting with different ways to explain it but omitting key elements.

Figure 9.4 shows one of the most complex criteria. This concerns an officer's ability to structure the areas of the interview. This is critical in conducting skilful interviews. They can be rehearsed and are the same during every interview. The topics, or subjects, discussed are different in every interview and impossible to rehearse like the introductions or legal elements. Therefore the officer's ability to cover the relevant subjects in the appropriate sequence is tested on every occasion. The aim is to produce an interview that closely examines the key evidence and does not waste time probing irrelevancies. The ability to do this becomes more difficult the longer an interview lasts and the more complicated the subject matter. The interviews assessed in the study vary in length from 32 minutes to over 4 hours. Interview A lasts no longer than 45 minutes and concerns simple crimes. However, officers' ability to structure these interviews

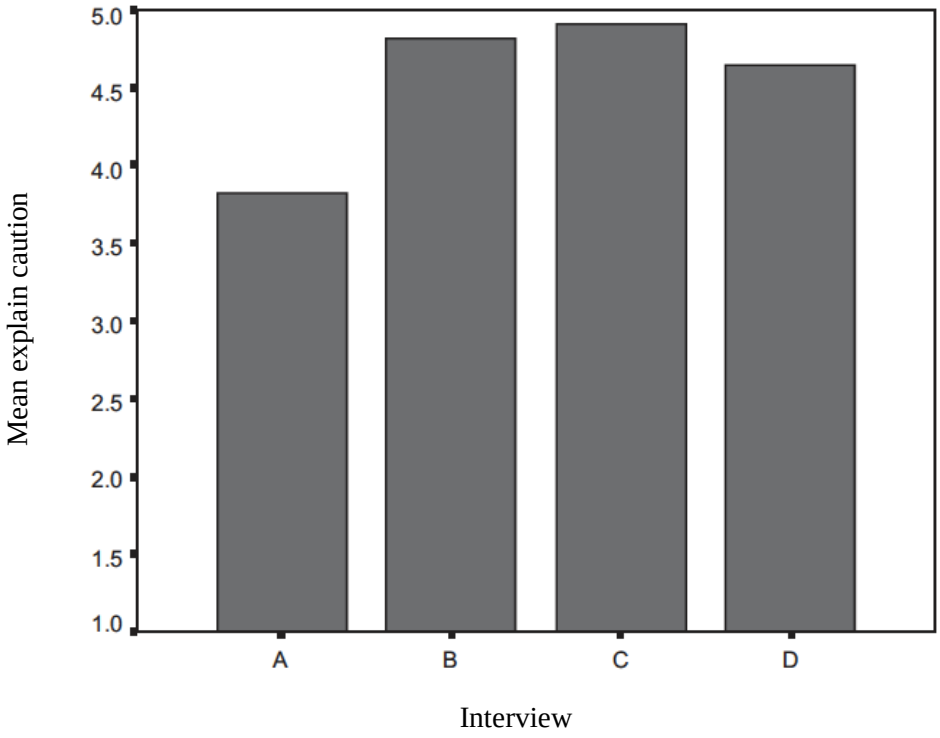

Figure 9.3 Assessment of explanation of the caution

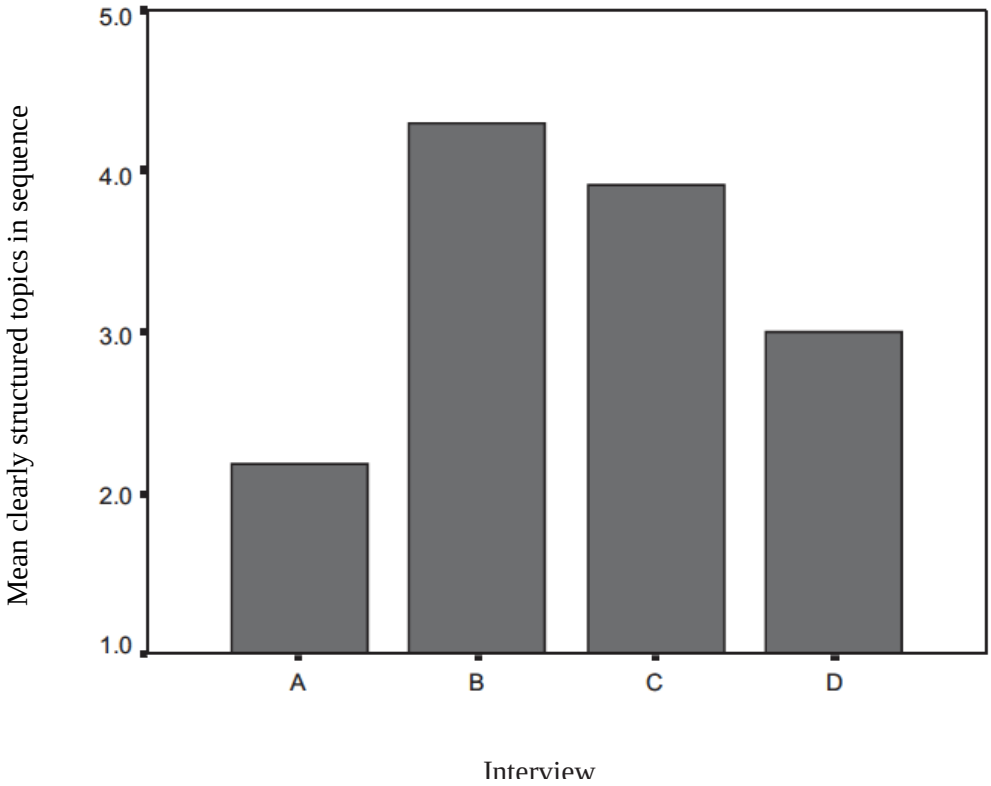

Figure 9.4 Assessment of the structure of topics in sequence

is poor on average, the mean score being 2.1. Very few officers scored higher than 3. Interview B concerns a serious crime with a significant amount of information to question the suspect about. Despite this the sample display a skilled performance in this area, the mean score being 4.4, which shows a significant improvement over interview A. In the discussion regarding Figure 9.3 the point was made about officers practising their introductions in order to improve their scores. This is not possible with the criterion subject of Figure 9.4 because the information available for every interview is unique and presents previously unseen issues. The skills loss found in the workplace interviews (C and D) concerning this criterion is significant. In particular, interview D shows a significant decrease since training. This illustrates the difference between maintaining improvement within simple or complex criteria. As a final point it should be noted that even with the skills loss officers show a higher level of skill in more complex interviews one year after training than before training.

The ability to question a suspect using appropriate question types is fundamental to advanced interviewing. The course spends extensive time raising awareness of different question types and the damaging effect certain types of questions can have. Figure 9.5 shows the skills of the sample across all four interviews within this area. The initial interview (A) records a mean score of 3.3 for the sample. This equates to a PEACE standard in the marking guide. As in the earlier discussion the sample shown in this figure were all successful in this

interview in that they gained access to the course. The level of skill displayed in this complex area is comparatively high in interview B, being 4.2. The workplace interviews (C and D) show a small skill loss even when examining the last interview assessed (D). Further, the performance at that point is significantly better than before training despite the interviews being for more serious offences. Comparing the results of this criterion and that of topic structure suggests that officers find the latter easier to learn (interview B mean 4.4 compared with 4.2 for use of questions) but more difficult to maintain over time; (interview D mean of 3.0 compared with 3.9 for use of questions).

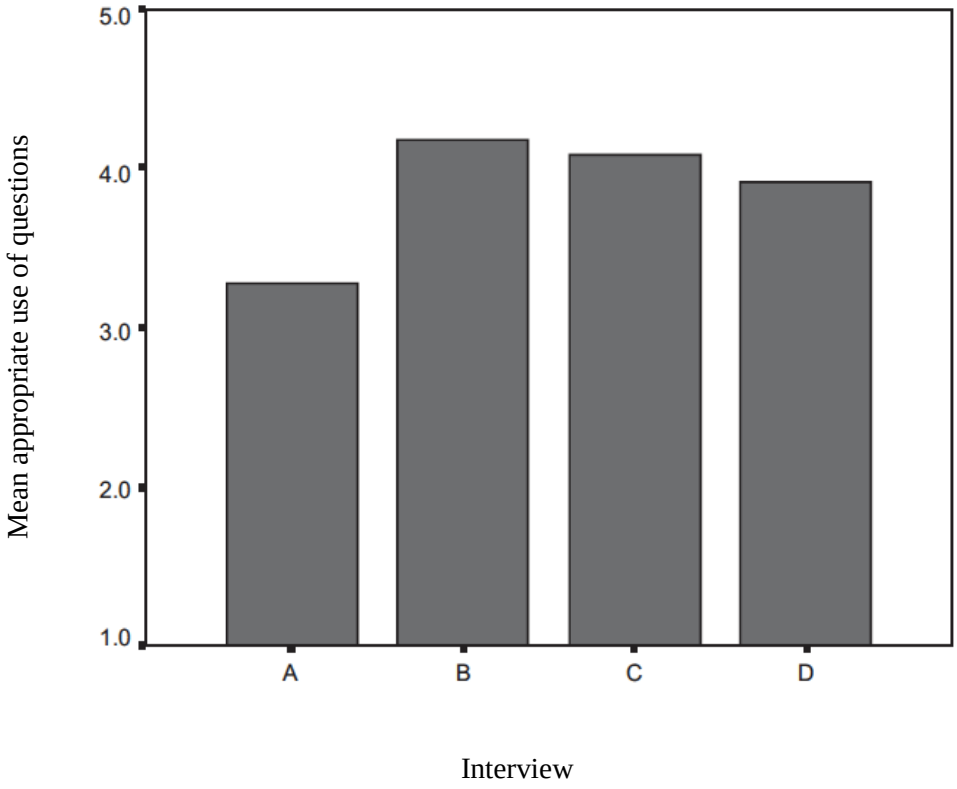

Figure 9.5 Assessment of the appropriate use of questions

VI. THE GRIFFITHS QUESTION MAP (GQM)

The initial criteria developed to assess the employment of question types within an interview used a Likert scale to evaluate appropriate and inappropriate questions. However, it was soon apparent that, although this was a useful indicator which allowed comparison with other criteria in the scale (as above), there was a need for a more in-depth analysis of question usage which went beyond simply counting the number of each type of question used in an interview. The result was

the Griffiths Question Map (GQM). The following is a brief description of the GQM (for a fuller description, see Griffiths and Milne in preparation). The GQM divides questions into eight types, split into productive and non-productive categories:

1. Open questions defined as those allowing a full range of response (e.g. 'Describe everything that happened in the shop?' or 'Tell me about the argument with your wife?'). These questions encourage longer and more accurate answers from interviewees.

2. Probing questions defined as more intrusive and requiring a more specific answer, usually commencing with the active words 'who', 'what, 'why', 'where', 'when' 'which' or 'how' (e.g. 'You said you pushed your wife over, *which* part of her body hit the ground first?'). These are appropriate when obtaining further detail following an initial account.

3. Appropriate closed yes/no questions which are used at the conclusion of a topic where open and probing questions have been exhausted. They are typically used to establish legal points (e.g. 'Did you strike the other man more than the one time you have described?').

These are all defined as productive questions and appropriate to obtaining an account from the interviewee. The remaining question types are defined as unproductive and associated with poor questioning:

4. Inappropriate closed yes/no questions which could appear identical in wording to an 'appropriate closed' question but are used at the wrong point in the interview and therefore become unproductive because they either allow an evasive interviewee the easy option in giving less detailed answers or close down the range of responses available to an interviewee (e.g. 'Could you describe the man who pushed you ?').

5. Leading questions which suggest an answer in formal content to an interviewee (e.g. 'Are you normally that aggressive after drinking?').

6. Multiple questions which constitute a number of sub-questions asked at once. This makes it difficult to ascertain which one the interviewee is meant to answer (e.g. 'How did you get there, what did you do inside and when did you first decide to steal the car?'). Multiple questions also include multiple concept questions. This is where an interviewer asks about two concepts at once (e.g. What did *they* look like?').

7. Forced choice questions which only offer the interviewee a limited number of possible responses (e.g. 'Did you kick or punch the other woman?').

8. Opinion or statement defined as posing an opinion or putting statements to an

interviewee as opposed to asking a question (e.g. 'I think you did assault the other person').

The GQM allots an individual line to each question type as shown below. In addition other information can be entered on the map (e.g. time). The map is used when observing an interview live or listening to a recording after the event. Each question is plotted on to the appropriate line as it is posed in the interview forming a 'map' of the way in which the interviewer uses different types of questions across the timeline of the interview. Context is an essential component in assessing question usage and the 'map' illustrates the way in which questions are used far better than simply scoring of the frequency of a particular question type. The same question construction can have different classifications depending where in time and space it comes in the interview. The following are examples of the use of the GQM in the research examining the effectiveness of advanced interview training.

Figure 9.6 is a map of an assessed interview conducted by an officer prior to attending the training course (interview A). The interview lasted 45 minutes and concerned an offence of assault where the suspect gave an account denying the offence. As can be seen the officer has made extensive use of probing questions (*n* = 56) compared with open questions (*n* = 20). There are a number of closed yes/no questions that have been assessed as appropriate

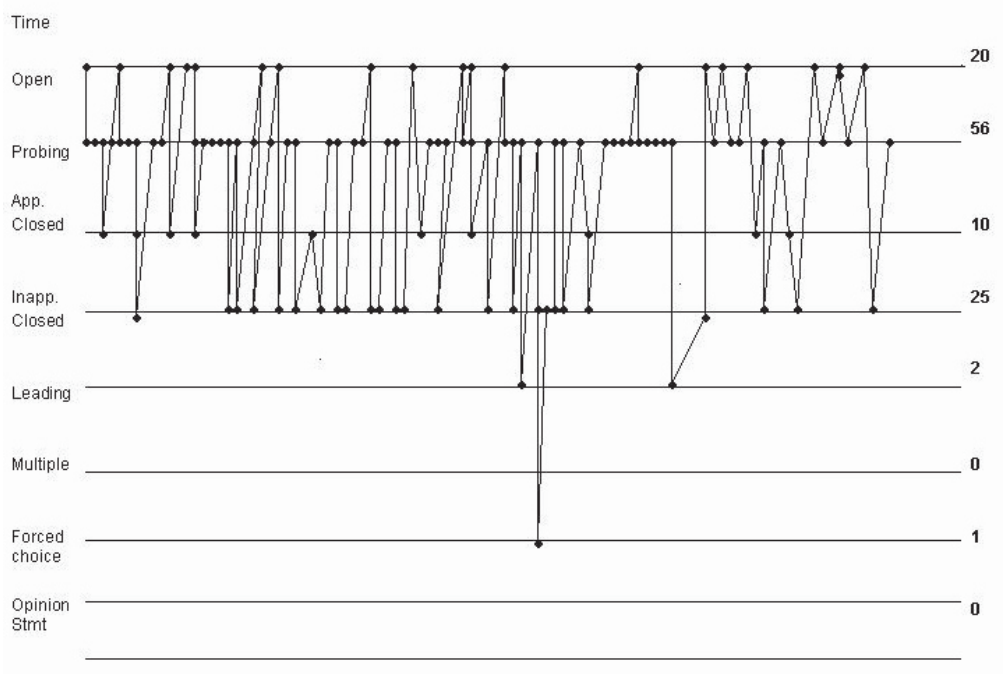

Figure 9.6 The GQM of an interview for assault

(*n* = 10); however, a high number of inappropriate closed yes/no questions were deemed inappropriate (*n* = 25). There are hardly any leading questions (*n* = 2) and only one forced choice question. Overall the chronology of question use reveals recurring patterns of sequences of probing questions with less use of any other question type. The majority of questions used were productive. As a result the officer was successful in gaining access to the course but needs developmental training in the appropriate use of closed yes/no questions.

Figure 9.7 is a map of part of a real-life interview with a murder suspect conducted by the same officer after training (interview C). The map depicts a 43-minute period in the early part the interview, spread across two audio tapes (note that audio tapes last a maximum of 45 minutes and the timescale reverts to 2 halfway across the map). Looking across the whole map the officer has still made a greater use of probing questions (*n* = 51) compared with open questions (*n* = 17). The officer has also used a number of appropriate closed yes/ no questions (*n* = 20) but has only used two (*n* = 2) unproductive questions in the whole interview. This is a significant improvement to the previous interview. However, a detailed look at the map

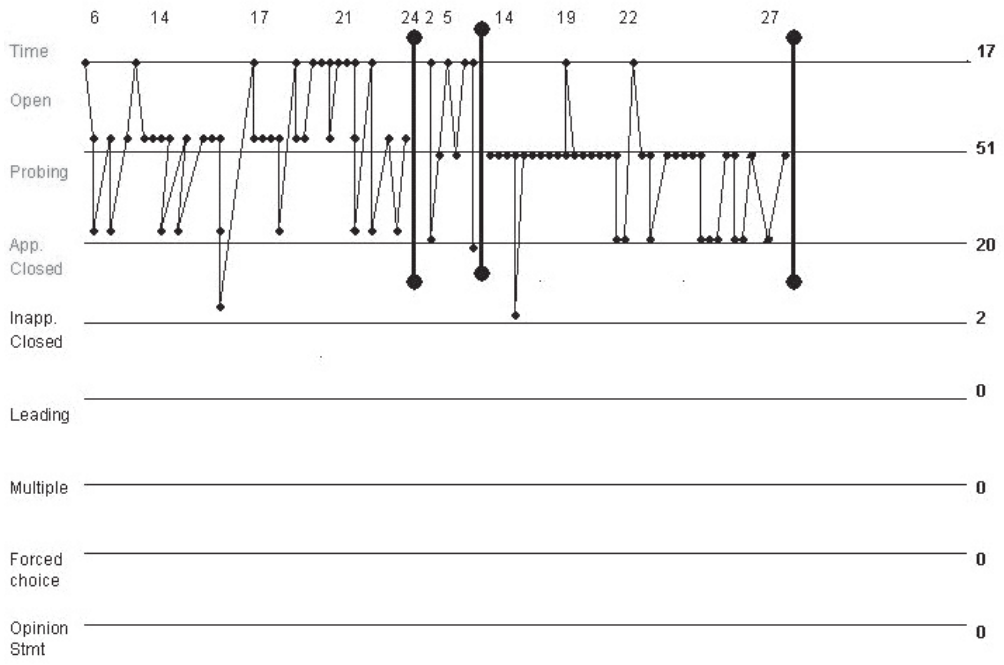

Figure 9.7 The GQM for an interview with a murder suspect

reveals more interesting information. This map depicts two different phases of the interview. The period from 6 to 24 minutes in the first interview represents the first account phase of the interview and shows the use of both open and probing questions. The second tape (from 2 to 27 minutes) on the map shows more detailed

questioning about two topics where the interviewer required more detail. In particular the second topic, which ran from 14 to 27 minutes, shows a string of probing questions and a definite change in style from the more varied use of open and probing questions in the first account. The interviewer also employs a number of appropriate closed yes/no questions towards the end of the topic to close down the topic area having obtained the information required. It can be seen that there is a clear difference between the use of question types in the interviews depicted in Figures 9.6 and 9.7. The latter interview conducted after training is more organized and logical in its structure whereas the former interview, which took place prior to training appears to show a random and unstructured approach. In addition, the use of questions by this officer has altered in that the questions in Figure 9.7 are exclusively productive and confined to the top-three question types.

Figure 9.8 is a map of a real interview with a suspect accused of sexually assaulting a child. The interview was not conducted by an officer who had received advanced interview training and was collected as part of the control sample. Initial examination of the map reveals a completely different profile from either of the previous two interview maps. This interview lasted 42 minutes. Although the interviewer commences with an open question he quickly descends into a predominate use of inappropriate closed yes/no and leading questions with the majority of questions being unproductive. Of particular note is the use of opinion and statement. The first example of this occurred at 30 minutes and consisted of a comment ‘I have interviewed this girl and I know she is not lying’. Nine similar comments followed in the last 12 minutes of the interview. The GQM of the interview shows that the officer became increasingly frustrated with his inability to gain an admission from the interviewee and resorted to unsupported accusations. The interview terminates with the officer expressing his view that the suspect was guilty of the alleged offence. Further research into this particular interview revealed that the judge excluded the interview from the subsequent trial and the defendant was acquitted.

This brief description of the GQM and preliminary findings shows that the use of questions is a critical factor in evaluating the legality

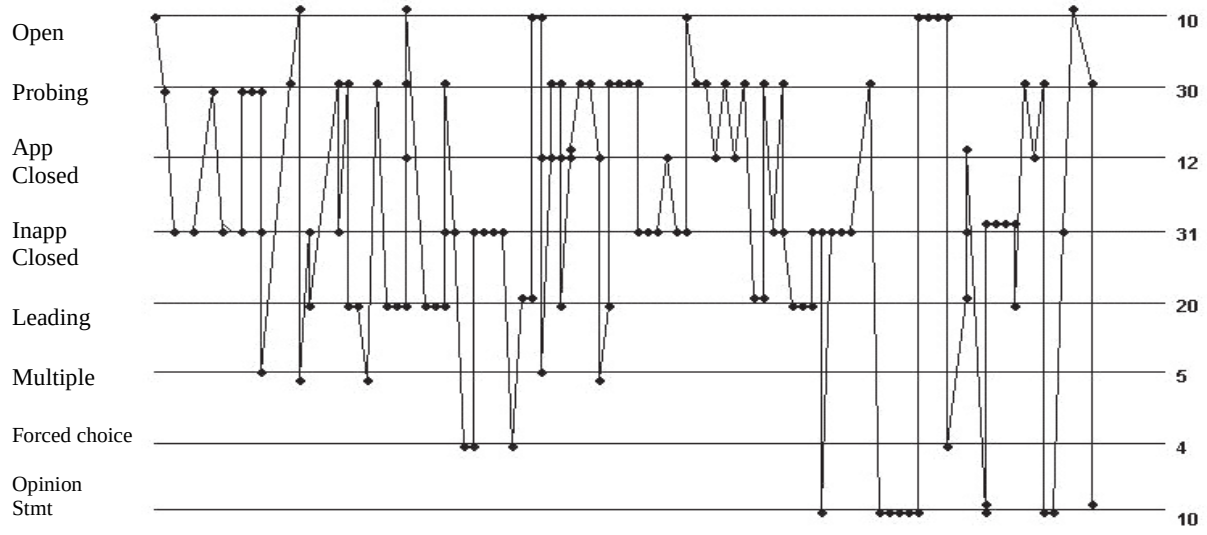

Figure 9.8 The GQM for an interview with a child abuse suspect

and effectiveness of interviews. The development of the GQM has continued and it has now been incorporated into police training courses where officers are using it to evaluate their own use of questions in order to identify strengths and weaknesses (see Griffiths and Milne in preparation).

VII. CONCLUSIONS

All officers attempting to gain access to the advanced course have been PEACE trained. Nevertheless, the level of skill demonstrated by the research sample in interview A overall is below that expected from PEACE-trained officers, similar to the findings of Clarke and Milne (2001). Detailed examination of individual criteria suggests that the officers score higher in areas associated with legal requirements that can be defined as simple criteria. The more complex areas associated with more difficult skills such as topic structure and questioning show a low level of skill across the sample before training (interview A). This lends support to the hypothesis that the original PEACE course was effective at preventing illegal and oppressive interviews but less effective at improving the ability of officers to obtain and probe accounts. After training (interview B) the sample show an improvement in every criterion examined. The level of improvement varies dependent on the criterion and ability prior to training but the complex criteria demonstrate appreciable improvements. This is despite the fact the final course interview (B) is more complex than the first interview (A). Overall these improvements transfer to the workplace. However, there is a marked decline in the performance of the sample in some of the more complex criteria in the last interview assessed (D). This suggests a need for refresher training in these

complex areas. This finding has resource implications for any organization deciding to initiate such a programme.

The development of advanced training, therefore, can be judged to have improved the skills of the interviewers in this sample. If such results are replicated across all police interviewers trained using this method then the implementation of the tiered approach can be judged to have improved police interviews with suspects immediately after training. However, the importance of monitoring and ongoing refresher training can be evidenced from the skills loss apparent within the complex criteria as time elapses after training. GQMs assessed from interviews some time after the course (interview D) show a wide variation of profile, further evidencing that need.

Tier four is solely concerned with the monitoring and evaluation of interviews in order to provide regular objective feedback. This area should be the subject of further research to evaluate its effect. These preliminary findings demonstrate that, with the appropriate training, officers can improve their skills and conduct effective and professional interviews. This is essential in securing safe convictions in the most serious of cases if the confidence of the public is to be maintained.

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Stephen Schulhofer is one of the nation's most distinguished scholars of criminal justice. He has written more than 50 scholarly articles and seven books, including the leading casebook in the field, and highly regarded, widely cited work on a range of criminal justice and national security topics. Schulhofer's scholarship has been distinguished by his simultaneous engagement with doctrinal analysis, criminal justice policy, and his own original empirical work.

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Saul Kassin is a Distinguished Professor of Psychology at John Jay College of Criminal Justice in New York and Massachusetts Professor Emeritus at Williams College, in Williamstown, MA. He has published numerous research articles and book chapters and has co-authored or edited various scholarly books, including: Confessions in the Courtroom, The Psychology of Evidence and Trial Procedure, The American Jury on Trial: Psychological Perspectives, and Developmental Social Psychology. In the 1980's, Kassin pioneered the scientific study of false confessions by introducing a taxonomy that distinguished between three types of false confessions (voluntary, compliant, and internalized) that is universally accepted today and by devising laboratory paradigms that enable tests of why innocent people are targeted for interrogation and why they confess. Also interested in the consequences of confession, Kassin has recently studied "forensic confirmation biases" and the impact that confessions have on judges, juries, lay witnesses, forensic science examiners, and the plea bargaining process.

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Thomas Grisso, Ph.D., is Professor Emeritus in Psychiatry at the University of Massachusetts Medical School. In addition to engaging in research and teaching in the University's Law and Psychiatry Program, he consults to federal and state programs on policy and forensic practice in the juvenile justice system. His work has focused on improving forensic evaluations for the courts and informing policy and law for youths in the juvenile justice system and for persons with mental disorders. Several of his fifteen books have been influential in setting standards for forensic mental health evaluations. His work has been recognized with awards from the American Psychological Association, the American Psychiatric Association, the Royal College of Psychiatrists (U.K.), the American Psychology-Law Society, an honorary Doctor of Laws degree from John Jay College of Criminal Justice, and the Chancellor’s Medal for Distinguished Scholarship at the University of Massachusetts Medical School.

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Allison D. Redlich, a Professor in the Department of Criminology, Law and Society, was trained as an experimental psychologist but uses multiple methods to conduct her research. To a large degree, her research centers on whether legal decision-making is knowing, intelligent, and voluntary. She examines such decision-making in vulnerable (juveniles and persons with mental health problems) and non-vulnerable defendants, and across several different contexts—in the interrogation room, during the guilty plea process, and in mental health courts. Professor Redlich also studies wrongful convictions, with a particular focus on false confessions and false guilty pleas. In addition to publishing numerous articles on these and related topics, she has co-authored/edited four books, most recently two volumes on the international practices of interviewing victims, witnesses, and suspects. To pursue her research, Professor Redlich has received funding from the National Science Foundation, the National Institute of Justice, the Brain and Behavior Research Association, and the Federal Bureau of Investigation, among others. Her expertise covers guilty pleas, interrogations and confessions, wrongful convictions, mental health courts, and experimental criminology.

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Andy Griffiths

Visiting Academic, Faculty of Humanities and Social Sciences, University of Portsmouth

Andy Griffiths is a police officer with thirty years' service. Has operational experience as a detective at all ranks. Also has extensive experience of criminal investigation training design, delivery and policy implementation. This includes development and delivery of specialist interview training, and a significant contribution to development of strategic interview policy both in the UK and abroad, including representing the National Policing Improvement Agency in France, Canada and South Korea. Completed his doctorate part-time supported by a Bramshill fellowship, and has since published several papers on investigative interviewing. He still trains police officers, as well as lecturing under and post-graduate students and is also advising on several international research projects. In 2010 he was awarded the Senior Practitioner award by the International Investigative Interview Research Group (iIIRG).

Rebecca Milne

Professor of Forensic Psychology, University of Portsmouth

Rebecca Milne is Professor of Forensic Psychology and course leader of the FdA Investigation and Evidence and the FdA in Police Studies, distance learning programs specifically for investigators and police officers respectively. A chartered forensic psychologist and scientist and Associate Fellow of the British Psychological Society, she is an Associate Editor of the International Journal of Police Science and Management and is on the editorial boards for the Journal of Investigative Psychology and Offender Profiling and the British Journal of Forensic Practice. Rebecca is one of the Academic lead members of the Association of Chief Police Officers Investigative Interviewing Strategic Steering Group and is Deputy Chair of the International Investigative Interviewing Research Group. She has worked closely with the police and other criminal justice organizations (in the UK and abroad) through training of the Enhanced Cognitive Interview, Witness

Interview Advising and also in the interviewing of vulnerable groups (Tier 3 and 5) and providing case advice. Rebecca was given the 2009 Tom Williamson award for her outstanding achievements in the field of investigative interviewing by ACPO. Rebecca recently opened the Centre of Forensic Interviewing: Research and training in investigative interviewing for all types of investigator at all stages of their career, from the basics to advanced interview skills and master classes.

Jerome Cohen

Professor of Law, NYU School of Law, Faculty Director of its U.S.-Asia Law Institute,

Prof. Jerome A. Cohen, a professor at NYU School of Law since 1990 and faculty director of its U.S.-Asia Law Institute, is a leading American expert on Chinese law and East Asian law. Prof. Cohen served for several years as C.V. Starr Senior Fellow and Director of Asia Studies at the Council on Foreign Relations, where he currently is an Adjunct Senior Fellow. Mr. Cohen is a Phi Beta Kappa graduate of Yale College (BA, 1951) and received his J.D. from Yale Law School in 1955. While at Yale, he served as the Editor-in-Chief of the Yale Law Journal. From 1955 to 1956, he clerked at the Supreme Court, first under Chief Justice Earl Warren and then under Justice Felix Frankfurter. Cohen joined the faculty of University of California, Berkeley School of Law in 1959. He moved to Harvard Law School in 1964 and remained a full-time faculty member there until he joined the international law firm of Paul, Weiss, Rifkind, Wharton & Garrison in 1981. From 1964 to 1979, he helped pioneer the introduction of East Asian legal systems and perspectives into the curriculum of Harvard Law School, where he served as Jeremiah Smith Professor, Associate Dean and Director of East Asian Legal Studies. During that time, Cohen advocated for normalized relations with China. In 1972, Cohen was able to make his first trip to the Chinese mainland as part of a delegation of the Federation of American Scientists and was able to meet with Premier Zhou Enlai. In 1977, he accompanied Senator Ted Kennedy to Beijing where they met with Deng Xiaoping. He retired from commercial law practice in 2000 but continues to serve as arbitrator and mediator in international business disputes relating to Asia and as adviser to families of persons detained in China, including Taiwan. Cohen's influence has been particularly strong in Taiwan where his former student Ma Ying-jeou was the former leader. Professor Cohen has published several books on Chinese, including The Criminal Process in the People’s Republic of China, 1949-63 (Harvard University Press. 1968), People’s China and International Law (Princeton University Press. 1974) and Contract Laws of the People’s Republic of China. Today, Prof. Cohen continues his research and writing on Asian law, specifically focusing on legal institutions, criminal justice reform, dispute resolution, human rights and the role of international law.

Ira Belkin

Executive Director, US-Asia Law Institute, Adjunct Professor of Law, NYU School of Law

Ira Belkin is the US-Asia Law Institute's first executive director. Prior to joining the Institute in September 2012, Belkin served as a program officer at the Ford Foundation in Beijing for five years, where he worked on law and rights issues. Before joining Ford, Belkin combined a career as an American lawyer and federal prosecutor with a deep interest in China. His appointments included two tours at the U.S. Embassy in Beijing and a year as a fellow at the Yale Law School China Law Center. After graduating from NYU Law in 1982, Belkin spent 16 years as a federal prosecutor including ten years in Providence, R.I., where he was chief of the criminal division, and in Brooklyn, N.Y., where he was deputy chief of the general crimes unit. Before attending law school, Belkin taught Chinese language at Middlebury College. He has lectured extensively in Chinese to Chinese audiences on the U.S. criminal justice system and to American audiences on the Chinese legal reform movement. In addition to his J.D. from New York University School of Law, Belkin has a master's degree in Chinese studies from Seton Hall University and a bachelor's degree from SUNY Albany.

Translators' Bio

Amy GAO

Amy Gao is a recent LLM (15') graduate from Columbia Law School. In 2014, she received her Ph.D degree in Law from Peking University Law School, from which she also received her LL.B degree. During the 2012-2013 academic year, she spent a year as a visiting scholar with U.S.-Asia Law Institute where she focused mainly on comparative law studies and judicial reforms. In August 2015, after obtaining her LLM degree from Columbia, she joined U.S.-Asia Law Institute as a Research Scholar. Her research interests include criminal law, criminal justice, evidence, constitutional protection of procedural rights, law development and its implementation. She is currently working on various institution projects, related to labor law, and criminal justice issues.

Chao Liu

Chao LIU received her LL.M. degree from NYU School of Law in 2010. Prior to joining the Institute as a Research Scholar, she worked for one year as a legal intern in the Enforcement Division of the Securities and Exchange Commission in Washington, D.C. Ms. Liu assisted in investigations involving Foreign Corrupt Practices Act violations, mortgage-backed securities, collateralized debt obligations, accounting fraud and other securities fraud. Ms. Liu has four years of working experience in China. She worked in a prominent Shanghai law firm and before that she was with the Council of Great Lakes Governor’s Office in Shanghai. Ms. Liu received her LL.B. degree from Shanghai University School of Law (the former School of Intellectual Property). She passed the Chinese Bar Exam and is admitted to the New York Bar.