Psychological consultation in cases involving interrogations and confessions

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Scientific investigation, including naturalistic observation and empirical research, is advancing our understanding of the psychology of interrogations and confessions. Psychological science enhances our understanding of why some people who initially claim innocence respond to interrogation procedures by confessing – sometimes to crimes they did not commit. Legal procedures allow three opportunities for a defendant to challenge confession evidence: whether there was a knowing, intelligent, and voluntary Miranda *waiver; whether the confession was coerced (involuntary); and whether the confession is unreliable. Expert psychological or psychiatric testimony can assist courts in each of these determinations.*

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Statement of the problem

Some people falsely confess to some crimes sometimes. That can make it difficult to resolve cases justly because once a person confesses to a crime, the investigation into "who done it" may cease. By the time it is recognized that the person who confessed is not guilty, the case may be difficult or impossible to investigate and effectively resolve.

Meanwhile, an innocent person is beleaguered by a myriad of social, economic, and personal problems while awaiting trial – a trial he is likely to lose. As the U.S. Supreme Court has recognized, "A defendant's confession is like no other evidence. It is probably the most probative and damaging evidence that can be admitted against him, and, if it is a full confession, a jury may be tempted to rely on it alone in reaching its decision."[1] This is borne out in research: "Taken together, our findings demonstrate that confession evidence has a greater impact *on* jurors—and is seen as having a greater impact *by* jurors—than other potent types of evidence."[2] Confessions are "uniquely potent"[3] and "devastating to the defendant."[4]

How often do people confess to crimes they did not commit? No precise figures are available, which is understandable because in groups of people who have confessed we often do not know who is truly guilty and who is not. Some studies suggest that the rate of false confessions in such groups may be small but not trivially so, perhaps around one to four percent.[5] There have been hundreds of well-documented cases in which an innocent person was found guilty. In studies of cases with false convictions, the percentage of cases that included a false conviction has ranged from about 14% (49 of 350 cases)[6] to nearly one in four (15 of 62).[7]

Advances in biological evidence techniques, including DNA testing, have enhanced certainty in establishing guilt, resulting in some exonerations and avoiding some false

convictions.[8] However, in some criminal cases there are no biological samples to test. And even when there are samples to test, the wait time for getting test results can be substantial. As of September 2004, in the USA there is a backlog of 300,000 biological samples to test.[9] This highlights the need to avoid false confessions whenever possible, and to recognize as soon as possible when a suspect's statement is of doubtful validity.

Background—Why Do Some Innocent People Confess?

This question fascinates me. Space considerations do not allow a thorough exploration here, so the interested reader should look to other sources.[10] Like many interesting questions, this one can be answered, "That depends." In considering some of the reasons, let us first look at three types of confessions: *self-initiated, first-response,* and *police-induced.*[11]

Self-initiated confessions occur when a person initiates contact with a law enforcement officer or other person in authority and declares that he or she is guilty of a crime. There is no police pressure. An example is the case of *Colorado v. Connelly,* 479 U.S. 157 (1986),[12] in which the defendant told the police that God told him to confess. It has been reported that over 200 people falsely confessed to kidnapping the Lindbergh baby,[13] for various reasons apparently including notoriety.

First-response confessions occur when the police approach a person and initiate questioning, and the person's first response is "I did it."

Police-induced confessions occur when the police approach a person and initiate questioning, the person's first response is something other than "I did it," (for example, "I didn't do it"), the police engage in further conversation with the person, and the person subsequently says, "I did it."

If a person makes a false confession that is either self-initiated or his first response to police questioning, the logical assumption might be that he does so for personal reasons. If a person confesses to a crime following police pressure, the logical assumption might be that he does so for social-psychological reasons. In fact, all three types of confessions could be made, falsely, for a combination of personal and social-psychological reasons. Some examples:

- Person *A* confesses to a crime that her husband committed because she anticipates a lighter sentence (he has an extensive criminal record and she does not).
- Person *B* confesses to a crime that *C* committed because *C* threatens to harm *B*'s children if he does not do so.
- Person *D* confesses to a crime under police pressure; Person *D* was especially vulnerable to police pressure due to personal factors such as low intelligence, psychosis, withdrawal from an addictive drug, etc.

The last example is of primary concern. Personal factors that increase the risk of a false confession may include the following: low intelligence, learning disability, youthful age and/or immaturity, lack of experience, lack of education, mental disorder (e.g., schizophrenia) affecting reality testing, mental disorder (e.g., Alzheimer's Disease) affecting memory, psychoactive substance use (e.g., drunk or under the influence of hallucinogens) around the time of the interrogation or around the time of the alleged offense, withdrawal symptoms at the time of the interrogation or at the time of the alleged offense, dependent personality, anxiety disorder, suggestibility, recent bereavement, language barriers, medical condition.[14]

Generally speaking, none of the above personal factors *cause* a person to falsely confess to a particular crime. Any of these factors, combinations of factors, or other, perhaps idiosyncratic, factors may make some people more vulnerable to the influence of police during interrogations. To

understand why some people falsely confess, it is essential to understand how police attempt to influence suspects during interrogations. Why? Because the same techniques that police use to elicit confessions from presumed guilty suspects can and do lead some innocent people to confess. [15]

Common techniques in police interrogation

A stroll through U.S. Supreme Court cases involving interrogations and confessions reflects the changing nature of police procedures in influencing suspects to confess.[16] Responding to reports of abuse by police officers, President Herbert Hoover appointed Attorney General George Wickersham to head the National Commission on Law Observance and Law Enforcement in 1929. In 1931 the Commission issued the "Report on Lawlessness in Law Enforcement" as volume eleven of a fourteen-volume report on criminal justice in America. "Documenting various in-custody abuses, the Wickersham Commission concluded that police use of brute physical force, threats of harm, intimidation, and protracted, incommunicado detention during interrogation was widespread. In short, the 'third degree' flourished in most American police departments."[17]

When the U. S. Supreme Court considered the issue of interrogations and confessions in the seminal case of *Miranda v. Arizona,* 384 U.S. 436 (1966), they cited the Wickersham report and noted that at the time of the *Miranda* decision in the 1960s, in some cases police continued to use brute force in the form of "beating, hanging, whipping" and in a case decided the year before *Miranda,* the police "placed lighted cigarette butts on the back of a potential witness under interrogation for the purpose of securing a statement incriminating a third party."[18] The Court considered such cases to be exceptions in the 1960s, but sufficiently widespread to be cause for concern.

The Court quoted Lord Sankey: "It is not admissible to do a great right by doing a little wrong. ... It is not sufficient to do justice by obtaining a proper result by irregular or

improper means."[19] Use of the third degree involves flagrant violations of the law by law enforcement officers, increases the danger of false confessions, "brutalizes the police, hardens the prisoner against society, and lowers the esteem in which the administration of Justice is held by the public."[20]

The Court noted that, "the modern practice of in-custody interrogation is psychologically, rather than physically, oriented" and "recognized that coercion can be mental as well as physical."[21] The Court noted that "Interrogation still takes place in privacy. Privacy results in secrecy, and this, in turn, results in a gap in our knowledge as to what, in fact, goes on in the interrogation rooms."[22]

As coercion by physical force has become increasingly unacceptable both in law and in practice in the United States, police interrogators have turned increasingly to psychological procedures to influence suspects to confess, with deception often being a key component in the process.[23] Several models have been developed to explain why people confess to crimes, despite the serious negative consequences likely to ensue.[24] To understand why a person who initially denied guilt makes a decision to confess, it is useful to consider a decision faced by criminal defendants at a later stage in the judicial process: whether to plead out or go to trial. In making that decision, the defendant typically has guidance from his attorney, as well as friends and family, and has the luxury of time to weigh his options. There is considerable opportunity to gain accurate information about the strength of the case against him, often including detailed depositions of prospective witnesses and authentication of any physical evidence. The prosecutor has an ethical responsibility to provide exculpatory as well as inculpatory evidence to the defense. If the defendant chooses to enter a plea of guilty or no contest, the judge will engage him in a colloquy to insure that he understands the rights he is forgoing (e.g., the right to confront witnesses, the right to be tried by a jury of peers), and that he is competent to waive the rights and enter a plea.

If there is doubt about his competence to proceed, that must be explored, which typically involves, at minimum, one psychological or psychiatric evaluation relevant to his understanding about the charges and his decision-making ability.[25]

It is estimated that over 90% of criminal convictions are obtained via plea (bargaining) rather than trial.[26] In at least some jurisdictions, a defendant has the right to enter a "best interests" plea, saying that, although he does not admit guilt, he believes it is in his best interests to plead out to the case and accept the consequences that would accrue to a person guilty of the crime.[27] Thus it is formally recognized that under some circumstances an innocent person might choose to do the functional equivalent of pleading guilty.

Now compare the foregoing to the situation of a suspect who agrees to talk to the police. (The majority of suspects agree to talk to the police.[28]) There are some obvious similarities in the decisions to be made, and, superficially, both involve a rational decision about whether or not to say that one committed a crime: an interrogation suspect decides whether or not to make admissions, and a criminal defendant decides whether or not to plead guilty. However, the difference in the processes and in the safeguards afforded is monumental.

The safeguards afforded a criminal defendant are designed to insure that he is both capable of, and actually performing, a rational act as he pleads guilty (or no contest). In contrast, interrogation procedures are designed to encourage rational people to make decisions that no rational person would make outside of the context of the influence of modern police interrogation. "All approaches to the analysis of human behavior that presume rationality would, if applied superficially, classify confession as an irrational act—whether the person is innocent or guilty of the crime. … Psychological methods of interrogation have evolved for the purpose of influencing a rational person who knows he is

guilty to alter his initial decision to deny culpability and decide instead to confess."[29]

During the shift from denial to admission, police use one set of tactics to alter the suspect's perception of his immediate situation, and another set of tactics to communicate information to the subject about incentives to confess and disincentives for continued denial. Routinely, police interrogators exert great control over the suspect's environment and distort or fabricate information to temporarily alter the suspect's subjective reality: "The process of interrogation produces confession because it results in the suspect being convinced either that he has been caught (if he is guilty) or that his situation is hopeless (if he is innocent), that further denial is pointless, and that it is in his self-interest to confess. For both innocent and guilty suspects, confessing is something neither would have chosen to do prior to the start of the interrogation and something each would have predicted he would have resisted to his last breath."[30]

Step by step

Modern interrogations are described as involving relentless efforts to move suspects to confess: "The unanticipated and unappreciated fact about psychological methods of interrogation is that they are so influential that if allowed to go forward without restraint or if directed at the exceptionally vulnerable they will have devastating consequences. These methods produce false confessions because they convince innocent suspects that their situations are hopeless just as surely as they convince the guilty that they are caught."[31]

Accusatory interrogation proceeds systematically with one goal: to obtain a confession from whomever has been selected as a suspect. When there is solid evidence linking the suspect to the crime, the interrogator will use that evidence, often along with additional, fabricated evidence, during the interrogation stage when he is persuading the suspect that there is an airtight case. When solid evidence is lacking, the interrogator relies entirely on deception and interpersonal

dominance to gain a confession. Innocent suspects recognize the inaccuracies in the interrogator's claims, but denials are expected initially and are likely to fall on deaf ears.

Ofshe and Leo[32] describe two phases of interrogation. First is the *pre-admission phase,* which is designed to alter the suspect's decision to deny responsibility and to elicit the statement, "I did it." The second phase is to elicit a *post-admission narrative* of the crime that proves his guilt. Consulting psychologists should note that "The voluntariness of a confession is determined by the tactics and incentives police use to shift the suspect from denial to admission. The truth of the suspect's admission ("I did it") is established by the accuracy of the information elicited during the post-admission narrative phase of interrogation."[33]

What influences the decision to allow questioning? The guilty suspect is motivated to mislead the interrogator, learn what evidence the police have against him, and try to convince the police that he is innocent. The innocent suspect may perceive the *Miranda* warnings as an unimportant formality, and may believe that speaking to the police carries little risk. He may begin talking to help the police with their investigation, and then continue to speak with the police in an attempt to clear up apparent misunderstandings.

Once the suspect has agreed to talk and the Miranda warnings have been completed, the next step of the pre-admission phase entails shifting the suspect from confident to despairing. Both innocent and guilty people are assumed to consent to police interrogation because they expect to emerge unscathed from the questioning. During the process, though, the interrogator systematically strives to convince the suspect that "all his future holds is arrest, trial, conviction, and punishment.[34]

The process is insidious. Using a non-threatening guise of gathering information, the interrogator typically begins by obtaining background information such as the suspect's

relationship with the victim and an account of the suspect's actions at the time of the crime. After obtaining the suspect's baseline account, the interrogator shifts his style, pointing out contradictions and confronting the suspect with flaws in the story. When there is considerable evidence linking the suspect to the crime, the combination of actual, exaggerated, and fabricated evidence creates the impression of an airtight case. A guilty suspect recognizes the truth in some of the interrogator's claims and may accept the interrogator's bluffs, all of which are delivered with a practiced air of confidence and certainty.

What effect does the process have for an innocent suspect? Knowing he is innocent, the suspect is likely to react to erroneous or fabricated evidence by saying that a mistake has been made and offering reasons why the interrogator's reported evidence is wrong. Interrogators are trained to encourage explanations, because even a suspect's denials might help build the case. (Alibis may be proven false. Partial admissions, such as admitting to being at the scene after previously denying it, may be damning).

In the face of increasingly relentless interpersonal pressure, the suspect is pushed to account for the purported evidence. By training, the interrogator interrupts any denial or introduction of exculpatory evidence offered by the suspect (e.g., I wasn't there, I was at my brother's house), and insists that the suspect explain the "facts" (e.g., your fingerprints were on the gun). As the list of inculpatory "evidence" grows, wrongly accused suspects develop some theory of what is going on. Some guess that someone has set them up by planting evidence. Others opine that they are being railroaded by the police—that the police have deliberately decided to fake evidence to produce a false conviction. Both types of theory are based on the suspect's partial acceptance of the interrogator's version of the facts: that the evidence, though false, does exist.

Once an innocent suspect begins to try to explain the purported "evidence," he falls into a tangled web. The dominant fact before the suspect is the interrogator's message that the case against him is airtight and his arrest is inevitable.

At some point the interrogator decides that the suspect is ready for the next step in the pre-admission phase, eliciting the admission. When the interrogator perceives that the suspect has reached a point of hopelessness, that his future is certain and undesirable, it is time to shift the focus of the interrogation. When the suspect knows that he is guilty and is caught, and knows that the police can prove it, subjectively there is little to lose by admitting what is already obvious and known. At that point even a fairly minor incentive may be enough to tip the balance and bring about the decision to confess.

From the perspective of objective reality, there may be no advantage to confessing. In time, as the suspect becomes a defendant and is represented by an attorney, the attorney is likely to see a confession as a major obstacle to efforts toward a finding of innocence, a reduction in charges, or a more lenient sentence. At the crucial psychological moment created by the interrogator, though, it appears to the suspect that there is little or nothing to lose by confessing, and something to gain.

Interpersonally, there is the expectation that the pressure of interrogation will cease. Although the suspect has been advised that he does not have to talk to the police and he can cease talking at any time, the process of interrogation is designed to create the expectation that the only way out of the mess is to cooperate with the police by talking things out until things are straightened out. Some suspects report that during interrogation they came to a point where their only wish was to go home, and they came to expect that the only way they could do so was to admit to the crime.

When a police interrogator perceives a suspect as being ready to crack, he offers reasons why an admission would be to the suspect's advantage. In choosing what to offer a given suspect, the interrogator relies on his background knowledge of the suspect from pre-interrogation investigation, clues about the suspect from the interrogation itself, and experience and training about what has worked with other suspects in the past. At the same time, the interrogator must be mindful of what courts do and do not allow, lest a confession be suppressed. As a general rule, an interrogator who believes a suspect is guilty will use whatever techniques—at this point, whatever incentives—will both work and be allowed by the courts. Examples include reducing feelings of guilt; doing the right thing; showing empathy for the victim or the victim's family; maintaining the good will of the police; showing remorse to look good for the prosecutor, judge, or jury; or avoiding a harsh sentence such as a lengthy prison sentence or death.[35]

Eliciting false confessions in the laboratory

Could experimenters use common police interrogation techniques to get subjects to confess to a "crime" they did not commit, believe that they actually did commit the "crime," and confabulate (make up) details consistent with that belief? Research by Kassin and Kiechel suggests that the answers are yes, yes, and yes.[36]

The crucial technique used was *false incriminating evidence.* Seventy-five college students participated in a study that ostensibly assessed reaction time. They typed letters read to them – at either a slow or a fast pace (43 or 67 letters per minute) – after being warned not to hit the ALT key near the space bar lest the computer malfunction.[37] Although all the students were actually innocent, in each case the computer supposedly crashed after 60 seconds and a frantic experimenter accused the participant of hitting the ALT key. All participants initially denied guilt. For half the participants, a confederate (actually one of the researchers, posing as another student participant) said that she saw the

participant hit the hidden key. To elicit compliance, the experimenter wrote out a standardized confession and encouraged the participant to sign it. To check for internalization of belief, participants were approached outside the original room by a second confederate who asked what the commotion was about. Same participants accepted blame (e.g., "I hit a key I wasn't supposed to and ruined the program"). Finally, the experimenter brought each participant back into the original room and asked if they could reconstruct how and when they hit the ALT key.

The results are intriguing. "Overall, 69% of the participants signed the confession, 28% internalized guilt, and 9% confabulated details to support their false beliefs. More important, however, was the joint effect of the two independent variables. In the slow pace—no witness group, 35% of participants signed the note, but not a single one exhibited internalization or confabulated a memory. Yet, out of 17 participants in the fast pace—witness group, all signed the confession, 65% came to believe they were guilty, and 35% confabulated details to fit the newly created belief. The results of this study support the provocative hypothesis that people can be induced to internalize guilt for an outcome they did not produce and that the risk is increased by the presentation of false evidence—a trick often used by the police and sanctioned by the U.S. Supreme Court.[38]

Policy remedies

Three procedural safeguards have been recommended to reduce the risk of a false confession: 1) courts should adopt mandatory tape recording requirements in felony cases, 2) the admissibility of confession evidence should be allowed only when the accused subject's guilt is corroborated by independent evidence, and 3) all confessions should meet a reasonable standard of reliability before being admitted.[39] The first safeguard has been adopted in England and Wales.[40] It

has also been adopted in some U.S. states and municipalities and is being considered in others.[41] This is the least controversial of the three safeguards and I believe that it will be increasingly adopted. There is a developing body of research about how to videotape interrogations to preserve an objective record of what transpired.[42]

Expert law enforcement officers recognize that interrogators can inadvertently contaminate confessions by asking questions that contain crime scene data and investigative results.[43] Unless the entire interrogation is audio- or video-recorded, it is impossible to know which details, if any, were imbedded in the interrogators' questions. Authors of a popular police interrogation manual note that videotaping the entire interrogation can benefit the prosecution by showing that no illegal coercive tactics were used and that the confession was not contaminated.[44] I am convinced that police officers should be required to electronically record entire interrogations because:

1. The same techniques that police use to elicit confessions from guilty suspects can cause some innocent people to confess some times.

2. It is very likely that police neither intend to nor recognize that they are creating false confessions when they do.

3. There is no scientific, objective, reliable way of distinguishing between true and false confessions, up to and including the point of "I did it."

4. Careful analysis can often distinguish between true and false confessions via a properly conducted post-admission narrative. For example, a guilty subject can give accurate details that would only be known by people who had intimate knowledge of the crime scene (e.g., by perpetrating the crime). (Of course, the ultimate question about the truth is the province of the trier of fact – the judge or jury.)

5. In the process of interrogation, police officers typically confront the suspect with a combination of true and fabricated evidence, building the impression that the suspect is caught and there is nothing to be lost by confessing.

6. Just by human nature, people, including the police, do not accurately recall the form and content of their own questions, focusing instead on the other person's answers.

7. Police interrogators contaminate the confession to varying degrees as they provide details of the crime to the suspect.

8. Only by recording the entire interrogation is it possible to show whether the suspect is providing details that come from guilty knowledge or is merely spitting back what was fed to him along the way.

The other two policy recommendations are more controversial. Although I agree that they would reduce the number of false confessions,[45] the key fact for psychologists consulting on current cases is that they are not in place now. In most, if not all, U.S. jurisdictions, a confession can be admitted into evidence when the accused subject's guilt is not corroborated by any independent evidence. Also, a confession can be admitted into evidence even though there are numerous indications that it is highly unreliable.[46]

Case-by-case remedies

If and when procedural safeguards are routinely implemented, changes in policies may eventually lead to fewer false confessions. Meanwhile, it remains the case that

- Some people falsely confess to crimes some times.

- The same interrogation procedures that induce some guilty people to confess can contribute to false confessions.

Therefore it is necessary to provide safeguards on a case-by-case basis to protect against false convictions. Procedural rules and laws allow for legal issues regarding confessions to be addressed before or at trial. Based on my review of the psychological and legal literature[47] and on my experience, I expect that in disputed-confession cases psychologists are most likely to be asked to provide testimony relevant to the following legal issues[48]:

- Did the State fail to prove, by a preponderance of the evidence, that the Defendant knowingly, intelligently, and voluntarily waived his *Miranda* rights?

- Did the State fail to prove, by a preponderance of the evidence, that the Defendant's supposed confession was freely and voluntarily made under the totality of the circumstances?

- Should the Court suppress the Defendant's coerced statements to the police because they are so highly unreliable and virtually uncorroborated?

Note that these questions are in the form that would be presented to the judge. The questions posed to a testifying psychologist would be in a different form, but would be designed to produce testimony that would be relevant to the question ultimately considered by the judge. The next three sections address how a psychologist can conduct a psychological assessment and prepare testimony that would assist the trier of fact in addressing these legal issues.

Waiver of Miranda rights

In 1966 the U.S. Supreme Court held in the now-famous *Miranda* decision that procedural safeguards are necessary to insure that the rights of people in police custody are respected. What does *Miranda* require? The Court wrote: "To summarize, we hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege, and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an

attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him."[49]

If the Court rules that the person was in police custody at the time of questioning, then the person's statements cannot be used against him at trial unless the prosecution shows several things: that the police advised him of his rights, that he understood his rights, and that he voluntarily waived his rights. In *Moran v. Burbine,* 475 U.S. 412, 421 (1986) the Supreme Court wrote that when a court is to decide whether a waiver was made voluntarily, knowingly, and intelligently, "[t]he inquiry has two distinct dimensions. First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the totality of the circumstances surrounding the interrogation reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived."[50]

At a suppression hearing, a judge decides (among other things) whether a particular person in a particular situation at a particular time made a knowing, intelligent, and voluntary waiver of his *Miranda* rights. A psychologist's testimony is likely to be considered relevant if it helps the judge make that determination. Some psychologists, by virtue of their knowledge, training, and experience, are able to assist the court in each of the following areas:

1. Gather and analyze information regarding "the physical and psychological environment in which the [waiver] was obtained."[51]

2. Assess the defendant's current mental status, including intelligence, memory, reading comprehension, listening comprehension, and psychopathology.

3. Reconstruct the defendant's mental state at the time of the waiver (similar to the type of assessment in insanity and other mental-state-at-the-time-of-the-offense evaluations).[52]

4. Assist the judge in understanding interactions among the above.

I have described assessment procedures in some detail elsewhere,[53] and will do so briefly here.

First, the psychologist reviews all available information regarding the *events* that occurred immediately before, during, and after the waiver. Prior to any contact with the defendant, the expert should develop as clear an understanding of the circumstances and events as possible, from points of view other than that of the defendant. Also prior to the face-to-face evaluation, the expert should analyze all available data about the defendant, including school records, medical and psychological reports, criminal history, etc.

The second step is to conduct a current psychological evaluation of the defendant. Although the crucial question involves the defendant's mental state at the time of the waiver, standard psychological assessment procedures are designed to assess a person's *current* mental state, intellectual ability, reading ability, etc. As with other forensic psychological assessments, a history and mental status provide useful information, which can be supplemented by a psychiatric screening instrument such as the Brief Symptom Inventory (BSI) or the Symptom Checklist 90-R (SCL-90-R),[54] by a structured diagnostic interview,[55] and/or (if the subject's reading comprehension level is sufficient)[56] by an

objective test of psychopathology such as the Personality Assessment Inventory (PAI)[57] or the Minnesota Multiphasic Personality Inventory-2 (MMPI-2).[58] The person's intellectual ability can be measured with a full-scale age-appropriate intelligence test such as the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV).[59] A neuropsychological screening test such as the Screening Test for the Luria-Nebraska Neuropsychological Battery (LNNB-ST)[60] can be used to assist in determining whether more detailed neuropsychological testing should be performed. Reading and listening ability, particularly reading comprehension and listening comprehension, can be measured via subtests from achievement batteries such as the Woodcock-Johnson III Tests of Achievement (WJ-III)[61] or the Wechsler Individual Achievement Test-Second Edition (WIAT-2).[62]

If psychopathology is suggested by interview and/or test data, testing for feigning or exaggeration of symptoms, for example with the Structured Interview of Reported Symptoms (SIRS)[63] should be conducted. If cognitive deficits are suggested, then testing for exaggeration or feigning should be conducted with an instrument such as the Word Memory Test (WMT)[64] or the Test of Memory Malingering (TOMM).[65]

In addition to the above-mentioned assessment instruments, the evaluator can employ forensic assessment instruments (FAIs). FAIs are specialized assessment tools with which to observe and describe behaviors of direct relevance to the law's questions about human competencies and capacities.[66] At the time of this writing, the Instruments for Assessing Understanding and Appreciation of *Miranda* Rights (herein abbreviated IAUAMR)[67] are the FAIs of choice for psychological assessments relevant to waiving *Miranda* rights.

It is important to recognize that the IAUAMR are psychological tests that *are directly relevant to* the legal question but *are not tests of* the legal question. The legal

question is whether the defendant gave a knowing, intelligent, and voluntary waiver of his *Miranda* rights prior to questioning by the police. The IAUAMR assess understanding and appreciation at a different (typically later) time and in a different interpersonal situation (a psychological evaluation, not an interrogation). Of course no test given today can directly assess what a person did or did not know last week or last year.

It is also important to recognize that the IAUAMR are not given in isolation. Intelligence and achievement tests (mentioned above) allow the psychologist to compare the defendant's scores to those of a normative population and report, for example, that the defendant has below-average intelligence and reads at a sixth-grade level. The IAUAMR extends this type of comparison to sets of stimuli that are more directly relevant to the legal issue, allowing, for example, assessment of current understanding of words from a typical *Miranda* warning. Use of intelligence and achievement tests without the IAUAMR might be challenged as missing the point because the stimuli are not directly relevant to the legal issue. Use of the IAUAMR without intelligence and achievement tests might be challenged as insufficient due to the brevity of the tests in the IAUAMR. Use of the IAUAMR in combination with intelligence and achievement tests provides ample assessment of a person's current capacity to understand and appreciate concepts and ideas, including those relevant to *Miranda* rights.[68] Further description of the IAUAMR[69] and a case example[70] are available elsewhere.

Because *Miranda* rights differ from jurisdiction to jurisdiction, it is important to augment the structured approach of the forensic assessment instrument with direct questioning using the local waiver form. If possible, a copy of the actual waiver form signed by the defendant can be used. Based on information obtained prior to meeting with the defendant, the psychologist can present the information to the defendant as

it was presented by law enforcement officers, either orally or in written form, and ask the defendant to explain his current understanding of the words and concepts.

As direct questioning regarding the defendant's current understanding of the local *Miranda* waiver form is completed, the psychologist can shift the assessment toward the third task, reconstructing the defendant's mental state at the time of the waiver. The psychologist can point to the copy of the waiver form and ask the defendant to describe in detail events that occurred prior to, during, and after the waiver form was completed. Cognitive Interview[71] techniques may help the defendant remember more details without contaminating the interview.

At the conclusion of the face-to-face evaluation (which might involve more than one session), the evaluator should have a clear assessment of the person's current mental state; a detailed account of the person's recollection of events occurring before, during, and after the waiver; the defendant's description of how and why his mental state may have been different at the time of the waiver; objective measurements of the defendant's current understanding of his rights; the defendant's description regarding what he understood at the time of the waiver; and the defendant's description of why he waived his rights.

After completing the face-to-face evaluation of the defendant, the psychologist can address the fourth and final task of the evaluation. The expert has assessed the defendant's current mental state, and has gathered information directly from the defendant and (via records review and/or interview) from law enforcement officers regarding the physical and psychological environment in which the waiver was obtained. The evaluator can now consider interactions among these factors in an attempt to reconstruct the defendant's mental state at the time of the waiver. As stated previously, this process is comparable to that of a psychologist

reconstructing a defendant's mental state at the time of the offense in order to address legal questions such as insanity. Based on knowledge, training, and experience, the expert can help the judge understand the defendant's mental state at the time of the waiver, which aids the judge in determining whether the defendant made a knowing, intelligent, and voluntary waiver.

Whether confession was voluntary

When a defendant has been charged with a crime and has made a statement to the police, his defense attorney may wish to have that statement suppressed. If the statement is suppressed, the statement could not be presented to the jury, and fruits of the statement (evidence that was acquired as a result of information obtained in the statement) may also be inadmissible. The U. S. Supreme Court has explained that one of the purposes of the safeguards prescribed by the Miranda decision was to free courts from the task of scrutinizing individual cases to try to determine, after the fact, whether particular confessions were voluntary.[72] But a signed Miranda waiver is no guarantee that a confession was given voluntarily, in large part because police use trickery to extract confessions from at-least-initially unwilling suspects.[73] Therefore some courts[74] have determined that a defendant's claim that his confession was induced by police trickery is sufficient legal grounds to require an evidentiary hearing to determine whether the confession should be suppressed. The legal issue to be considered by the judge at the suppression hearing might be presented as follows: Did the State fail to prove, by a preponderance of the evidence, that the Defendant's supposed confession was freely and voluntarily made under the totality of the circumstances?

The assessment procedure parallels that described in the previous section, with an important difference: the relevant time is not the relatively brief time period when the

defendant waived his *Miranda* rights, but the longer period extending throughout the course of the interrogation. The psychologist can assist the Court by performing an assessment that includes the following:

1. Gather and analyze information regarding "the physical and psychological environment in which the confession was obtained."[75]

2. Gather and analyze information about the interrogation techniques employed by the police.

3. Assess the defendant's current mental status, including intelligence, memory, reading comprehension, listening comprehension, personality, and psychopathology.

4. Reconstruct the defendant's mental state during the confession.

5. Assist the judge in understanding the effect of the interrogation techniques on the defendant throughout the interrogation.

Note that tasks 1 and 2 require skills common to social psychologists, and task 3 involves skills common to counseling and clinical psychologists. If one expert is to do all these tasks, that expert will have had to augment his or her training or experience with additional preparation.[76] Alternatively, a team of experts can be employed, sharing and then combining tasks.

Gather and analyze information regarding the physical and psychological environment in which the confession was obtained

In *Crane v. Kentucky*[77] the trial court did not allow the defense to present evidence to the jury about "the size and other physical characteristics of the interrogation room, the length of the interview, and various other details about the taking of the confession." The U.S. Supreme Court reversed and remanded the case, noting that evidence surrounding a confession bears on both the confession's voluntariness and its credibility. Courts must allow such evidence to be

presented to the judge to determine voluntariness (the subject of this section), and to the jury to determine its credibility (the subject of the next section).

In gathering information about the physical and psychological environment in which the confession was obtained, the psychologist should attend to where and how the police and the suspect came into contact. Who initiated contact? Did the police approach the suspect, or did he approach them? At what point did the police tell, show, or take actions to suggest that the suspect was not free to go? What conversations, if any, took place at the location where the police and suspect first came into contact, during transport to the police station, in the hallway, etc.? How much time elapsed between the time when the police and suspect first came into contact and when the Miranda waiver form was signed? What happened during that time?

Was a statement taken in a room designed to help the police assert power and control over a suspect during interrogation?[78] Information about the physical and psychological environment can be gleaned from the recording of the interrogation, if it was recorded; from the interrogators via their reports, notes, and depositions; and from the defendant by asking him. The psychologist should note discrepancies, if any, between these data sources. Generally, the psychologist should refrain from choosing to believe one source over another. It is often useful to construct a timeline which includes the initial contact between the police and the suspect, along with any documented times (e.g., when the *Miranda* waiver form was signed, when polygraph testing began and ended, when a partial recording began and ended, when the post-confession narrative concluded, when the suspect was booked into jail). One "clean" copy of this original timeline should be maintained with only the most accurately documented information noted.

Gather and analyze information about the interrogation techniques employed by the police

As the psychologist gathers information about the interrogation techniques employed by the police, it is important for the psychologist to know what she seeks. That information comes from reading interrogation manuals,[79] from social psychology, and from applied social science literature.[80] To the best extent possible considering the completeness of the record, the psychologist can attempt to reconstruct the interrogation procedure using a copy of the timeline described above. Again, the information can be gleaned from the recording of the interrogation, if it was recorded; from the interrogators via their reports, notes, and depositions; and from the defendant by asking him.

Assess the defendant's current mental status, including intelligence, memory, reading comprehension, listening comprehension, personality, and psychopathology

Assessment begins with records review, followed by procedures and techniques (similar to those described in the section on *Miranda* waiver, above) to conduct a general psychological assessment of a person's current mental state, skills, abilities, etc. Specialized assessment may focus on three personality constructs that have been considered to be directly relevant to a person's response to police interrogation procedures: *interrogative suggestibility, compliance, and acquiescence.*

Interrogative suggestibility is defined as "the extent to which, within a closed social interaction, people come to accept messages communicated during formal questioning, as the result of which their subsequent behavioral response is affected."[81] Neither the concept of interrogative suggestibility nor tools to measure it are new. Experiments to measure interrogative suggestibility via misleading questions were

performed in America[82] and Europe[83] 100 years ago. Today the theoretical model with the most research support is that of Gudjonsson and Clark[84] and the most empirically validated instruments for measuring interrogative suggestibility are the Gudjonsson Suggestibility Scales (GSSs; GSS 1 and GSS 2).[85]

The Gudjonsson-Clark model recognizes three components as necessary for the suggestibility process: *uncertainty, interpersonal trust,* and *expectations.* People enter into the interrogation process with individual differences in each of these components, which affect their vulnerability to the process, and interrogators take steps to increase uncertainty, enhance interpersonal trust, and alter expectations.

People with low intelligence or memory problems are generally more uncertain about the answer to interrogators' questions and are therefore more prone to change their answers in response to negative feedback. If an interrogator succeeds in getting a suspect to doubt his memories, that enhances the likelihood that the suspect will change his answers to the interrogator's questions.

Suspects who generally have greater interpersonal trust are more prone to believe that the interrogators' intentions are genuine and that there is no trickery involved in the questioning. Interrogators who promote trust and use subtle leading questions are more likely to succeed in getting an uncertain suspect to change his responses.

Uncertainty and interpersonal trust are necessary but not sufficient to get people to yield to suggestions, because a person could just say "I don't know" in response to the interrogator's questions. People are less likely to do so, and therefore more likely to accept the interrogator's cues to change their answers, if they believe that: 1) they must provide a definite answer, 2) they should know the answer to the question, and 3) they are expected to know the answer and be able to give it.[86] Studies have shown that the GSS

can reliably measure individual differences in interrogative suggestibility.[87]

According to the Gudjonsson-Clark model, suggestibility implies personal acceptance of the information provided, but *compliance* does not. Broadly, compliance refers to the tendency of a person to go along with—comply with—propositions, requests, or instructions, in order to achieve some immediate interpersonal gain. The compliant person is fully aware that his or her responses are being influenced. The person may disagree with the proposition or request made, but he or she nevertheless reacts in a compliant way.

The Gudjonsson Compliance Scale (GCS)[88] has been developed to measure the personality trait of compliance. The GCS is intended to compliment Gudjonsson's work into interrogative suggestibility by focusing on two different types of behavior: 1) complying with police requests and instructions that they would rather not do, for instrumental gain, such as termination of a police interview, release from custody, escaping from a conflict and confrontation or eagerness to please another person, and 2) submitting to pressure from others to commit offenses.[89] (*i.e.,* they can be coerced into committing a crime)." The GCS is a 20-item self-report questionnaire with two factors: 1) uneasiness or fear of people in authority and avoidance of conflict and confrontation, and 2) eagerness to please. Subjects rate their behavior in terms of how they *generally* react to interpersonal pressure and demands from others.

Acquiescence refers to the tendency of a person to answer questions in the affirmative regardless of the content. It can be construed as a personality trait related to submissiveness and eagerness to please, but it may be more related to intellectual and educational factors than temperament or personality variables.[90] People with IQs in the mentally retarded range have been found to be prone to acquiesce.[91] Acquiescence can be measured by way of an item-reversal

technique, counting how often a person agrees with both items in matched pairs of logically opposite items or statements.[92]

No test score, and no combination of test scores, tells whether a given defendant gave a true or a false confession (or a partially true and partially false confession), or whether a given confession should be deemed to have been voluntary or coerced. While scores on tests measuring interrogative suggestibility, compliance, and acquiescence are all potentially helpful for understanding a person's vulnerability to interrogation procedures, such scores should not be interpreted or conveyed as if they had talismanic significance. A comparison to other forensic issues may help to illustrate this point. A person with a low IQ score is more likely to be considered incompetent to proceed to trial than a person with a high IQ score, but the IQ score alone does not determine competency. A person with schizophrenia is more likely to be judged to have been insane at the time of the offense than a person with no mental illness, but the diagnosis of schizophrenia does not end the investigation into mental state at the time of the offense. Similarly, a person with high scores on tests measuring interrogative suggestibility, compliance, and/or acquiescence may or may not have confessed voluntarily. In the context of a comprehensive assessment, such scores help to describe the person's strengths and vulnerabilities, but the scores do not tell us what happened at some point in the past.

Reconstruct the defendant's mental state during the confession

As mentioned previously, this process is similar to the process of reconstructing a defendant's mental state at the time of an alleged offense, which psychologists address routinely as we conduct evaluations relevant to insanity.[93] Relevant information comes from an assessment of the

person's current mental state, data regarding the person's mental state at other points in time (*e.g.,* previous test scores, results of previous psychological assessments), data about the setting and the interrogation procedures used, and data about other factors that would be likely to affect a person's mental state (*e.g.,* alcohol or drug use, medication, sleep deprivation, family stress, fear, *etc.*). The psychologist will want to consider what was going on in the person's life around the time of the interrogation. There are a multitude of physical, psychological, and social factors that can affect a person's mental state, and all are relevant to this inquiry. For defendants who have a mental illness, the psychologist should seek reliable data about the degree to which the person was suffering from symptoms before, during, and after the interrogation. As Gudjonsson[94] notes, "Any information obtained from the accused must, whenever possible, be supported or corroborated by other evidence, because it is essentially self-serving."

There is a forensic assessment instrument that can help psychologists gather information about why a person confessed: the Gudjonsson Confession Questionnaire–Revised (GCQ-R).[95] Use of the GCQ-R can help a defendant articulate why he confessed, although, as it is when simply asking the defendant why he confessed, there are no guarantees that the defendant's responses will be truthful.

Assist the judge in understanding the effect of the interrogation techniques on the defendant throughout the interrogation

Whether requested by the defense, the prosecution, or the judge, the psychologist's primary role as an expert witness is to assist the judge.[96] As Gudjonsson notes,[97] "When leading questions have been asked by the interrogators and persuasive manipulation and pressure [have been] employed, then these have to be related to the accused's personality and mental

state, as well as to the circumstances of the situation." By virtue of their knowledge, training, and experience, psychologists who have studied the psychology of interrogation and confession can help judges understand these interactions. After psychologists identify the defendant's vulnerabilities, they can help the judge recognize how interrogators have exploited those weaknesses, if they have; how interrogators have manipulated information to alter the suspect's perceptions, if they have; and how interrogators have manipulated external pressures, if they have. Of course it is up to the judge to render the ultimate decision about whether a confession was illegally coerced.

Whether confession is reliable

As mentioned previously, it has been reported that over 200 people falsely confessed to kidnapping the Lindbergh baby.[98] Imagine that you are a detective on the case and it is your job to assess whether confessor #49 is giving a true or a false confession. If it is a true confession, then much of the extensive resources being applied to investigate the case can be freed up to work on other cases. If it is a false confession, then of course the investigation must continue. Although you are not the final arbiter of truth in this criminal case, your assessment is essential to proper allocation of resources. Also, the procedure you use can assist the final arbiter of truth–the judge or jury–down the line.

What should you do?

1. Electronically record (audio- or videotape) the entire interrogation.

2. Elicit a detailed post-admission narrative from the suspect.

3. After the conclusion of the interrogation (including the post-admission narrative), check to see whether the details provided by the suspect conform to the actual evidence in the case, and whether the details go beyond a) any information purposefully or inadvertently provided to the suspect during the interrogation and b) details known to the public.

4. Perform further investigation as needed to confirm or disconfirm the suspect's statement.[99]

If the suspect gives no accurate details that could not have been gleaned from public information and/or the discussion during the interrogation, then there is nothing in the confession that can reliably show whether this suspect actually committed the crime. As an experienced detective you may have a hunch or a "gut instinct" about whether the person is telling the truth. Such hunches *may* be better than nothing, but available research[100] suggests that they are not as useful as some[101] have claimed. If the suspect has "guilty knowledge" about the crime, though, then it is likely that he either did it or at least has had some contact with the perpetrator or the crime scene.[102]

Now we turn from fanciful considerations about investigating the Lindbergh kidnapping to a task more likely to be referred to a psychologist: assisting a judge or jury in considering the reliability of a confession.

The defense's right to present evidence relevant to the reliability of a confession is guaranteed by the Sixth and Fourteenth Amendments: "The manner in which a statement was extracted is, of course, relevant to the purely legal question of its voluntariness, a question most, but not all, States assign to the trial judge alone to resolve. But the physical and psychological environment that yielded the confession can also be of substantial relevance to the ultimate factual issue of the defendant's guilt or innocence. Confessions, even those that have been found to be voluntary, are not conclusive of guilt. And, as with any other part of the prosecutor's case, a confession may be shown to be insufficiently corroborated or otherwise ... unworthy of belief. Indeed, stripped of the power to describe to the jury the circumstances that prompted his confession, the defendant is effectively disabled from answering the one question every rational juror needs answered: If the defendant

is innocent, why did he previously admit his guilt? Accordingly, regardless of whether the defendant marshaled the same evidence earlier in support of an unsuccessful motion to suppress, and entirely independent of any question of voluntariness, a defendant's case may stand or fall on his ability to convince the jury that the manner in which the confession was obtained casts doubt on its credibility."[103] Therefore the defense can present evidence of both the process and the content of a confession that suggest inaccuracy of the confession. And some appellate courts[104] have specifically held that trial courts must allow testimony by "an expert on interrogation techniques and false confession phenomena."

Courts recognize that the average juror is not aware of the frequency of false confessions, or of their causes. For example, in *Smith v. United States,* 348 U.S. 147, 153 (1954), the Court noted that "the experience of the courts, the police and the medical profession recounts a number of false confessions voluntarily made. ... [T]his experience with confessions is not shared by the average juror." Therefore an expert witness should be allowed to educate the jury about the suspected causes of false confessions.

A psychologist serving as an expert witness can present testimony as follows:

1. Some people falsely confess to crimes some times.

2. Some interrogation procedures increase the risk of false confessions.

3. Some personal factors make some people more vulnerable to police influence than others.

4. There are procedures recommended by social scientists and law enforcement agencies to avoid false confessions.

5. There are procedures recommended by social scientists and law enforcement agencies to recognize false confessions when they occur.

For items 2 through 5, the psychologist can then describe factors in the instant case that are present, and those that are not present.

Some people falsely confess to some crimes some times

Psychologists who have studied the psychology of interrogations and confessions are aware that some people falsely confess to some crimes some times, and that the frequency of false confessions, though unknown and presumed to be small, is not infinitesimal. Such psychologists have some understanding about the social processes that can contribute to a false confession, about the psychological vulnerabilities that make some people more vulnerable to giving a false confession than others, about proper procedures to reduce the risk of a false confession, and about proper procedures for gathering data to assess the reliability of a confession. The average juror may believe that false confessions occur less frequently than they actually do, may lack knowledge about who is most vulnerable to giving a false confession, and may have little or no knowledge about the social processes that contribute to false confessions. Therefore psychologists can play an important role in confession cases by educating the jury about false confessions.

Psychologists who consult on confession cases should be familiar with the clinical and research literature on false confessions, and should be prepared to convey this information to the jurors. My book *Interrogations and Confessions* should provide a good starting point for amassing this knowledge, and the reader is encouraged to go to the primary sources cited in this article and that book to enhance knowledge about who confesses and why. The information in chapter 6 of *Interrogations and Confessions* should help psychologists appreciate the legal context regarding confessions, but there is no substitute for

consultation with an attorney, especially one who is experienced in working on confession cases in the local jurisdiction.

Some interrogation procedures increase the risk of false confessions

The legal and psychological literatures provide lists of procedures that are considered to increase the risks of a false confession.[105] A sample follows[106]: whether the accused initiated contact with the law enforcement officials; whether the police isolated the suspect from others, whether the accused initially denied guilt; how the police responded to the accused's denial of guilt; whether the police made direct or implied promises that the suspect would be able to go home (sooner) if he cooperated and/or confessed; whether the police (firmly) stated that the evidence against the suspect was overwhelming (and resistance was futile); the length of the interrogation, the timing of the interrogation (e.g., late at night); whether the police lied to the suspect, or otherwise employed trickery or dishonesty; whether the police exaggerated the amount of evidence against the suspect; whether the police lied to or otherwise misled the suspect about the results of a polygraph examination; how the police advised the suspect of his Constitutional rights, and how they ascertained that he understood them and made a knowing, intelligent, and voluntary waiver of them; whether the police sought out the suspect's vulnerabilities and attempted to exploit them; whether the police suggested moral justifications for the offense; whether the police suggested psychological excuses for the offense; whether the police suggested that the offense might have occurred by accident, in self-defense, or unintentionally; whether the police (either purposefully or inadvertently) provided details of the crime to the suspect (in the process of interrogating him); whether the police took steps to enhance their power, control, and/or authority while interrogating the suspect; whether the police

asked (or demanded) the suspect to explain fabricated evidence (e.g., how do you explain that your fingerprints were found on the weapon?); whether the police suggested that the suspect's memory might be faulty; whether the police suggested that the suspect might have committed the crime even though he does not remember having done it; whether the police asked the suspect to (close his eyes and) imagine what he might have done; or whether the police conducted a careful, detailed, post-admission interview (*i.e.,* elicited a detailed post-admission narrative).

It is not expected that the use of one or two such procedures would lead most innocent suspects to confess, but a combination of such procedures could lead to a false confession, particularly for vulnerable suspects. Techniques that question or challenge a suspect's memory, or techniques (such as guided imagery) that could influence a suspect's memory, particularly enhance the risk of an internalized false confession. The risk of a compliant false confession is particularly enhanced when interrogators use combinations of techniques that stress the certainty of the evidence (including exaggerating the certainty of evidence or fabricating evidence) against the suspect *and* minimize the moral and/or legal seriousness of the defendant's actions *and* suggest or imply an advantage of confessing.

Some personal factors make some people more vulnerable to police influence than others

The legal and psychological literatures provide lists of personal characteristics that are considered to increase the risks of a false confession. While no list is exhaustive, the following should be considered: low intelligence, learning disability, youthful age and/or immaturity, lack of experience, lack of education, mental disorder (*e.g.,* schizophrenia) affecting reality testing, mental disorder (*e.g.,* Alzheimer's Disease) affecting memory, psychoactive substance use (*e.g.,*

drunk or under the influence of hallucinogens) around the time of the interrogation or around the time of the alleged offense, withdrawal symptoms at the time of the interrogation or at the time of the alleged offense, dependent personality, anxiety disorder, suggestibility, recent bereavement, language barriers, or medical condition.

The reader is encouraged to see the two previous sections (on *Miranda* waiver and whether confession was voluntary) regarding psychological assessment procedures.

There are procedures recommended by social scientists and law enforcement agencies to avoid false confessions

The psychologist can provide information to the judge and jury from social scientists such as Ofshe and Leo[107] and from law enforcement professionals such as Napier and Adams.[108] If the investigators in a particular case chose not to follow procedures to reduce the risk of a false confession, that should be made clear to the judge or jury.

There are procedures recommended by social scientists and law enforcement agencies to recognize false confessions when they occur

The procedure mentioned for assessing Lindbergh-baby suspect #49 is relevant here. Was the interrogation recorded? Did the investigators instrumentally or inadvertently provide crime-scene details to the suspect? Did the investigators elicit a detailed post-admission narrative? Did the suspect provide details of "guilty knowledge" beyond that provided during the interrogation or known to the public?[109] It is unlikely that the psychologist would be allowed to offer an opinion about whether a confession is true or false, but it is likely that the psychologist would be allowed to testify about the

> importance of corroboration: "[I]nvestigators must go well beyond the 'I did it' admission. They must press for minute details to tie suspects to the crime scene to disclose their active participation in the crime. Corroboration anchors the most secure confession. Some suspects may not readily provide information to support their involvement in a crime for fear of exposing the true nature of their evil acts. However, a suspect's corroboration, by providing details known to only a few individuals, solidifies a confession. Evidence linking such details as the location of the body, the weapon, or the fruits of the crime provide a superior foundation for preventing the retraction of a confession or one otherwise successfully challenged in court."[110]

Summary and conclusions

I am not in any way suggesting that psychologists or other social scientists should replace juries or do juries' jobs. I do suggest that psychologists who study the psychology of interrogations and confessions have special knowledge that can help juries do their jobs.

When there is a clear and accurate record of the entire interrogation, psychologists can help identify the presence of personal and social factors, if any, that increase the risk of a false confession. Psychologists can also help to understand how social and personal factors interact. When there is no clear and accurate record of the entire interrogation, psychologists can help the jury understand how that decreases the reliability of a confession. Psychologists can help juries understand the importance of the post-admission narrative, and how the lack of a post-admission narrative undermines the reliability of a confession.

Do courts admit such testimony? Fulero[111] writes that testimony about the phenomenon of false confessions, social psychological testimony about the police interrogation

procedures that are commonly used, clinical psychological testimony about personality or clinical factors that might be linked to confessions, and specific clinical testimony about a particular defendant, are likely to pass muster, while testimony that purports to determine if a particular confession is true or false is not.

Are law enforcement agencies likely to view psychologists who testify in disputed-confession cases as friends or enemies? I believe that will depend more on the policies and procedures of the law enforcement agency than it will depend on which side (defense or prosecution) requested the psychologist's services. In cases where law enforcement personnel electronically recorded the entire interrogation, carefully informed the suspect of his constitutional rights, insured that the suspect understood those rights and gave a voluntary waiver, used legally permissible techniques to encourage a suspect to confess, began with open-ended statements and avoided contaminating the suspect's knowledge of the crime scene, continued the interrogation beyond the 'I did it' statement to obtain a detailed statement regarding particulars of the crime, compared the defendant's statement to the actual details of the crime, and conducted further investigation to confirm or disconfirm the subject's statement, the psychologist's testimony about the reliability of the interrogation will reflect that the law enforcement workers did their jobs properly, without increasing the risk of a false confession.

Of course, even when law enforcement officers do their jobs well, some suspects will have personal characteristics that make them more vulnerable to making a false confession, and the testifying psychologist will point this out. In such cases the psychologist would also testify that the law enforcement officers showed that they recognized the suspect's vulnerabilities and took steps to document the suspect's level of understanding of his rights, the reason he waived his rights, the reason why he chose to confess, and the fact that

the suspect ultimately provided details that matched the crime scene and were not provided to the suspect during the course of the interrogation.

On the other hand, law enforcement officers are likely to see psychologists as being the enemy when the law enforcement officers have not done their jobs well. Once the psychologist has testified, the jury will be likely to see failure to electronically record the entire interrogation and/or to take a detailed post-admission narrative as glaring deficiencies (which they are). In the short run, psychologists who testify in disputed-confession cases may be viewed with antipathy by law enforcement officers who may feel attacked for not having done their jobs well enough. In the long run, such testimony is likely to force law enforcement officers to gather confession evidence in a more reliable way, so that fewer innocent people are arrested and convicted. That will free up some resources so that some additional guilty people are arrested and convicted.

Notes

1. *Arizona v. Fulminante* 499 U.S. 279, 280 (1991).

2. Kassin, S. M., & Neuman, K. (1997). On the power of confession evidence: An experimental test of the fundamental difference hypothesis. *Law and Human Behavior, 21,* 469-484, p. 481, emphasis in original.

3. *Id.*, p. 482.

4. *Id.*, p. 481.

5. Kassin, S. M. & Gudjonsson, F. D. (2004). The psychology of confessions: A review of the literature and related issues. *Psychological Science in the Public Interest, 5,* 33-67. See also Sigurdsson, J. F. & Gudjonsson, G. H. (1994). Alcohol and drug intoxication during police interrogation and the reasons why suspects confess to the police. *Addiction, 89,* 985-997. See also Sigurdsson, J. F.& Gudjonsson, G. H., (1996). Psychological characteristics of "false confessors": a study among Icelandic prison inmates and juvenile offenders. *Personality and Individual Differences, 20,* 321-329

6. Bedau, H. A. & Radelet, M. L. (1987). Miscarriages of justice in potentially capital cases. *Stanford Law Review, 41,* 21-179. See also

Radelet, M. L., Bedau, H. A., & Putnam, C. E. (1992) *In Spite of innocence: Erroneous convictions in capital cases.* Boston, MA: Northeastern University Press. See also Radelet, M. S., Lofquist, W. S., & Bedau, H. A. (1996) Prisoners released from death rows since 1970 because of doubts about their guilt. *Thomas M. Cooley Law Review, 13,* 907-966. See also Leo, R. A. & Ofshe, R. J. (1998). The consequences of false confessions: Deprivation of liberty and miscarriages of justice in the age of psychological interrogation. *Journal of Criminal Law and Criminology, 88,* 429-496.

7. Scheck, B., Neufeld, P. & Dwyer, J. (2001). *Actual innocence.* New York: Doubleday.

8. Scheck, B., & Neufeld, P. (2001). DNA and innocence scholarship. In S. D. Westervelt & J. A. Humphrey, *Wrongly convicted: Perspectives on failed justice.* New Brunswick, NJ: Rutgers University Press, 241-252.

9. New York Times, September 21, 2004. Retrieved September 21, 2004 from http://www.nytimes.com/2004/09/21/opinion/21tue3.html?ex=1096774108&ei=1&en3b14c7cea508be8.

10. DeClue, G. (2005). *Interrogations and confessions: A manual for practice.* Sarasota, FL: Professional Resource Press. See also Gudjonsson, G. H. (2003). *The psychology of interrogations and confessions: A handbook.* West Sussex, England: Wiley. See also Ofshe, R. & Leo, R. (1997). The social psychology of police interrogation: The theory and classification of true and false confessions. *Studies in Law, Politics, and Society, 16,* 189-251. The writings of Gudjonsson, Leo, and Ofshe have been essential to my understanding of interrogations and confessions, and to preparation of this article.

11. DeClue, *id.*

12. *Id.,* chapter 6.

13. Wrightsman, L. S., & Kassin, S. M. (1993). *Confessions in the courtroom.* Newbury Park, CA: Sage.

14. DeClue, *supra* note 10.

15. Ofshe & Leo, *supra* note 10. See also DeClue, *supra* note 10. See also Gudjonsson, *supra* note 10.

16. DeClue, *supra* note 10, chapter 6.

17. Leo, R. A. (1992). From coercion to deception: The changing nature of police interrogation in America. *Crime, Law, and Social Change, 18,* 35-59, p. 38.

18. *Miranda v. Arizona,* 384 U.S. 436, 446 (1966).

19. *Id.,* p. 448.

20. *Id.,* p. 448.

21. *Id.,* p. 448.

22. *Id.,* p. 448.

23. Leo, *supra* note 17.

24. See Gudjonsson, *supra* note 10, chapter 5. See also DeClue, *supra* note 10, chapter 2.

25. *Pate v. Robinson,* 383 U.S. 375 (1966).

26. Melton, G. B., Petrila, J., Poythress, N. G. & Slobogin, C. (1997) *Psychological evaluations for the courts, 2nd Edition.* New York: Guilford.

27. *North Carolina v Alford,* 400 U.S. 25 (1970).

28. Gudjonsson, *supra* note 10.

29. Ofshe & Leo, *supra* note 10, p. 194.

30. *Id.,* p. 194.

31. *Id.,* pp. 194-195. Ofshe & Leo's model is followed throughout this section.

32. *Id.*

33. *Id.,* p. 198.

34. *Id.,* p. 200.

35. Note that in plea bargaining, the prosecutor makes a blatant offer of reduced charges or leniency to get the defendant to plead guilty. In interrogation, the police are not allowed to make blatant offers, but they may be allowed to imply threats or promises of leniency.

36. Kassin, S. M., & Kiechel, K. L. (1996). The social psychology of false confessions: Compliance, internalization, and confabulation. *Psychological Science, 7,* 125-128. See also Kassin, *supra* note 2.

37. Presenting the letters at different speeds provided a way of distinguishing the participants' vulnerability by affecting their level of certainty regarding their own actions.

38. Kassin, *supra* note 2, pp. 227-228. Kassin references the following case: *Frazier v. Cupp,* 394 U.S. 731 (1969).

39. Ofshe & Leo, *supra* note 10.

40. Gudjonsson, *supra* note 10.

41. Ofshe & Leo, *supra* note 10. See also DeClue, *supra* note 10.

42. Lassiter, G. D., & Geers, A. L. (2004). In G. D. Lassiter (Ed.), *Interrogations, confessions, and entrapment* (pp. 197-214). New York: Kluwer Academic/Plenum.

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44. Inbau, F. E., Reid, J. E., Buckley, J. P., & Jayne, B. C. (2001). *Criminal interrogation and confessions, 4th Ed.* Gaithersburg, MD: Aspen.

45. See DeClue, *supra* note 10, for my thoughts. See Ofshe & Leo, *supra* note 10, for a more thorough description of why they make the recommendations.

46. Ofshe & Leo, *supra* note 10.

47. DeClue, *supra* note 10.

48. This is likely to vary somewhat from jurisdiction to jurisdiction.

49. *Miranda v. Arizona,* 384 U.S. 436, 478-479 (1966).

50. Citations omitted.

51. *Crane v. Kentucky,* 476 U.S. 683, 684 (1986).

52. See, *e.g.,* Rogers, R. & Shuman, D. (2000). *Conducting insanity evaluations (2nd Ed.)*. New York: Guilford.

53. DeClue, *supra* note 10.

54. The BSI and SCLR-90R are both available via http://assessments.ncspearson.com/assessments/.

55. See Rogers, R. (2001). *Handbook of diagnostic and structured interviewing.* New York: Guilford.

56. If the subject's reading comprehension level is below the reading level of a significant number of the test items, and if the subject's listening comprehension level is at or above the level of the test items, then it may be useful to employ an oral administration of an objective test of psychopathology.

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59. Wechsler, D. (2003). *Wechsler Intelligence Scale for Children – Fourth Edition Administration and Scoring Manual.* San Antonio, Texas: The Psychological Corporation.

60. Golden, C. J. (1987). *Screening Test for the Luria-Nebraska Neuropsychological Battery.* Western Psychological Services, Los Angeles, CA.

61. Maher, N. & Woodcock, R. W. (2001). *Woodcock-Johnson III Tests of Achievement Examiner's Manual,* Itasca, IL: Riverside.

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63. Rogers, R., Bagby, R. M., & Dickens, S. E. (1992). *Structured Interview of Reported Symptoms professional manual.* Lutz, FL: Psychological Assessment Resources.

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65. Tombaugh, T. N. (1996). *Test of Memory Malingering (TOMM).* North Tonawanda, New York: Multi-Health Systems. For more regarding assessment of response style see Rogers, R. (1997). *Clinical assessment of malingering and deception, 2nd Edition,* New York: Guilford.

66. Grisso, T. (2003). *Evaluating competencies: Forensic assessments and instruments, 2nd Edition,* New York: Plenum.

67. Grisso, T. (1998). *Instruments for Assessing Understanding and Appreciation of Miranda Rights.* Sarasota, FL: Professional Resource Press.

68. Another reason for utilizing the IAUAMR as part of an assessment battery (rather than in isolation) is that the IAUAMR include no assessment of response style (e.g., malingering).

69. Grisso, *supra* note 66.

70. See the Soddi Jones report provided as an appendix in DeClue, *supra* note 10.

71. Fisher, R. P. & Geiselman, R. E. (1992). *Memory enhancing techniques for investigative interviewing: The cognitive interview.* Springfield: Charles C. Thomas.

72. *Berkemer v. McCarty* 468 U.S. 420 (1984).

73. Leo, *supra* note 17. See also Leo, R. (1996a). Inside the interrogation room. *Journal of criminal law and criminology, 86,* 266-303. See also Leo, R. (1996b). *Miranda's* revenge: Police interrogation as a confidence game. *Law and Society Review, 30,* 259-288. See also Leo, R. (2001b). Questioning the relevance of *Miranda* in the Twenty-First Century. *Michigan Law Review, 99(5),* 1000-1029.

74. Including *Massey v. State,* 820 So.2d 1003 (Fla.App. 4 Dist. 2003).

75. *Crane v. Kentucky,* 476 U.S. 683, 684 (1986).

76. See DeClue (manuscript in preparation), Review of A. G. Miller (Ed.) (2004) *The Social Psychology of Good and Evil,* New York: Guildford and S. S. Brehm, S. Kassin, & S. Fein (2005) *Social Psychology, Sixth Ed.,* Boston: Houghton Mifflin.

77. 476 U.S. 683, 686 (1986).

78. See Kassin, *supra* note 2, pp. 221-233.

79. *E.g.,* Inbau, *et al., supra* note 44.

80. *E.g.,* Gudjonsson, *supra* note 10; Leo, *supra* note 17.

81. Gudjonsson, *supra* note 10.

82. Cattell, J. M. (1895). Measurements of the accuracy of recollection. *Science, 2,* 761-766.

83. Binet, A. (1900). *La suggestibilite.* Paris: Doin. See also Binet, A. (1905). La science du temoignage. *Annee Psychologique,* 11, 128-136. Both cited in Gudjonsson, *supra* note 10.

84. Gudjonsson, G. H. & Clark, N. K. (1986). Suggestibility in police interrogation: A social psychological model. *Social Behavior, 1,* 83-104. Cited in Gudjonsson, *supra* note 10.

85. Gudjonsson, *supra* note 10. See also Gudjonsson, G. H. (1984). A new scale of interrogative suggestibility. *Personality and individual differences, 5,* 303-314. See also Gudjonsson, G. H. 1987). A parallel form of the Gudjonsson Suggestibility Scale. *British Journal of Clinical Psychology, 26,* 215-221. See also Gudjonsson, G. H. (1997). *The Gudjonsson Suggestibility Scales manual.* Hove: Psychology.

86. Gudjonsson, *supra* note 10, p. 350.

87. *Id.* See also DeClue, *supra* note 10.

88. Gudjonsson, G. H. (1989). Compliance in an interrogation situation: A new scale. *Personality and individual differences, 10,* 535-540. See also Gudjonsson, 1997, *supra* note 85. See also Gudjonsson, *supra* note 10.

89. Gudjonsson, *supra* note 10.

90. *Id.*

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92. Winkler, J. D., Kanouse, D. E., & Ware, J. E. (1982). Controlling for acquiescence response set in score development. *Journal of Applied Psychology, 67,* 555-561. Cited in Gudjonsson, *supra* note 10.

93. See Rogers & Shuman, *supra* note 52.

94. *Supra* note 10, p. 314.

95. Gudjonsson, G. H., & Sigurdsson, J. F. (1999). The Gudjonsson Confession Questionnaire—Revised (GCQ-R): Factor structure and its relationship with personality. *Personality and individual differences, 27(5),* 953-968. See also Gudjonsson, *supra* note 10, pp. 628-630.

96. Committee on Ethical Guidelines for Forensic Psychologists. (1991). Specialty guidelines for forensic psychologists. *Law and Human Behavior, 15(6):* 655-665.

97. Gudjonsson, *supra* note 10, p. 315.

98. Wrightsman & Kassin, *supra* note 13.

99. This list is adapted from Ofshe & Leo, *supra* note 10.

100. See Ekman, P., O'Sullivan, M., & Frank, M. G. (1999). A few can catch a liar. *Psychological Science, 10 (3),* 263-266. See also Mann, S., Vrij, A. & Bull, R. (2004). Detecting true lies: Police officer's ability to detect suspect's lies. *Journal of Applied Psychology, 89,* 137-149.

101. *E.g.,* Inbau, *et al., supra* note 44.

102. Or contact with someone who had such contact, etc.

103. *Crane v. Kentucky,* 476 U.S. 683, 688-689 (1986), citations omitted.

104. *E.g., Boyer v. State,* 825 So.2d 418, 419 (Fla.App. 1 Dist. 2002).

105. Remember that some of the same procedures that could increase the likelihood that a guilty person would confess could also increase the risk that an innocent person would confess. See Ofshe & Leo, *supra* note 10.

106. For more, see chapter 10 in DeClue, *supra* note 10.

107. *Supra* note 10.

108. Napier & Adams, *supra* note 43.

109. See Ofshe & Leo, *supra* note 10; Napier & Adams, *supra* note 43.

110. Napier & Adams, *supra* note 43, paragraphs 28-29.

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