

Interrogation and Confessions

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In this chapter, I review and analyze the most important findings from the extensive empirical social-science research literature on police interrogation and confessions. I then review existing law and policy on interrogation and confessions, and offer empirically based policy and legal recommendations. I will argue that the most important legal and policy reforms for achieving both the elicitation (by police) and admission into evidence (by trial courts) of voluntary and reliable confession evidence are: mandatory full electronic recording of all police interviews and interrogations; improved police training and practice on pre-interrogation investigative procedures; a shift from guilt-presumptive accusatory interrogation techniques that prioritize eliciting confessions above all else to more professional investigative interviewing approaches that prioritize obtaining accurate information above all else; and pretrial reliability hearings to prevent false and unreliable confession evidence from being admitted into evidence at trial and leading to wrongful convictions.

INTRODUCTION

In July 1997, Michelle Moore-Bosko was brutally raped and murdered in Norfolk, Virginia. Based on the hunch of a friend of Moore-Bosko's that her neighbor Danial Williams might have committed the crime, investigators interrogated Williams overnight for more than 11 hours, eventually extracting multiple confessions from him to the horrific crime. During Williams' marathon interrogation, investigators repeatedly accused Williams of committing the crime; yelled at him; administered a polygraph examination and lied to him about the results; lied to him further by falsely telling him other evidence (DNA, hairs, witnesses) established that he had committed the crime when, in fact, no such evidence existed against him; poked him in the chest;

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threatened him with capital murder charges if he did not confess; promised him a lesser charge if he did confess; and educated him about the details of the rape and murder. Months later, forensic testing would establish that Williams' DNA did not match the sperm, blood, or other genetic material recovered from the crime scene.¹

Norfolk police would mistakenly suspect many other innocent individuals of raping and murdering Michelle Moore-Bosko, and would go on to extract false confessions from three more individuals: Joseph Dick, Eric Wilson and Derek Tice. Like Williams, Dick, Wilson, and Tice confessed after lengthy, guilt-presumptive and accusatory interrogations in which they were: repeatedly yelled at and called liars; physically touched (e.g., tapped or poked); lied to about non-existent evidence that supposedly irrefutably linked them to the crime, including bogus polygraph results; threatened with the death penalty if they did not confess; promised leniency and an end to grueling interrogations if they did confess; and shown crime-scene photos and fed details of the crime. And, as with Williams, Dick's, Wilson's, and Tice's DNA did not match the sperm, blood, or other genetic material recovered from the crime scene. Eventually DNA testing along with other dispositive evidence would establish that Omar Ballard, a violent felon and rapist, had committed the murder and rape of Michelle Moore-Bosko alone, for which he confessed after a brief interrogation, pled guilty and received a life sentence. However, the fact of Ballard's demonstrable guilt and his conviction for the rape and murder of Michelle Moore-Bosko did not prevent Williams, Dick, Wilson, and Tice—who became known as the Norfolk 4—from all being wrongfully convicted of the crime and spending many years in prison despite their provable innocence.²

The Norfolk 4 case is one of hundreds of police-interrogation induced false-confession cases that have been documented in the last three decades in America. Like the Norfolk 4, many false confessors have been wrongfully convicted and spent years, if not decades, in prison for crimes they did not commit. As of this writing, approximately 15% of the more than 350 post-conviction forensic DNA exonerations documented by the Innocence Project have involved individuals who had falsely confessed after being interrogated by police,³ as have approximately 13% of the more than 2,000 DNA and non-DNA

1. TOM WELLS & RICHARD A. LEO, *THE WRONG GUYS: MURDER, FALSE CONFESSIONS, AND THE NORFOLK FOUR* (2008).

2. *Id.*

3. INNOCENCE PROJECT, <https://www.innocenceproject.org/> (last visited Mar. 14, 2017).

exonerations documented by the National Registry of Exonerations.⁴ These figures are regarded as the very small tip of a much larger iceberg because most false confessions and wrongful convictions are invisible, impossible to locate or document, or impossible to prove. At the same time, many police interrogations have led to false confessions from innocent suspects who were not wrongly convicted but who nevertheless spent months, and sometimes years, in jail but were ultimately spared a prison sentence because the prosecutor eventually decided to drop charges, because the judge suppressed the confession at a pretrial hearing, or because the jury acquitted the innocent false confessor at trial.⁵ In short, the American criminal justice system has a false-confession problem of its own making, which often leads to the wrongful incarceration and conviction of the innocent. At the same time, when a police interrogation induces a false confession that leads to the wrongful incarceration or conviction of an innocent individual, the true perpetrator may go on to commit more violent crimes. Put differently, the underlying problem caused when police interrogation produces erroneous outcomes is not only that the innocent may be wrongfully convicted but also that the guilty may go free.

Police interrogation of criminal suspects is an important subject for criminal justice analysts and policymakers. The process of modern police interrogation, and the confessions it produces, raises a number of important empirical, legal and policy questions: How do police elicit confessions from reluctant suspects in America? How should they be permitted to interrogate in a democratic society that needs both crime control and due process to maintain public confidence in its institutions of criminal justice? How should law and public policy regulate police interrogation to accommodate the competing interests and values at stake while promoting fair procedures and achieving just and accurate results?

Police interrogation of criminal suspects has, at various times in American history, been politically and legally contested. In the 1920s and 1930s, the widespread use of the so-called “third degree”—methods of physical coercion and psychological duress—to extract confessions was controversial until it was replaced by more professional and sophisticated methods of psychological

4. THE NATIONAL REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/about.aspx> (last visited on Mar. 14, 2017). For a discussion of wrongful convictions, see Brandon L. Garrett, “Actual Innocence and Wrongful Convictions,” in Volume 3 of the present Report.

5. Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891 (2004); Jon B. Gould et al., *Preventing Wrongful Convictions*, 99 IOWA L. REV. 471 (2014).

pressure and persuasion.⁶ In the 1960s, the United States Supreme Court's imposition of *Miranda* warnings on custodial interrogation was controversial until police adjusted to the brief warning and waiver ritual and eventually came to see it as harmless.⁷ And, as mentioned above, from the 1990s to the present, American police interrogation methods and practices have again become controversial because of police-induced false confessions—widely publicized and well documented by both DNA and non-DNA exonerations⁸—that often lead to the wrongful conviction of the innocent.⁹

The central policy problem of American police interrogation is how to structure, incentivize and regulate the questioning of criminal suspects such that the resulting statements, admissions, or confessions are both “voluntary” (i.e., fairly and legally obtained) and “reliable” (i.e., factually accurate). In our democratic system of government, voluntary confessions are necessary out of respect for the dignity and autonomy of the accused, as well as for the integrity of the criminal justice process and to maintain fidelity to constitutional norms. However, it is almost never in a suspect's rational self-interest to make incriminating statements, admissions, or confessions to police. As a result, we must allow police interrogators some latitude to apply some level of pressure and persuasion to move criminal suspects from denial to admission. At the same time, regardless of where we draw the line between permissible and impermissible interrogation practices, we must regulate police methods so that resulting statements, admissions, and/or confessions are factually accurate. We must also structure subsequent pretrial and trial procedures to effectively recognize and exclude any false and unreliable confessions that are elicited through police interrogation.

In the remainder of this chapter, I will review and analyze the most important findings from the extensive empirical social-science research literature on police interrogation and confessions. I will then review existing law and policy on interrogation and confessions, and then offer empirically based policy and legal recommendations. I will argue that the most important legal and policy reforms for achieving both the elicitation (by police) and admission into evidence (by trial courts) of voluntary and reliable confession evidence are: mandatory full

6. Richard A. Leo, *The Third Degree and the Origins of Psychological Police Interrogation in the United States*, in INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT 37 (G. Daniel Lassiter ed., 2004).

7. Richard A. Leo & Welsh White, *Adapting to Miranda: Modern Interrogators' Strategies for Dealing with the Obstacles Posed by Miranda*, 84 MINN. L. REV. 397 (1999).

8. INNOCENCE PROJECT, *supra* note 3; NATIONAL REGISTRY OF EXONERATIONS, *supra* note 4.

9. Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3 (2010); Drizin & Leo, *supra* note 5.

electronic recording of all police interviews and interrogations; improved police training and practice on pre-interrogation investigative procedures; a shift from guilt-presumptive accusatory interrogation techniques that prioritize eliciting confessions above all else to more professional investigative interviewing approaches that prioritize obtaining accurate information above all else; and pretrial reliability hearings to prevent false and unreliable confession evidence from being admitted into evidence at trial and leading to wrongful convictions.

I. EXISTING LAW AND POLICY

Police interrogation and confession-taking in America is regulated almost entirely by federal constitutional law as applied to the states. Three legal doctrines in particular govern the admissibility of confession evidence at trial: the Fifth and Fourteenth Amendment due process voluntariness test; the Sixth Amendment right to counsel; and, perhaps most centrally, the Fifth Amendment *Miranda* doctrine.

A. FIFTH AND FOURTEENTH AMENDMENT DUE PROCESS VOLUNTARINESS

In the mid-1880s, the United States Supreme Court began to evaluate the admissibility of confession evidence against criminal defendants at trial. The Court initially relied on the common-law voluntariness test, which was intended to protect against the danger of unreliable or untrustworthy confessions and exclude them. The underlying purpose of the voluntariness test, though, was never entirely clear and would continue to evolve throughout the 20th century. Initially, and arguably through at least the 1950s, the dominant rationale of the due process voluntariness test was to promote reliability in the trial process by excluding confessions that were likely to be false or untrustworthy because they were products of police coercion or improper influence. However, the idea that courts should admit into evidence only confessions that were the product of a free and independent will also began to gain ascendance in the 1930s and 1940s. A third but subordinate rationale underlying the voluntariness test was the idea that confessions elicited through fundamentally unfair police methods should be excluded so as to deter offensive police behavior, regardless of whether the suspect confessed involuntarily or his statements were likely to be trustworthy. The due process voluntariness test continued to evolve in the 1950s and 1960s as the Supreme Court made clear that the reliability or trustworthiness of a suspect's confession was no longer directly relevant to a determination of its voluntariness.¹⁰ In 1986, the Supreme Court in *Colorado*

10. *Rogers v. Richmond*, 365 U.S. 534 (1961).

*v. Connelly*¹¹ said that the reliability of the defendant's statement should have no role in the determination of its voluntariness and thus admissibility. A confession's lack of trustworthiness, it was argued, would not tend to establish that it is involuntary. Instead, the Court declared that a statement given by someone in the suspect's condition "might be proved to be quite unreliable, but this is a matter to be governed by the evidentiary laws of the forum ... not by the Due Process clause of the Fourteenth Amendment."¹²

Today the contemporary Fifth and Fourteenth Amendment due process voluntariness test is concerned almost exclusively with protecting a suspect's independent free will and capacity for autonomous decision-making from coercive or otherwise improper police influence during interrogation. Trial judges are to evaluate, in their totality, both the police interrogation methods and the suspect's vulnerabilities on a case-by-case basis. If the trial judge determines that the interrogation pressures overbore the defendant's free will, then the confession will be excluded as involuntary under the Fourteenth Amendment (state) or Fifth Amendment (federal) due process clause and cannot be used against the defendant in future trial proceedings. Otherwise, the Fifth and Fourteenth Amendment due process clauses do not prohibit the government from using confession evidence against the accused at trial.

B. SIXTH AMENDMENT RIGHT TO COUNSEL

Americans have enjoyed a constitutional trial right to counsel in federal cases since the ratification of the Bill of Rights in 1791. This right was incorporated into state constitutions through the Fourteenth Amendment in capital offenses in 1932. It was subsequently modified in 1963 to include all felony offenses. The underlying rationale of the Sixth Amendment is to protect a suspect's right to a fair trial. In 1964, however, the Supreme Court in *Massiah v. United States*¹³ held that a suspect was entitled to the protections of the Sixth Amendment upon indictment. The Supreme Court subsequently held that a suspect has a right to legal representation as soon as judicial proceedings have been initiated against him, whether by formal charge, preliminary hearing, indictment, information, or arrangement. At that point, police thus cannot interrogate a suspect about matters relating to those proceedings absent an explicit relinquishment (i.e., a knowing and voluntary waiver) of the suspect's Sixth Amendment right to legal representation. Because virtually all police interrogation in America occurs prior to charges being filed or judicial proceedings commencing,

11. *Colorado v. Connelly*, 479 U.S. 157 (1986).

12. *Id.* at 167.

13. *Massiah v. United States*, 377 U.S. 201 (1964).

however, the Sixth Amendment right to counsel is almost always irrelevant to the admissibility of confession evidence in practice.

C. FIFTH AMENDMENT MIRANDA WARNINGS

In 1966, the Supreme Court decided *Miranda v. Arizona*,¹⁴ ushering in a new era in the American law of confessions. In *Miranda*, the Supreme Court applied the Fifth Amendment privilege against self-incrimination to the pretrial interrogation process. According to the Supreme Court in *Miranda*, modern police interrogation was fundamentally at odds with the privilege against self-incrimination because it contained inherently compelling pressures that threatened to undermine a suspect's ability to freely decide whether to provide information to police during interrogation. The Supreme Court held that the Fifth Amendment privilege against self-incrimination required procedural safeguards prior to any custodial questioning in order to dispel the inherent compulsion of psychological interrogation, or else the state could not use a suspect's interrogation-induced statements against him at trial.

More specifically, the Supreme Court held that police must forewarn suspects of their rights to silence and appointed counsel before any custodial questioning can legally commence. The typical *Miranda* warning thus reads:

- You have the right to remain silent.
- Anything you say can and will be used against you in a court of law.
- You have the right to an attorney.
- If you cannot afford an attorney, one will be appointed to you free of charge.

The Court required the four-fold *Miranda* warnings in all cases in which “questioning [was] initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in a significant way.”¹⁵ In addition, the Court held that the state must demonstrate that the suspect's waiver of these constitutional rights was made “voluntarily, knowingly and intelligently.”¹⁶ As a result, police interrogators were directed to follow up the fourfold *Miranda* warnings with two further questions designed to elicit an explicit waiver:

- Do you understand these rights?
- Having these rights in mind, do you wish to speak to me?

14. *Miranda v. Arizona*, 384 U.S. 436 (1966).

15. *Id.* at 444.

16. *Id.*

On their face, the *Miranda* warning and waiver requirements seem relatively straightforward. In the last 50 years, however, the Supreme Court has substantially weakened *Miranda*'s original vision and carved out numerous significant exceptions to the *Miranda* rule, even though there are no exceptions to the Fifth Amendment privilege against self-incrimination on which the original *Miranda* decision was based.

These include exceptions for routine booking questions (no *Miranda* warnings are required);¹⁷ for impeachment at trial (a statement taken in violation of *Miranda* can nevertheless be used to impeach a defendant if he testifies at trial inconsistently with his previously suppressed *Miranda*-violative statement);¹⁸ for public safety (an interrogator need not give *Miranda* warnings in situations where they are otherwise required if the questions he seeks to ask are "reasonably prompted by a concern for public safety");¹⁹ and for witness statements²⁰ and physical evidence²¹ obtained as a result of a *Miranda* violation.

Perhaps more significantly, in the more than 50 years since *Miranda v. Arizona* was decided, the U.S. Supreme Court has destroyed its doctrinal foundation.²² In a series of decisions, the Burger and Rehnquist Courts in the 1970s and 1980s de-constitutionalized *Miranda*, declaring that *Miranda* warnings are "not themselves rights protected by the Constitution," that is, "measures to insure that the right against compulsory self-incrimination [is] protected."²³ This has led some police, prosecutors, and courts to interpret *Miranda* as a non-constitutional rule of evidence, and it has incentivized police interrogators to disregard the original *Miranda* warning and waiver regime altogether.²⁴ Related to this, the Supreme Court has watered down the legal meaning of custody at the front end of the *Miranda* ritual and lowered the legal standard for an acceptable waiver at the back end. By telling a suspect that he or she is not in custody or that he or she is free to leave, the interrogator need not provide the suspect with *Miranda* warnings because the interrogation is thereby considered legally non-custodial.²⁵ And even if a suspect is read his *Miranda* rights, the Supreme Court has held that waivers to *Miranda* can be

17. *Pennsylvania v. Muniz*, 496 U.S. 592 (1990).

18. *Harris v. New York*, 401 U.S. 222 (1971).

19. *Quarles v. New York*, 467 U.S. 649 (1984).

20. *Michigan v. Tucker*, 417 U.S. 433 (1974).

21. *United States v. Patane*, 542 U.S. 630 (2004).

22. Richard A. Leo & Alexa Koenig, *The Gatehouse and Mansions: Fifty Years Later*, 6 ANN. REV. L. & SOC. SCI. 323-339 (2010).

23. *Tucker*, 417 U.S. at 444.

24. Charles Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109 (1998).

25. *California v. Beheler*, 463 U.S. 1121 (1983).

implicit²⁶ and increasingly opened the door for police interrogators to merely read the *Miranda* warnings and launch into interrogation,²⁷ making the formal requirement of a knowing, voluntary, and intelligent waiver virtually meaningless in practice.²⁸

The Fifth and Fourteenth Amendment due process voluntariness test, the Sixth Amendment *Massiah* doctrine, and the *Miranda* warning and waiver ritual are, for the most part, the only rules that govern the admissibility of confession evidence in state and federal trials. In a minority of jurisdictions—20 states and the District of Columbia²⁹—police interrogators are also legally required to electronically record their custodial interrogations in some or all felony cases or else a rebuttable presumption is created that the confession evidence should not be admitted into evidence against a criminal defendant.

II. LITERATURE REVIEW

With the decline of the third degree in the 1930s and 1940s, interrogation shifted to psychological methods and approaches. Initially police shifted to polygraphic lie detection and interrogation to elicit confessions. In addition, police developed purely psychological interrogation methods—based on influence, manipulation, deception, and ultimately pressure and persuasion—that they subsequently wrote about in training manuals, which later became the basis for interview and interrogation training programs.

In America, the primary method of interrogation is known as the “Reid” method of interrogation, named after former Chicago police investigator John Reid, who with Fred Inbau co-authored the leading interrogation manual in the United States, starting in 1942 and extending, many editions later, to the present. Just as it has been said that virtually all modern literature is a variation on Shakespeare, so too can it be said that virtually all modern American police interrogation is a variation of the Reid method.

The Reid method of interrogation can be described and divided a number of different ways. Commentators often begin by describing the “Behavioral Analysis Interview,” which is a recommended structured set of questions from

26. North Carolina v. Butler, 441 U.S. 369 (1979).

27. Berghuis v. Thompkins, 560 U.S. 370 (2010).

28. Alfred Garcia, *Is Miranda Dead, Overruled or Was It Irrelevant?*, 10 ST. THOMAS L. REV. 461 (1998); Charles Weisselberg, *Mourning Miranda*, 96 CAL. L. REV. 1519 (2008). *But see* Lawrence Rosenthal, *Against Orthodoxy: Miranda is Not Prophylactic and the Constitution is Not Perfect*, 10 CHAP. L. REV. 579 (2006).

29. Thomas Sullivan, *Compendium Shows More Jurisdictions Recording Interrogations*, CHAMPION, Apr. 2014, at 46-47.

which investigators are taught that they can infer whether suspects are lying or telling the truth based on their demeanor, body language, and the content of their answers. The underlying theory of behavioral analysis is that, as with the polygraph, a normally socialized individual will experience inner conflict and anxiety when lying, which will then manifest itself in involuntary physiological stress reactions. The deceptive individual, the theory goes, displays certain nonverbal behavior symptoms (manifested in body posture, eye contact, gestures, and movements) as well as verbal behaviors (e.g., attitudes and statements) in order to reduce the anxiety or conflict associated with lying, while the truthful individual does not. If the investigator judges the suspect deceptive after the Behavioral Analysis Interview, he or she then launches into the interrogation. Though it has been widely criticized as lacking any probative value by social scientists,³⁰ the Behavioral Analysis Interview may not always be necessary to understand how the Reid method of interrogation plays out in practice. Most interrogations in America are not preceded by a formal full-scale Behavioral Analysis Interview, though many involve selected questions from the Behavioral Analysis Interview.³¹

The Reid method of interrogation consists of guilt-presumptive, accusatory, and confirmatory questioning that, relying on pressure and persuasion, seeks to move a suspect from denial to admission and then to elicit a full narrative confession of guilt. The Reid method is guilt-presumptive because interrogators are trained only to interrogate those suspects whose guilt they believe to be reasonably certain. It is accusatory because the most fundamental interrogation technique is to accuse the suspect of committing the crime (usually repeatedly), and then to accuse the suspect of lying when he or she denies it. The Reid method is confirmatory because the investigator's goal during interrogation is not to evaluate whether the suspect is innocent or guilty, but to seek a confession that confirms what the investigator already believes to be the truth, i.e., to elicit a confession to the investigator's pre-existing theory of the crime. The Reid method relies on pressure and persuasion through a series of recommended interrogation techniques that seek first to convince him that resisting the investigator's accusations is futile, and then to induce him to perceive that it

30. RICHARD A. LEO, *POLICE INTERROGATION AND AMERICAN JUSTICE* (2008); see also Aldert Vrij, Samantha Mann & Ronald Fisher, *An Empirical Test of the Behavior Analysis Interview*, 30 *LAW & HUM. BEHAV.* 329 (2006); Jaume Masup et al., *Is the Behavior Analysis Interview Just Common Sense?*, 25 *APPLIED COGNITIVE PSYCHOL.* 593 (2011).

31. One field study reported Behavioral Analysis Interview questions present in 40% of the interrogations observed, while another observed them present in 29%. See Richard A. Leo, *Inside the Interrogation Room*, 86 *J. CRIM. L. & CRIMINOLOGY* 266 (1996); BARRY C. FELD, *KIDS, COPS AND CONFESSIONS: INSIDE THE INTERROGATION ROOM* (2013).

is in his self-interest to stop denying and start admitting to the alleged crime. To this end, the Reid method recommends that investigators ply the suspect with “themes” or scenarios that minimize the suspect’s blameworthiness, culpability or the consequences he will face if he confesses, while overstating his blameworthiness, culpability or the consequences he will face if he continues to deny the investigator’s accusations.³²

For many decades after the Reid method was first developed, police interrogation in practice largely remained a mystery because interrogations were not electronically recorded and empirical researchers did not have access to them. Indeed, at the time of the famous *Miranda* decision in 1966, the U.S. Supreme Court relied on interrogation training manuals, and primarily the one by Inbau and Reid,³³ to describe how police interrogation in America was likely practiced. In the late 1960s and early 1970s, a number of lawyers and law professors sought to empirically study the impact of *Miranda* requirements on police interrogation, confessions, and conviction rates.³⁴ In the 1990s, another set of researchers sought to study empirically the impact of *Miranda* requirements.³⁵ The scholarly consensus is that *Miranda*’s impact in the real world is, for the most part, negligible—the overwhelming majority (78% to 96%) of suspects waive their rights and appear to consent to interrogation, implicitly or explicitly.³⁶ The police have successfully adapted to *Miranda*, have learned how to issue *Miranda* (or avoid having to issue) warnings in ways that will result in legally acceptable waivers, and still elicit a high percentage of incriminating admissions and confessions.³⁷ Rarely are confessions ever

32. LEO, POLICE INTERROGATION, *supra* note 30.

33. FRED E. INBAU & JOHN E. REID, CRIMINAL INTERROGATION AND CONFESSIONS (1st ed. 1962).

34. For a review, see Richard A. Leo, *Questioning the Relevance of Miranda in the Twenty-First Century*, 99 MICH. L. REV. 1000 (2001).

35. Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621 (1996); Paul Cassell & Brett Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839 (1996); Leo & White, *supra* note 7.

36. Richard A. Leo, *Miranda and the Problem of False Confessions*, in THE *MIRANDA* DEBATE: LAW, JUSTICE, AND POLICING (Richard A. Leo & George C. Thomas III eds., 1998).

37. LEO, POLICE INTERROGATION, *supra* note 30.

suppressed for *Miranda* violations,³⁸ and even when they are, prosecutors can impeach the defendant with the confession if he takes the witness stand and even arguably testifies inconsistently with anything in the confession statement, as we have seen.³⁹

Though it dates back more than a century,⁴⁰ the modern empirical study of police interrogation practices and their effects took off in the early 1980s⁴¹ and has, in the last four decades, developed into a robust, extensive and generally accepted social-science research literature. Relying on a variety of well-established social-science research methodologies, this research literature consists of numerous observational studies;⁴² experimental studies;⁴³ archival studies relying on case files, materials or documents;⁴⁴ interview-based

38. George C. Thomas, *Stories About Miranda*, 102 MICH. L. REV. 1959 (2004). Very few scholars take the view that the prophylactic *Miranda* requirements have harmed law enforcement. *But see* Paul Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387 (1996); Paul Cassell & Richard P. Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda's Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055 (1998). Moreover, the bases for such claims have been widely criticized as unreliable. *See* Stephen Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500 (1996); Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Evidence*, 32 HARV. C.R.-C.L. L. REV. 105 (1997); John Donahue, *Did Miranda Diminish Police Effectiveness?*, 50 STAN. L. REV. 1147 (1998); Floyd Feeney, *Police Clearances: A Poor Way to Measure the Impact of Miranda on the Police*, 32 RUTGERS U. L. REV. 1 (2000).

39. *Harris v. New York*, 401 U.S. 222 (1971).

40. HUGO MUNSTERBERG, *ON THE WITNESS STAND: ESSAYS ON PSYCHOLOGY AND CRIME* (1908).

41. Saul Kassin & Lawrence Wrightsman, *Confession Evidence*, in *THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE* 67 (Saul Kassin & Lawrence Wrightman eds., 1985).

42. Leo, *Inside the Interrogation Room*, *supra* note 31; Lesley King & Brent Snook, *Peering Inside the Canadian Interrogation Room: An Examination of the Reid Model of Interrogation, Influence Tactics and Coercive Strategies*, 36 CRIM. JUST. & BEHAV. 674 (2009); FELD, *supra* note 31; Stavoula Soukara et al., *What Really Happens in Police Interviews of Suspects? Tactics and Confessions*, 15 PSYCHOL. CRIME & L. 493 (2009).

43. Kassin et al., *Police-Induced Confessions*, *supra* note 9.

44. *See* Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 990-997 (1997); Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051 (2010); Brandon L. Garrett, *Contaminated Confessions Revisited*, 101 VA. L. REV. 395, 410 (2015); Dave Walsh & Ray Bull, *Interviewing Suspects: Examining the Association Between Skills, Questioning, Evidence Disclosure, and Interview Outcomes*, 21 PSYCHOL. CRIME & L. 661 (2015); Stephen Moston, Geoffrey M. Stephenson & Thomas M. Williamson, *The Effects of Case Characteristics on Suspect Behavior During Police Questioning*, 32 BRIT. J. CRIMINOLOGY 23 (1992); Hayley Cleary, *Police Interviewing and Interrogation of Juvenile Suspects: A Descriptive Examination of Actual Cases*, 38 LAW & HUM. BEHAV. 271 (2014).

studies;⁴⁵ individual⁴⁶ and aggregated case studies;⁴⁷ survey studies;⁴⁸ and meta-analyses,⁴⁹ among others.⁵⁰

The empirical research literature on police interrogation and confessions is too vast to summarize in this chapter, which is primarily focused on policy recommendations that advance the twin goals of ensuring fairness in interrogation procedures and maximizing the accuracy of confession evidence. For our purposes, the relevant empirical findings from this large body of social-science research can be summarized as follows.

First, American police investigators routinely employ guilt-presumptive, accusatory and confirmatory Reid-based interrogation methods to elicit confession evidence from criminal suspects. These methods include the following: isolation, rapport-building, accusation, attacks on a suspect's denials, confrontation with evidence (both true-evidence ploys and false-evidence ploys, i.e., lies about non-existent or falsified evidence), pressure, repetition, minimization (i.e., suggesting that the suspect's blameworthiness,

45. LEO, POLICE INTERROGATION, *supra* note 30; Laurence Alison, Mark Kebbell & Joane Leung, *A Facet Analysis of Police Officers' Self-Reported Use of Suspect-Interviewing Strategies and Their Discomfort with Ambiguity*, 22 APPLIED COGNITIVE PSYCHOL. 1072 (2008); Mark Kebbell et al., *How Do Sex Offenders Think the Police Should Interview to Elicit Confessions from Sex Offenders?*, 16 PSYCHOL. CRIME & L. 567 (2010).

46. WELLS & LEO, THE WRONG GUYS, *supra* note 1; ROB WARDEN & STEVEN DRIZIN, TRUE STORIES ABOUT FALSE CONFESSIONS (2009).

47. See Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 483 (1998); Drizin & Leo, *supra* note 5.

48. Saul Kassin et al., *Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs*, 31 LAW & HUM. BEHAV. 381-400 (2007); Richard A. Leo & Brittany Liu, *What Do Potential Jurors Know about Police Interrogation Techniques and False Confessions?*, 27 BEHAV. SCI. & L. 381, 388-90 (2009). See generally Danielle Chojnacki, Michael Cicchini & Lawrence White, *An Empirical Basis for the Admission of Expert Testimony on False Confessions*, 40 ARIZ. ST. L.J. 1 (2008); Linda Henkel, Kimberly Coffman & Elizabeth Dailey, *A Survey of People's Attitudes and Beliefs About False Confessions*, 26 BEHAV. SCI. & L. 555 (2008); Mark Costanzo, Netta Shaked-Schroer & Katherine Vinson, *Juror Beliefs About Police Interrogation, False Confession, and Expert Testimony*, 7 J. EMPIRICAL LEGAL STUD. 231 (2010).

49. Christian A. Meissner et al., *Interview and Interrogation Methods and their Effects on True and False Confessions*, CAMPBELL SYSTEMATIC REV. (2012), https://www.campbellcollaboration.org/media/k2/attachments/Meissner_Interview_Interrogation_Review.pdf; Christian A. Meissner et al., *Accusatorial and Information Gathering Interrogation Methods and Their Effects on True and False Confessions: A Meta-Analytic Review*, 10 J. EXPERIMENTAL CRIMINOLOGY 459 (2014); Christian A. Meissner, Christopher Kelly & Skye Woestehoff, *Improving the Effectiveness of Suspect Interrogations*, 11 ANN. REV. L. & SOC. SCI. 211 (2015).

50. For an example of a vignette study, see Deborah Davis, Richard A. Leo & William Follette, *Selling Confession: Setting the Stage with the Sympathetic Detective with a Time-Limited Offer*. 26 J. CONTEMP. CRIM. JUST. 441 (2010).

culpability or consequences he faces will be minimized if he makes or agrees to a confession) and maximization (suggesting that the suspect will be perceived as more blameworthy or more culpable or will face worse consequences if he refuses to make or agree to a confession), offers of help, implied and explicit promises of leniency/immunity (or their functional equivalent), and implied and explicit threats of harsher treatment (or their functional equivalent). American, Reid-based methods of interrogation appear to be highly effective at eliciting incriminating statements, admissions, and confessions.⁵¹

Second, American police interrogators are trained to believe that they can reliably infer a suspect's guilt from his or her body language, demeanor, and other non-verbal and verbal behaviors, and thus that they can distinguish accurately between truth-tellers and liars. Yet, like lay people who on average are only 54% accurate at distinguishing truth from deception,⁵² police exhibit slightly better than chance-level accuracy in their demeanor-based judgments of truth and deception. Reid-based police training in the detection of truth and deception leads investigators not only to make prejudgments of guilt that are frequently in error, but also to make them with high levels of confidence, which leads to and reinforces behavioral confirmation biases.⁵³

Third, confession evidence is uniquely damning and consequential in the American criminal justice system. Confessions are perceived to be the strongest evidence of guilt the state can bring against an individual.⁵⁴ Mock and real-world juries treat confession evidence as more impactful on verdicts than other forms of evidence, even when the confessions are judged to be the product of coercion or contradicted by other case evidence. Once a suspect has confessed, a whole set of cascading and reinforcing case-processing effects is set into motion: police are more likely to close their investigation and declare the case solved, ignoring contradictory or exculpatory evidence; prosecutors are more likely to set higher bail, file more and higher charges, and make the confession

51. DAVID SIMON, *HOMICIDE: A YEAR ON THE MEAN STREETS* (1991); Leo, *Inside the Interrogation Room*, *supra* note 31; Ofshe & Leo, *supra* note 44; King & Snook, *supra* note 42; FELD, *supra* note 31.

52. Bella DePaulo et al., *Cues to Deception*, 129 *PSYCHOL. BULLETIN* 74 (2003); Charles Bond & Bella DePaulo, *Accuracy of Deception Judgments*, 10 *PERSONALITY & SOC. PSYCHOL. REV.* 214 (2006).

53. Saul Kassin & Christina Fong, "I'm Innocent!": *Effects of Training on Judgments of Truth and Deception in the Interrogation Room*, 23 *LAW & HUM. BEHAV.* 499 (1999); Saul Kassin & Christian Meissner, *He's Guilty: Investigator Bias in Judgments of Truth and Deception*, 26 *LAW & HUM. BEHAV.* 469 (2002); Keith Findley & Michael Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 *WIS. L. REV.* 291.

54. Saul Kassin, *Why Confessions Trump Innocence*, 67 *AM. PSYCHOLOGIST* 431 (2012).

the centerpiece of their case; defense attorneys are more likely to presume their client's guilt and pressure him or her to take a plea bargain; and juries are more likely to convict, even if the confession was coerced.⁵⁵ Moreover, confessions are such seemingly potent evidence of guilt that they may taint or corrupt other case evidence to misleadingly create the illusion of corroboration.⁵⁶ Confession evidence thus biases the collection, perception, and interpretation of subsequently obtained evidence, setting in motion what Saul Kassin and colleagues have dubbed *forensic confirmation biases*.⁵⁷

Fourth, though highly counterintuitive to most people, false confessions are far more common than previously imagined, and appear to occur regularly in the American criminal justice system. In the last quarter-century, researchers have documented hundreds of proven false confessions, which—because the phenomenon of false confession is difficult to identify and prove—are the tip of a much larger problem. False confessions often mimic true confessions: they are typically vivid, detailed, and contain unique non-public details that are said to reveal inside knowledge but instead are the product of police contamination (i.e., leaking or feeding of non-public case facts).⁵⁸ As a result, most people cannot reliably distinguish between true and false confessions.⁵⁹ Most people understand that psychologically coercive interrogation techniques can lead to true confessions, but they do not understand the relationship between psychologically coercive interrogation techniques and false confessions.⁶⁰ Sadly, when entered into the stream of evidence against an accused, false confessions appear to almost always lead to the wrongful conviction of the innocent.⁶¹

Fifth, researchers have identified two categories of factors that, when present, increase the risk of eliciting false confessions. *Situational* risk factors include lengthy custody and interrogation; police lies about non-existent evidence (i.e., false-evidence ploys); minimization; and implied or explicit

55. Saul Kassin & Katherine Neumann, *On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis*, 21 *LAW & HUM. BEHAV.* 469 (1997); Leo & Ofshe, *supra* note 47; Drizin & Leo, *supra* note 5; Kassin, *Why Confessions Trump Innocence*, *supra* note 54.

56. Saul Kassin et al., *Confessions that Corrupt: Evidence from the DNA Exoneration Files*, 23 *PSYCHOL. SCI.* 41 (2012).

57. Saul Kassin, Itiel Dror & Jeff Kukucka, *The Forensic Confirmation Bias: Problems, Perspectives and Proposed Solutions*, 2 *J. APPLIED RES. MEMORY & COGNITION* 42 (2013).

58. Ofshe & Leo, *supra* note 44, at 990-997.

59. Saul Kassin et al., *I'd Know a False Confession if I Saw One: A Comparative Study of College Students and Police Investigators*, 29 *LAW & HUM. BEHAV.* 211 (2005).

60. Leo & Liu, *supra* note 48; Iris Blandon-Gitlin, Kathryn Sperry & Richard A. Leo, *Jurors Believe Interrogation Tactics Are Not Likely to Elicit False Confessions: Will Expert Witness Testimony Inform Them Otherwise?*, 17 *PSYCHOL. CRIME & L.* 239 (2011).

61. Drizin & Leo, *supra* note 5; Kassin, *Why Confessions Trump Innocence*, *supra* note 54.

promises and threats. The psychological effects of these techniques may lead to false confessions from innocent suspects for a variety of related reasons: They wish to terminate the interrogation and escape from the stress, pressure, and confinement of the interrogation process; they come to perceive that they have no meaningful choice but to comply with the demands and requests of their interrogators; or they come to perceive that the benefits of admitting to some version of the offense outweighs the costs of denial,⁶² even as they tend to focus on more immediate rather than distant consequences.⁶³

Dispositional risk factors include adolescence and immaturity; cognitive and intellectual disabilities; mental illness; and certain personality traits, such as suggestibility and compliance.⁶⁴ Even though psychologically coercive interrogation methods are the primary cause of false confessions, individuals differ in their ability to withstand interrogation pressure and thus in their innate susceptibility to making or agreeing to false confessions.⁶⁵ Juveniles are more likely to falsely confess because they tend to be developmentally immature, impulsive, naively trusting of authority, submissive, eager to please adult figures, and thus more easily pressured, manipulated, and persuaded to make or agree to false statements without fully understanding the nature or gravity of an interrogation or the long-term consequences of their responses to police accusations.⁶⁶ Mentally handicapped individuals are more likely to confess falsely for a variety of reasons related to their low intelligence, short attention span, poor memory, and poor conceptual and communication skills, which cause them to become easily confused, highly suggestible and compliant, and easy to manipulate; in addition, people with intellectual disabilities have a tendency to mask or disguise their cognitive deficits and to look to others—particularly authority figures—for appropriate cues to behavior.⁶⁷ People with mental illness possess any number of psychiatric symptoms that make them more likely to agree with, suggest, or confabulate false and misleading information to detectives during interrogation, including faulty reality

62. Ofshe & Leo, *supra* note 44.

63. Stephanie Madon et al., *Temporal Discounting: The Differential Effect of Proximal and Distal Consequences on Confession Decisions*, 36 LAW & HUM. BEHAV. 13 (2012); Stephanie Madon et al., *How Factors Present During the Immediate Interrogation Situation Produce Short-Sighted Confession Decisions*, 37 LAW & HUM. BEHAV. 60 (2013).

64. Kassir et al., *Police-Induced Confessions*, *supra* note 9; see also Drizin & Leo, *supra* note 5.

65. Kassir et al., *Police-Induced Confessions*, *supra* note 9.

66. FELD, *supra* note 31.

67. LEO, POLICE INTERROGATION, *supra* note 30; GISLI H. GUDJONSSON ET AL., PERSONS AT RISK DURING INTERVIEWS IN POLICE CUSTODY: THE IDENTIFICATION OF VULNERABILITIES (1993).

monitoring, distorted perceptions and beliefs, an inability to distinguish fact from fantasy, proneness to feelings of guilty, heightened anxiety, mood disturbances, and a lack of self-control.⁶⁸

III. ANALYSIS AND ASSESSMENT

As mentioned above, this chapter seeks to describe the best available practices and policy recommendations that, based on the social-science research, are most likely to both ensure fair procedures and maximize the accuracy of the information police interrogators elicit. It is important that we discuss best practices or policy reforms in both the investigative stage of the criminal process (where errors are made) and the adjudicative phase (where errors are corrected).⁶⁹ To this end, we seek practices that will maximize the number of true confessions that police elicit and minimize the number of false ones. We thus also seek to recommend procedures prior to the interrogation that will prevent police from interrogating innocent suspects in the first place, as well as procedures following the interrogation that will prevent false confessions that have been elicited from being entered into evidence against criminal defendants at trial.

It can be difficult to describe precisely the line between fair and unfair psychological interrogation procedures. In American law, the Fifth and Fourteenth Amendment due process voluntariness test and the Fifth Amendment *Miranda* prophylactic rules have essentially become stand-ins for fairness in the interrogation process: If the suspect gives a voluntary confession and waives an adequate version of properly read *Miranda* rights, then the suspect's subsequent confession is in effect considered both fair and legal. But neither set of legal rules do a particularly good job at ensuring fairness, because no one knows what voluntariness (i.e., not overbearing the will) really means since it is such a vague, indeterminate and ethereal concept, and *Miranda* warnings, when given, are almost always waived in a moment that precedes the actual interrogation, which can last hours. More objective rules to ensure more fairness in the interrogation process could include time limits during interrogation (e.g., that no interrogation last more than four or six hours) or special rules for interrogating readily identifiable vulnerable groups such as juveniles or the obviously mentally handicapped or mentally ill.

68. Allison Redlich, *Mental Illness, Police Interrogations, and the Potential for False Confession*, 55 LAW & PSYCHIATRY 19 (2004); GISLI H. GUDJONSSON, *THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS: A HANDBOOK* (2003).

69. DAN SIMON, *IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS* (2012).

The most salient contemporary debate about the fairness of interrogation procedures is whether to permit police to use deception (lies, fabrications, falsehoods) to elicit confessions. In many first-world countries (e.g., England, Germany, Australia), police are not permitted to lie to suspects to elicit confessions. In America, police are permitted to lie so long as they do not otherwise overbear the will of the suspect per the Fifth and Fourteenth Amendment due process voluntariness test. In American interrogation, police lies take three primary forms: (1) lying about the alleged evidence the police claim to have against the suspect (e.g., about non-existent eyewitnesses, non-existent co-conspirator confessions, non-existent surveillance videos, non-existent DNA, etc.); (2) lying about their role by telling the suspect that their purpose is to help him, as if they are the suspect's institutional agent, friend, or representative; and (3) trying to persuade the suspect that it is in the suspect's material self-interest to make a confession, which it almost never is. If our system valued procedures that are fair to criminal suspects above all else, we would never allow any one of these types of police deception during interrogation.

Recommending procedures that seek to maximize the diagnosticity (i.e., ratio of true to false) of confession evidence—regulating police interrogation in a way that minimizes the likelihood of eliciting false confessions and maximizes the likelihood of eliciting true confessions—is, because of the empirical social-science research, more straightforward than analyzing where to draw the line between fair and unfair practices. False confessions leading to the wrongful conviction of the innocent usually result from a three-step process: first, the police misclassify a suspect who is innocent as guilty (the *misclassification error*); second, they subject the innocent suspect to a guilt-presumptive interrogation process that is designed to elicit an incriminating statement, not to test the hypothesis of guilt or obtain the truth (the *coercion error*); and third, police leak and feed the innocent suspect unique and/or non-public details that the innocent suspect, once broken, then repeats back and incorporates into his (false) confession statement, which makes it appear true and persuasive (the *contamination error*).⁷⁰

Empirical social-science research and best practices suggest ways to reduce all three errors in practice and thus increase the accuracy of confession evidence. The *misclassification error* often occurs because police investigators receive poor training about their ability to separate the innocent from the guilty based on flimsy to non-existent evidence. American police are taught falsely (by the Reid and other knock-off approaches) that they can be highly accurate human lie detectors, which is both wrong and dangerous. It is wrong because it is based

70. LEO, POLICE INTERROGATION, *supra* note 30.

on inaccurate speculation that is contradicted by the findings of virtually all the published scientific research on this topic. Studies have repeatedly demonstrated across a wide variety of contexts that people are poor human lie detectors and thus highly prone to error in their judgments about whether an individual is lying or telling the truth. Even specific studies of police interrogators have found that they cannot reliably distinguish between truthful and false denials of guilt at levels greater than chance; indeed, they routinely make erroneous judgments. The method of behavior analysis taught by Reid and Associates has been found empirically to actually lower judgment accuracy.⁷¹ The American police belief of interrogator as lie detector is dangerous because it can easily lead a detective to make an erroneous judgment about an innocent suspect's guilt based on little or nothing more than his body language and then, as a result, subject the suspect to a guilt-presumptive accusatory interrogation designed simply to get a confession. But this false belief is also dangerous because it has been shown to significantly increase detectives' confidence in their erroneous judgments. Erroneous prejudgments of deception lead to what Meissner and Kassin have called the *investigative response bias* (i.e., the tendency to presume a suspect's guilt with near or complete certainty).⁷² The overconfident police detective who mistakenly decides an innocent person is a guilty suspect will be far less likely to investigate new or existing leads, evidence, or theories of the case that point to other possible suspects, thus increasing the risk of eliciting a false confession.

Once detectives misclassify an innocent person as a guilty suspect, they will often subject him to a confirmatory interrogation in which they apply Reid-based methods of pressure and persuasion to move the presumed guilty suspect from denial to admission (the *coercion error*). Empirical researchers have identified several interrogation techniques that elevate the risk of eliciting a false confession when misapplied to innocent suspects. As mentioned earlier, these *situational* risk factors include false-evidence ploys; minimization; implied and explicit suggestions or promises of leniency or immunity; implied and explicit threats of harsher treatment or punishment; lengthy custody and interrogation; and sleep deprivation.⁷³ As we have seen, these techniques increase the risk of eliciting false confessions by causing suspects to perceive that their situation is hopeless and that they have no choice but to comply with the demands of their interrogator(s). As we have also seen, certain individual risk factors—such as adolescence, psychosocial immaturity, and subnormal

71. Vrij et al., *supra* note 30; Masup et al., *supra* note 30.

72. Kassin & Meissner, *supra* note 53.

73. Kassin et al., *Police-Induced Confessions*, *supra* note 9.

cognitive and intellectual functioning—make suspects more vulnerable to psychological coercion and making or agreeing to a false or unreliable statement, admission, or confession.⁷⁴

The *contamination error* occurs when police imply or communicate non-public case facts to innocent suspects, who, once broken, then incorporate and regurgitate these facts into their false confession.⁷⁵ Police feeding of facts appears to be inadvertent;⁷⁶ without realizing it, and in violation of their own training,⁷⁷ police interrogators often tell suspects how the crime occurred. Contamination occurs through the use of evidence ploys, such as telling the suspect the alleged evidence against him, showing him crime-scene photographs, taking the suspect to the crime scene, or repeating the victim's specific allegations and representing them as too detailed to be false.⁷⁸ The presence of non-public unique case facts gives false confessions verisimilitude. In addition, police interrogators sometimes also script suspect's confessions, pressuring and persuading suspects to incorporate plausible motives, expressions of remorse, acknowledgments of voluntariness, and even apology notes.⁷⁹ The upshot is that factually false confessions become vivid and detailed narratives that contain cues that third parties associate with truthful confessions and, on their face, become indistinguishable from them.

RECOMMENDATIONS

These three errors—misclassification, coercion, and contamination—that impede eliciting true confessions from the guilty and lead to false confessions from the innocent can be corrected and lessened by several policy reforms, as I will discuss in the remainder of this section. However, there is no single law, policy reform, or panacea that will solve all the problems associated with police interrogation and confession evidence in America; a multipronged approach is necessary. And, beyond any specific policy recommendation, the most important and challenging reform may be to change the culture of interrogation in America.

74. *Id.*

75. Ofshe & Leo, *supra* note 44.

76. Garrett, *Substance of False Confessions*, *supra* note 44.

77. FRED E. INBAU ET AL., *CRIMINAL INTERROGATION AND CONFESSIONS* (5th ed. 2013).

78. Richard A. Leo, *Why Interrogation Contamination Occurs*, 11 OHIO ST. J. CRIM. L. 193 (2013).

79. LEO, *POLICE INTERROGATION*, *supra* note 30; Sara Appleby et al., *Police-Induced Confessions: An Empirical Analysis of Their Content and Impact*, 19 PSYCHOL. CRIME & L. 111 (2011).

1. **All police departments must electronically record interrogations in their entirety, as some already do by law in their jurisdictions and many others do voluntarily.**⁸⁰ The full electronic recording of police interrogations creates a comprehensive and reviewable factual record that can be used to resolve any swearing contests about whether investigators used coercion or contaminated their suspects (as well as false allegations against police).⁸¹ The mandatory full electronic recording of interrogation promotes truth-finding by making it unnecessary to rely on the incomplete, selective, and potentially biased accounts of the disputants about what occurred. Recording all promotes truth-finding by deterring police from using impermissible interrogation techniques,⁸² thereby preventing false confessions and erroneous convictions.⁸³ Even if police continue to elicit some false confessions, electronic recording will help prevent them from being introduced into the stream of evidence that can lead to wrongful convictions. Recording is also an effective investigative tool that protects police against false allegations, and allows them to investigate suspects more thoroughly because they can review the recording as a case unfolds and in light of subsequent evidence. By recording rather than taking notes, detectives are better able to focus on their interrogation strategy and getting information from suspects, who appear to be less defensive when police are not taking notes. Electronic recording is an effective law enforcement tool and technology.

Electronic recording has many additional benefits that extend beyond the interrogation room. Recording allows for the most effective monitoring of police interrogation by police, prosecutors, judges and juries. Recording also allows police to present the results of their interrogations in court more effectively, and is believed by prosecutors to facilitate eliciting plea bargains. Recording also conserves resources in an overburdened criminal justice system. It saves money by reducing the time that police, prosecutors, defense attorneys, judges and juries must spend reconstructing, testifying about, or evaluating interrogations and confessions. When police record, there will be fewer pretrial motions to suppress and fewer trials. In short, the electronic recording of police interrogations offers numerous benefits—to police, prosecutors, defense attorneys, judges, juries, and society in general—and few costs. Unlike some potential reforms, the recording of

80. Sullivan, *supra* note 29.

81. LEO, POLICE INTERROGATION, *supra* note 30.

82. Saul Kassin et al., *Does Video Recording Alter the Behavior of Police During Interrogation?*, 38 LAW & HUM. BEHAV. 73 (2014).

83. LEO, POLICE INTERROGATION, *supra* note 30.

police interrogations is not an adversarial or zero-sum solution: It benefits all parties who value accurate fact-finding and more-informed decision-making.⁸⁴ However, substantial empirical research also suggests that when recording, police should adopt an “equal focus” camera that shows both the interrogators and the suspect (rather than focusing exclusively on the suspect or the interrogators) in order for third parties to make more informed and balanced decisions about the voluntariness and reliability of any resulting confession statements.⁸⁵

2. **To increase the number of true and reliable confessions police elicit and reduce the number of false and unreliable ones, police interrogation training needs to be significantly improved in at least two ways.** Interrogators need to be taught that they cannot reliably intuit whether a suspect is innocent or guilty based on their perceptions of his demeanor, body language, and nonverbal behavior. Police interrogators are not highly accurate human lie-detectors and never will be; and the utility of the Behavior Analysis Interview is not supported by any empirical or scientific research.⁸⁶ As we have seen, scientific research has repeatedly demonstrated that the deception-detection training materials of police are flawed, that police judgments of truth-telling and deception are slightly better than chance and thus highly prone to error, and that interrogators cannot accurately assess their own lie-detection skills.⁸⁷

In addition, police investigators need to be taught not only that their interrogation methods can elicit true confessions, but also that they can elicit false ones and why, including which interrogation methods create the highest risk of eliciting unreliable statement evidence. Perhaps above all, interrogators must avoid implicit promises and threats—including those conveyed through Reid-based minimization techniques and strategies—as well as explicit ones; they must also better understand how and why guilt-presumptive, accusatory and manipulative Reid-based interrogation methods can and do move even innocent suspects from denial to admission and the making of a narrative and detailed false confession. Individuals under interrogation ultimately make or agree to

84. *Id.*

85. G. Daniel Lassiter et al., *Videotaped Confessions and Interrogations: A Change in Camera Perspective Alters Verdicts in Simulated Trials*, 87 J. APPLIED PSYCHOL. 867 (2002); G. Daniel Lassiter et al., *Evaluating Videotaped Confessions: Expertise Provides No Defense Against the Camera-Perspective Effect*, 18 PSYCHOL. SCI. 224 (2007).

86. Vrij et al., *supra* note 30; Masup et al., *supra* note 30.

87. DePaulo et al., *supra* note 52.

false confessions either because they are distressed or coerced to a state of hopelessness and view the act of compliance or confessing as their only means of escaping an intolerably aversive situation or because the interrogation process convinces them that it is more likely than not that they committed the crime in question despite no memory of having done so.⁸⁸ If interrogators are taught the logic, principles and effects of their psychological interrogation methods, they will not only be more knowledgeable about the causes of false confessions but also more effective at eliciting truthful ones.

A word on the use of police lies during interrogation (i.e., the presentation of false evidence) is in order here. Unlike many other advanced Western democracies (e.g., England, Germany, Australia, Iceland, New Zealand, etc.), American police are permitted to confront suspects with fabricated evidence during interrogation, as we have seen. American police appear to almost universally support the use of false-evidence ploys because of its perceived role in eliciting true confessions from guilty suspects, whereas American scholars appear to almost universally oppose false-evidence ploys because of its perceived role in eliciting false confessions from innocent suspects. Experimental research indicates that false-evidence ploys are far more likely to elicit false confessions than true confessions,⁸⁹ and archival/documentary research indicates that false-evidence ploys are present in virtually all police interrogations leading to proven false confessions.⁹⁰ This is not surprising: More than 100 years of basic psychological research indicates that misinformation effects can substantially alter individual's perceptions, beliefs, and even memories.⁹¹ If policymakers are committed to regulating police interrogation such that the resulting statements are both voluntary and reliable, then the American criminal justice system must either ban the use of false evidence during interrogation or better use existing safeguards (such as some of the ones discussed in this section) to

88. Kassin & Wrightsman, *supra* note 41; Ofshe & Leo, *supra* note 44; Kassin et al., *Police-Induced Confessions*, *supra* note 9.

89. Melissa B. Russano et al., *Investigating True and False Confessions within a Novel Experimental Paradigm*, 16 *PSYCHOL. SCI.* 481, 484 (2005); Fadia Narchet, Christian Meissner & Melissa Russano, *Modeling the Influence of Investigator Bias on the Elicitation of True and False Confessions*, 35 *LAW & HUM. BEHAV.* 452 (2011); Allyson J. Horgan, Melissa B. Russano & Christian A. Meissner, *Minimization and Maximization Techniques: Assessing the Perceived Consequences of Confessing and Confession Diagnosticity*, 18 *PSYCHOL. CRIME & L.* 65 (2012).

90. Drizin & Leo, *supra* note 5.

91. Elizabeth Loftus, *Planting Misinformation in the Human Mind: A 30 Year Investigation of the Malleability of Memory*, 12 *LEARNING & MEMORY* 361 (2005).

place more effective limits on the use of false-evidence ploys (e.g., allowing some false-evidence ploys but not others; or allowing false-evidence ploys in some types of cases but not others; or allowing false-evidence ploys on some types of suspects but not others).

3. **Police should embrace interrogation methods that increase the elicitation of true relative to false confessions.** The most comprehensive empirical research and analysis currently available on this specific point⁹² suggests that American police should move away from Reid-based approaches relying on guilt-presumptive accusatory interrogation techniques and toward investigative interviewing methods. Investigative interviewing approaches differ from their Reid-based counterparts in several ways: Investigative interviewing approaches emphasize truthful information-gathering as their goal rather than eliciting a confession of guilt; they emphasize establishing rapport and letting suspects first tell their story before being confronted with inconsistencies or truthful existing evidence rather than accusatory approaches based on psychological control and manipulation; investigative interviewing approaches do not permit false-evidence ploys and lies and do not rely on minimization techniques that implicitly communicate promises and threats; and investigative interviewing approaches rely on open-ended exploratory questioning rather than close-ended confirmatory questioning. Investigative interviewing approaches in England and elsewhere have not resulted in a decline in the confession rates. The ultimate goal of shifting to investigative interviewing approaches is not only to improve the diagnostic accuracy of confession evidence, but also to change and professionalize the culture of police interrogation in America.
4. **The American criminal justice system should incentivize and increase (judicial and non-judicial) scrutiny of the reliability of confession statements before they are admitted into evidence against a defendant at trial.** This could be done in at least three ways. One would be to require police to meet a minimal evidentiary threshold—such as reasonable suspicion or probable cause—prior to allowing investigators to subject criminal suspects to the inherent jeopardy of an accusatory guilt-presumptive interrogation whose goal is to obtain a confirmatory confession. By subjecting the basis for the police decision to interrogate to an independent review by a third party, a reasonable suspicion requirement

92. Meissner et al., *Interview and Interrogation Methods*, *supra* note 49; Meissner et al., *Accusatorial and Information Gathering*, *supra* note 49.

could prevent fishing expeditions and ill-conceived interrogations, thus screening out the kinds of interrogations that tend to lead to false confessions. Another way to increase judicial scrutiny would be to make reliability a more explicit factor in the Fifth and Fourteenth Amendment due process voluntariness analysis at pretrial suppression hearings,⁹³ which would be more consistent with the historical purpose underlying the due process voluntariness.⁹⁴ A third would be to institutionalize pretrial reliability hearings in which trial judges—in their traditional gatekeeping role and informed by social-science research—are empowered to exclude confessions that contain substantial indications of unreliability and thus are, in the language of law, more prejudicial than probative.⁹⁵

Of course, there are a variety of other possible reforms that can and should increase the accuracy of confession evidence. These include, for example: time limits on interrogation, with a sliding-scale presumption of coercion/involuntariness as interrogation length increases; special protections for the vulnerable populations such as juveniles and people with mental handicaps; expert witness testimony in cases involving dispute interrogations and/or disputed confession evidence; and cautionary jury instructions.⁹⁶ The police interrogation training firm Reid and Associates has suggested that interrogators should not require more than four hours to obtain a confession,⁹⁷ and some academic commentators have proposed a limit of six hours on all custodial interrogations.⁹⁸ As Barry Feld has noted, “A limit of four or six hours gives police ample opportunity to obtain true confessions from guilty suspects without increasing the

93. Eve Brensike Primus, *The Future of Confession Law: Toward Rules for the Voluntariness Test*, 114 MICH. L. REV. 1 (2015).

94. GEORGE C. THOMAS III & RICHARD A. LEO, *CONFESSIONS OF GUILT: FROM TORTURE TO MIRANDA AND BEYOND* (2012).

95. Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479; BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* 19 (2011); Richard A. Leo et al., *Promoting Accuracy in the Use of Confession Evidence: An Argument for Pre-Trial Reliability Assessments to Prevent Wrongful Convictions*, 85 TEMPLE L. REV. 759 (2013).

96. LEO, *POLICE INTERROGATION*, *supra* note 30; FELD, *supra* note 31.

97. FRED E. INBAU ET AL., *CRIMINAL INTERROGATION AND CONFESSIONS* 597 (4th ed. 2001) (“Rarely will a competent interrogator require more than approximately four hours to obtain a confession from an offender, even in cases of a very serious nature Most cases require considerably fewer than four hours.”).

98. WELSH S. WHITE, *MIRANDA'S WANING PROTECTIONS: POLICE INTERROGATION PRACTICES AFTER DICKERSON* 155 (2003).

risk of eliciting false confessions from innocent people.”⁹⁹ Additional safeguards for vulnerable populations could include model policies for interrogating juveniles, the mentally handicapped, and mentally ill; additional specialized interrogation training for police; and the provision of an appropriate adult or special representative during interrogation.¹⁰⁰ The purpose of expert witness testimony in cases involving a disputed interrogation and/or confession evidence—which is widely accepted by American courts and has become increasingly common—is to educate triers of fact about the general findings from scientific research on interrogation and confession so that they can better understand the psychological principles, practices, and processes of modern interrogation and thereby more accurately discriminate between reliable and unreliable confession evidence.¹⁰¹ Cautionary instructions should increase jury sensitivity about the confession evidence they are being asked to evaluate and thus lead to more accurate verdicts and fewer wrongful convictions based on unreliable confessions.¹⁰²

Regardless of the approach, the American legal system should move to a policy regime that emphasizes principles and practices that increase the accuracy (i.e., diagnosticity) of confession evidence—thereby maximizing true, and minimizing false, confessions.

99. FELD, *supra* note 31, at 260.

100. LEO, POLICE INTERROGATION, *supra* note 30. For a discussion of juvenile justice, see Barry C. Feld, “Juvenile Justice,” in Volume 1 of the present Report. For a discussion of mental illness in the criminal justice system, see Stephen J. Morse, “Mental Disorder and Criminal Justice,” in Volume 1 of the present Report.

101. Keith Findley, Brian Cutler & Danielle Loney, *Expert Testimony on Interrogation and False Confessions*, 82 UMKC L. REV. 589 (2014); Kelsey Henderson & Lora Levett, *Can Expert Testimony Sensitize Jurors to Variations in Confession Evidence?*, 40 LAW & HUM. BEHAV. 638 (2016). See generally Garrett, *supra* note 4.

102. LEO, POLICE INTERROGATION, *supra* note 30.