

Justice Imperiled: False Confessions and the Reid Technique

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Abstract

There is widespread consensus that false confessions are one of the leading causes of wrongful convictions. Because confessions are statements against interest, they are regarded by the justice system as inherently reliable. Consequently, police, prosecutors, judges, juries, and even defence counsel are predisposed to infer guilt, based on the confession. False confessions often result in the misdirection of resources, diminished public faith in the justice system, and the premature abandonment of an investigation that allows the actual culprit to remain free to commit additional crimes. This paper reviews the interrogation procedure currently in vogue in North America, describes inherent problems with it that compromise the reliability of admissions arising from it, and offers some suggestions for improvement.

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Justice Imperiled: False Confessions and the Reid Technique

Timothy E. Moore* and C. Lindsay Fitzsimmons**

There is now widespread consensus that false confessions are one of the leading causes of wrongful convictions,¹ due partly to the fact that the courts typically attach tremendous importance to them. According to Wigmore, the “confession of a crime is usually as much against a man’s permanent interests as anything well can be . . . no innocent man can be supposed ordinarily to be willing to risk life, liberty, or property by a false confession. Assuming the confession as an undoubted fact, it carries a persuasion which nothing else does, because a fundamental instinct of human nature teaches each one of us its significance.”²

Because confessions are statements against one’s own interest, they are regarded by the justice system as inherently reliable. Consequently, police, prosecutors, judges, juries, and even defence counsel are predisposed to infer guilt from a confession. In addition to the considerable harm³ and suffering befalling the accused, additional negative consequences

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1. Innocence Project (2010), online: <www.innocenceproject.org>; B. Garrett, “Judging Innocence” (2008), 108 Col. L. Rev. 55; *R. v. Oickle*, [2000] 2 S.C.R. 3, 147 C.C.C. (3d) 321, 36 C.R. (5th) 129; *Report on the Prevention of Miscarriages of Justice* (2005), online: <www.justice.gc.ca/eng/dept-min/pub/pmj-pej/pmj-pej.pdf>.
2. *Wigmore on Evidence* (Chadbourn rev. 1970), vol. 3, 820b at p. 303.
3. S.D. Westervelt and K.J. Cook, “Framing Innocents: The Wrongly Convicted as Victims of State Harm” (2010), 53 Crime, Law and Social Change 259.

resulting from false confessions include the misdirection of resources, diminished public faith in the justice system, and the premature abandonment of an investigation that allows the actual culprit to remain free to commit additional crimes. This article reviews the interrogation procedure currently in vogue in North America, describes how inherent problems with the protocol compromise the reliability of admissions arising from its use, and offers suggestions for reforming investigative interviewing.

No one would dispute that the ideal interrogation strategy (*i.e.*, one that is “diagnostic”) secures confessions from guilty suspects but not from innocent ones. The “Reid technique” is the most influential and widely used police interrogation procedure in North America.⁴ Several comprehensive critiques have identified a number of fundamental and inter-related assumptions of that protocol, each of which lacks sound scientific support.⁵ Taken together, the validity of these views is sufficiently dubious so as to imperil the effectiveness of the entire exercise.

1. Detecting Deceit

The first false assumption underlying the Reid technique is the notion that innocent suspects can be distinguished from their guilty counterparts on the basis of an assortment of behavioral cues that are displayed during the initial interview. Simply put, guilty suspects appear deceptive. Their duplicity becomes apparent to the investigator who uses indicators from facial expressions, eye contact, posture, hand gestures, particular phrases, and various other “symptoms” of deceit. Suspects who are guarded, appear insincere, and are uncooperative, for instance, are assumed to be guilty. Misconceptions about the detection of deceit are not confined to the Reid manual. In Canada, *The Law Enforcement Handbook*,⁶ now in its 4th edition, informs the reader that a skilled interrogator needs to understand the hidden meaning of gestures. For example, “nervous manipulation of jewelry, small change, or bits of paper” is an indicator of deception, whereas “hands clasped behind head while answering” reflects truthfulness.

The problem with such “symptom analysis” approaches is that they do not work. Innocent suspects may say and do things that are incorrectly attributed to their assumed culpability. There is no compelling evidence that police (or anybody else) can detect deception with a high degree of accuracy.⁷ One study⁸ presented videotaped denials of mock suspects who were truly guilty or innocent of a mock crime to college students who had been trained in the Reid technique. They performed at chance when distinguishing liars from truth-tellers. Those who were trained were *less* accurate than untrained controls. Another study⁹ engaged trained, experienced investigators in the same task. They displayed chance-level accuracy, high

6. D. Rowland J. Bailey *The Law Enforcement Handbook*, 4th ed. (Toronto: Nelson, 2010), pp. 134-35.

7. P.A. Granhag and L.A. Stromwall, eds., *The Detection of Deception in Forensic Contexts* (Cambridge, UK: Cambridge University Press, 2004).

8. S. Kassin and C.T. Fong, “I’m Innocent! Effects of Training on Judgments of Truth and Deception in the Interrogation Room” (1999), 23 *Law and Human Behavior* 499.

9. C.A. Meissner and S.M. Kassin, “He’s Guilty! Investigator Bias in Judgments of Truth and Deception” (2002), 26 *Law and Human Behavior* 469.

4. F.E. Inbau, J.E. Reid, J.P. Buckley and B.C. Jayne, *Criminal Interrogation and Confessions*, 4th ed. (Gaithersburg, MD: Aspen, 2001).

5. D. Davis and W. O’Donohue, “The Road to Perdition: ‘Extreme Influence’ Tactics in the Interrogation Room”, in W. O’Donohue, P. Laws and C. Hollin, eds., *Handbook of Forensic Psychology* (New York: Basic Books, 2003), pp. 897-996; S.M. Kassin, “A Critical Appraisal of Modern Police Interrogations”, in T. Williamson, eds., *Investigative Interviewing: Rights, Research, Regulation* (Devon, UK, Willan Publishing, 2006), pp. 207-28; S. Kassin and G. Gudjonsson, “The Psychology of Confession Evidence: A Review of the Literature and Issues” (2004), 5 *Psychological Science in the Public Interest* 33; S. Kassin, “On the Psychology of Confessions: Does Innocence Put Innocents at Risk?” (2005), 60 *American Psychologist* 215; A.D. Redlich and C.A. Meissner, “Techniques and Controversies in the Interrogation of Suspects: The Artful Practice Versus the Scientific Study” in J.L. Skeem, K.S. Douglas, S.O. Lilienfeld, eds., *Psychological Science in the Courtroom* (NY: Guilford Press, 2009); R.A. Leo and S.A. Drizin, “The Three Errors: Pathways to False Confession and Wrongful Conviction”, in D. Lassiter and C. Meissner, eds., *Interrogations and Confessions: Current Research, Practice, and Policy Recommendations* (Washington: American Psychological Association, 2010); S.M. Kassin, S.A. Drizin, T. Grisso, G.H. Gudjonsson, R.A. Leo and A.D. Redlich, “Police-induced Confessions: Risk Factors and Recommendations” (2009), *Law and Human Behavior* 1.

confidence and a response bias *toward* deception. The procedures that investigators trained in the Reid technique use to (purportedly) sort out the liars from the truth-tellers have no empirical foundation. The interviewers would be no less accurate if they simply flipped a coin.

Granhag and Vrij caution that¹⁰

To trust the information that these manuals provide in terms of cues to deception might result in misinterpretations of the verbal and nonverbal behaviours that a suspect shows. Such misinterpretations might, in turn, fuel suspect-driven investigations that might ultimately result in miscarriages of justice.

The training manual encourages investigators to trust their intuitions and to rely on a smorgasbord of behaviours, statements and reactions that are *not*, in fact, reliable cues to deceit. Because there is such a wide range of potential criteria to choose from, it is not surprising that the research reveals a mismatch between the accuracy of deceit judgments (little better than chance) and the confidence with which they are made (very high). The outcome of the initial screening is a defining moment because if deceit is “detected”, the suspect is assumed guilty and the subsequent interrogation is designed to extract a confession. The interrogation is not investigative in nature; rather, it is guilt-presumptive. Its purpose is to elicit a confession from a suspect who is “known” or strongly suspected to be guilty. Because the initial screening exercise is error-prone, many innocent suspects will potentially be subjected to highly intimidating interrogation techniques based on little more than a vague impression or a misinterpretation of the suspect’s demeanor.

2. Eliciting Confessions

The Reid procedure consists of a structured nine-step process comprised of *confrontation* and *minimization* strategies. The former entails forceful accusations, the presentation of evidence (either real or manufactured), and interruptions whenever denials are attempted by the suspect. *Minimization*

10. P. Granhag and A. Vrij, “Deception Detection”, in N. Brewer and K. Williams, eds. *Psychology & Law: An Empirical Perspective* (New York: Guilford, 2005), p. 50.

involves the sympathetic presentation of moral justifications or explanations for the crime, often accompanied by the implication that a confession will result in leniency. The guilt-presumptive nature of this exercise creates a slippery slope for innocent suspects because it may set in motion a sequence of reciprocal observations and reactions between the suspect and the interrogator that serve to confirm the interrogator’s belief in the suspect’s guilt. Increased distress on the part of the suspect may be interpreted as resistance, thereby motivating the interrogator to redouble his or her efforts to extract a confession.

From the suspect’s perspective, isolation, fatigue and fear may produce a compliant (but false) confession from a person who merely wants to extricate himself from an aversive situation and/or who succumbs to implied threats of dire consequences or implicit promises of clemency. The suspect is stressed, anxious, scared, confused, without social support, and presented with falsely constrained alternatives. In one recent Ontario case, the cognitively impaired defendant (ultimately acquitted) in a child sexual assault case was asked during his two-hour interrogation: “Are you another Paul Bernardo or did you do this out of love?” The suspect may make a regrettable but understandable decision about the perceived costs and benefits of confessing. Are they confessing to something they did, or are they signing on to the spin that the interrogator has persuaded them is in their best interests to endorse? Notwithstanding the authors’ assertions regarding the imperviousness of innocent suspects to these tactics, there is no psychological reason to assume that they would be immune to them, and the numerous DNA-exonerated defendants who confessed shows that they were clearly susceptible to these practices.

Sometimes a suspect produces an “internalized false confession”. The suspect may actually come to believe, albeit tentatively, in his or her own culpability. Illusory beliefs about criminal actions can be cultivated by the interrogator’s use of pseudo-technical explanations of how the crime could have occurred without the culprit’s conscious awareness. After three long interrogation sessions during which incriminating (but

false) evidence was presented to him, Michael Crowe appeared to concede that he had killed his sister and somehow blocked the event from his memory.¹¹ During the police investigation of Darrelle Exner's murder¹² in Regina in 1996, after several hours of interrogation the police persuaded Joel Labadie that he had "blacked out" and could not recall committing the murder to which he eventually falsely confessed. "It's like they kill your spirit", Labadie recalled. Reprinted below is how a retired school teacher described his own interrogation which induced a confession to sexual touching. The confession was ultimately excluded at trial.

I had never been in any kind of trouble in my life and always respected authority. This was the worst day of my life. I trusted the officer who was going to interview me. I decided I would answer all his questions.

He started out being very friendly but then he got into a badgering mode and he was getting angry. I am not comfortable with confrontations and never have been. I often give in to arguments easily.

He kept badgering me. He assumed I did it. I was finally manipulated into saying "I'm sorry for it" but I meant sorry for what had happened and he assumed I was saying I did it. I was totally frustrated with his badgering and putting words in my mouth. I started to go along with some of his statements about me. I felt beaten down. He kept saying things about me and then getting angry if I denied them. I felt totally helpless. My denials were thrown back at me in anger. I felt I had no other options because all my life I have respected authority. It was a long interview and I was totally exhausted by it and I wanted it to end. I actually did not say that I had touched that girl. In essence, he did all the talking and expected me to agree with him. I simply agreed with authority to get it over with after an exasperating two hours. I tried to be vague with my answers and humour him. I simply made up a lot of stuff.

As intended, the interrogation techniques persuaded the suspect that the costs of denying his involvement in the crime outweighed the costs of making some admissions. His denials of wrongdoing were called "bullshit", he was told the case was

"open and shut", and he was given the choice of admitting he needed help or spending two years in jail. The suspect's respect for authority and uneasiness with confrontation made him no match for his opponent.

In many instances, it does not occur to an innocent suspect that he is in an adversarial situation (and is being lied to) until it is too late. Indeed, the initial stages of the interrogation often contain offers of sympathy and assistance. The detective may express a wish to help the suspect, contingent on the latter's confession. Frequently, it is stated or implied that the detective can influence the prosecutor's actions, and that a "second chance" may be offered, again contingent on a confession.¹³ For example, in a recent murder investigation in northern Ontario, the suspect was informed by her interrogator, "if I thought you were a cold blooded person who's been planning this for weeks, I wouldn't even be in this room talking to you because those are the kind of people that don't deserve a second chance . . . I need to be able to go to the crown attorney or the prosecutor and say with confidence that this is not a plan that Mary had been thinking about for a long time". While implied offers of leniency may be on the table, protestations of innocence are not countenanced. In the above situation Mary is told from the outset that ". . . we know what happened. All of our forensic experts have done all their work . . . There's no doubt, there's no doubt that you're the one that stabbed Martin, all right. That's clear." This theme is repeated continuously with resolute confidence.

Viewed in terms of operant conditioning principles, an association is established between denial of involvement and the unpleasantness of the interrogation. The suspect learns the futility of asserting his or her innocence because it simply prolongs the discomfort. Advocates of the Reid technique assume that an innocent suspect will recognize the interrogator's lie(s) and refuse to capitulate, but obduracy is only one of a variety of possible outcomes. When exaggerated (or fabricated) inculpatory evidence is presented (repeatedly) with unwavering conviction an innocent suspect might infer

13. See D. Davis, R.A. Leo and W.C. Follette, "Selling Confession: Setting the Stage with the 'Sympathetic Detective with a Time-limited Offer'" (2010), 26 *Journal of Contemporary Criminal Justice* 441.

11. S.A. Drizin and B.A. Colgan, "Tales From the Juvenile Confession Front: A Guide to How Standard Police Interrogation Tactics Can Produce Coerced and False Confessions From Juvenile Suspects", in G. Daniel Lassiter, ed., *Interrogations, Confessions, and Entrapment* (New York: Plenum, 2004), pp. 127-62.

12. Canadian Broadcasting Company, *Inside the Interrogation Room: Police Tactics*. (2002), first aired on *Disclosure*, January 28, 2003, DVD ISBN 978-0-7365-9219-2.

that if this particular detective is prepared to lie so blatantly, so too might others. Faced with the prospect of a corrupt system, a plea might make rational sense. Alternatively, the contrived evidence could be so psychologically disorienting that the suspect feels trapped, terrified and helpless. The perceived inevitability of a conviction may trigger such despair that the suspect becomes compliant, vulnerable and highly susceptible to the interrogator's suggestions and offers of "help". Courts are sometimes sensitive to the oppressive nature of the Reid technique:¹⁴

When stripped to its essentials the Reid Technique is solely designed to convince the suspect that he is caught, that the police have overwhelming evidence that he is the culprit, and that there is no way that the suspect will be able to convince the interrogator or anyone else involved in the Criminal Justice System that he didn't do the crime.

Legal scholars and psychologists on both sides of the border have been cataloguing and lamenting these coercive and manipulative tactics for more than a decade. Leo and his colleagues note that:¹⁵

Currently, police interrogation is thoroughly and intentionally deceptive: Police routinely lie to and mislead suspects about their role in the interrogation, the facts of the case, and the (real or alleged) evidence against the suspect. Police also routinely lie to and manipulate suspects during the post-admission portion of the interrogation. Many scholars have argued that police lying about evidence (false evidence ploys) may heighten the risk of eliciting false or unreliable confessions.

It is not unusual for investigators to describe (or even display) fabricated evidence. Recent research has demonstrated that doctored video evidence can induce people to provide false eyewitness testimony against another person,¹⁶ and even to falsely confess, and believe that they had taken some money.¹⁷

14. *R. v. S. (M.J.)*, [2000] A.J. No. 391 at para. 45, 80 Alta. L.R. (3d) 159, 32 C.R. (5th) 378.

15. R.A. Leo, M. Costanzo and N. Shaked-Schroer, "Psychological and Cultural Aspects of Interrogations and False Confessions: Using Research to Inform Legal Decision-Making", in Daniel A. Drauss and Joel D. Lieberman, eds., *Psychological Expertise in Court: Psychology in the Courtroom* (Ashgate: Burlington, VT, 2009), vol. II.

16. K.A. Wade, S.L. Green and R.A. Nash, "Can Fabricated Evidence Induce False Eyewitness Testimony?" (2010), 24 *Applied Cognitive Psychology* 899.

17. R.A. Nash and K.A. Wade, "Innocent but Proven Guilty: Eliciting

Courts have recognized "unsavoury chapters" in the history of interrogations, particularly when a confession is subsequently shown to be false.¹⁸ As a result, the confessions rule was developed in order that an accused's statement could be excluded if it was "obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority" and further if "the necessary mental element of deciding between alternatives is absent".¹⁹ A confession is inadmissible if the circumstances under which it was obtained raise reasonable doubt as to whether it was voluntary.²⁰

In applying the voluntariness rule from *Oickle*, a court must consider all relevant factors involved in the statement, including (i) threats or promises, (ii) oppression, (iii) operating mind (or lack thereof), and (iv) police trickery. Threats and promises include the suggestion that a confession will result in leniency, or that a family member or friend will not be charged in exchange for cooperation. Oppression considers the context under which the statement was made and is concerned with whether a statement was made solely so that an accused could escape harsh conditions. The analysis focuses on deprivation of food, water, medical attention, but can also include the police use of non-existent evidence. These first two factors are concerned with the reliability of the statement, while the lack of an operating mind or police trickery lead to trial fairness concerns. Although the rule leaves one hopeful with respect to protection against false confessions, its application has been disappointing. The result in *Oickle* was that the accused's statements were found voluntary and admitted as evidence at his trial, despite police language minimizing the significance of the crimes, offers of psychiatric help in the course of the interview, the introduction of "failed" polygraph results, moral inducements, and promises that the police would not investigate the accused's fiancée further if he confessed.

Internalized False Confessions using Doctored-Video Evidence" (2009), 23 *Applied Cognitive Psychology* 624.

18. *R. v. Oickle*, *supra*, footnote 1, at paras. 34-35.

19. *Ibid.*, at paras. 24-25, citing *Ibrahim v. The King*, [1914] A.C. 599 (P.C.); *R. v. Hebert*, [1990] 2 S.C.R. 151, 57 C.C.C. (3d) 1, 77 C.R. (3d) 145.

20. *Ibid.*, at paras. 68 and 69.

According to Don Stuart, the judgement in *Oickle* "reads like a Manual for Coercive Interrogation".²¹

Other cases are also disturbing. In *R. v. Khansaiyasith*,²² the accused was struck by a police vehicle and tasered during his arrest. After being cautioned at the scene, he told police officers that he had just taken heroin and was feeling ill. During his stay at the police station, he informed officers that he felt sick and that his head hurt. Hospital records confirmed that the accused had presented with extensive and superficial bruising. During the recorded police interview the accused expressed his desire to remain silent approximately 47 times. The accused's statements were nevertheless admitted as voluntary during his trial.

Sometimes police misinformation expands to deceive acquaintances of the suspect. In a recent case in southern Ontario, investigators initiated a conversation with the suspect's father that lasted an hour and a half, during which the father was informed of the irrefutable scientific proof of his son's guilt. The father was also told that his son, when informed of the evidence against him, had "run out the door". None of this was true. The next day the father phoned his son and in order to "push him to the edge" told him he had seen the inculpatory photos (he had not) and urged him to confess. The son repeatedly denied any wrongdoing, upon which his father proclaimed him to be a "loser" and no longer a member of the family. Within an hour, the son attended the local police station and announced that he was there to "take responsibility" and start serving his time. During the course of the ensuing five-hour interrogation some self-incriminating statements were made.

3. The Missing Science

As noted above, an additional false assumption underlying the interrogation process is the belief that innocent suspects are immune to the tactics of the Reid technique. The manual is replete with unsupported pronouncements regarding what an innocent (compared to a guilty) suspect "would do". Trainees

21. D. Stuart, *Charter Justice in Canadian Criminal Law*, 4th ed. (Toronto: Carswell, 2005), p. 145.

22. [2008] O.J. No. 1477 (S.C.J.).

are repeatedly assured that false confessions are highly improbable: "none of the steps is apt to make an innocent person confess"; "the prescribed efforts... would, in no way, be apt to cause an innocent person to confess"; "It is our clear position that *merely* introducing fictitious evidence during an interrogation would not cause an innocent person to confess."²³ Perhaps most telling is the assertion that: "*none of what is recommended is apt to induce an innocent person to offer a confession!*"²⁴

Surely these statements go to the heart of the problem. An exclamation mark is a poor substitute for a sound empirical foundation. At least 20% of all DNA post-conviction exonerations entailed confessions, and many crimes do not lend themselves to DNA testing. Moreover, laboratory simulations demonstrate that innocent research participants succumb to Reid technique tactics and produce nontrivial false confessions to misdeeds that they did not commit. For example Russano and colleagues enticed university students to "confess" that they had cheated on a problem-solving task that they were supposed to be working on independently. They found that diagnosticity was highest when *no* Reid tactics were used (46% of guilty suspects confessed vs. only 6% of innocents) and worst when both minimization (*e.g.*, sympathy; face-saving excuses) and maximization (offers of leniency) strategies were employed. In the latter instance, true confessions increased by 35% but at a cost, namely *a seven-fold increase in false confessions*.²⁵

*Daubert v. Merrell Dow Pharmaceuticals, Inc.*²⁶ and two subsequent U.S. Supreme Court decisions (*General Electric Co. v. Joiner*,²⁷ *Kumho Tire Co. v. Carmichael*²⁸) declared that the admissibility of expert opinion evidence should depend on the scientific quality of the evidence. Judges were, in effect, being asked to evaluate the reliability of the principles and methods

23. Inbau *et al.*, *supra*, footnote 4, at pp. 212, 365 and 429 (emphasis added).

24. *Ibid.*, at p. 313 (emphasis in original).

25. M.B. Russano, C.A. Meissner, F.M. Narchet and S.M. Kassin, "Investigating True and False Confessions within a Novel Experimental Paradigm" (2005), 16 *Psychological Science* 481.

26. 509 U.S. 579 (1993).

27. 522 U.S. 136 (1997).

28. 526 U.S. 137 (1999).

underlying the proffered evidence. Since then, much attention has been paid to whether or not *Daubert* and its progeny have actually improved the quality of expert opinion evidence,²⁹ but nobody would dispute the benefits of improving its scientific rigor. Gallini³⁰ has noted a glaring disconnect between the courts' concern with the empirical foundation of expert opinion evidence and the routine admission of confessions obtained from the Reid technique. He argues, persuasively in our opinion, that because the latter's basic operating assumptions are unscientific, confessions arising from the Reid procedure should be declared inadmissible: "... the Supreme Court has provided a test to assess the validity of expert evidence and the Reid technique utterly fails that test. Any 'scientific' technique should, at a minimum, pass *Daubert's* factors with ease."³¹

A parallel situation exists with respect to the admissibility of hypnotically refreshed memories. In *R. v. Trochym*,³² the Canadian Supreme Court determined that post-hypnosis testimony does not satisfy the test for admissibility set out in *R. v. J. (J.-L.)*³³ because of the unreliability of the procedure. The Reid technique tactics are often successful in extracting "true" confessions from guilty suspects. Regrettably, the same tactics produce false confessions from innocent suspects. There is no scientific basis from which to conclude that the Reid approach is reliable and diagnostic.³⁴

In *Phillion*,³⁵ the Ontario Court of Appeal expressed

29. A. Gold, "Increasing the 'Science' in Forensic Science: *Daubert* Done Right" (paper presented at Unlocking Innocence: An International Conference on Avoiding Wrongful Conviction, October 20-22, 2005, Winnipeg, Manitoba); J. Groscup, S. Penrod, C. Studebaker, M. Huss and K. O'Neil, "The Effects of *Daubert* on the Admissibility of Expert Testimony in State and Federal Criminal Cases" (2002), 8 *Psychology, Public Policy, and Law* 339; Dahir *et al.*, "Judicial Application of *Daubert* to Psychological Syndrome and Profile Evidence" (2005), 11 *Psychology, Public Policy & Law* 62.
30. B.R. Gallini, "Police 'Science' in the Interrogation Room: Seventy Years of Pseudo-Psychological Interrogation Methods to Obtain Inadmissible Confessions" (2010), 61 *Hastings Law Journal* 529.
31. *Ibid.*, at p. 579.
32. (2007), 216 C.C.C. (3d) 225, 43 C.R. (6th) 217, [2007] 1 S.C.R. 23.
33. [2000] 2 S.C.R. 600, 148 C.C.C. (3d) 487, 37 C.R. (5th) 203.
34. A.D. Redlich and C.A. Meissner, "Techniques and Controversies in the Interrogation of Suspects: The Artful Practice versus the Scientific Study", in J.L. Skeem, K.S. Douglas and S.O. Lilienfeld, eds., *Psychological Science in the Courtroom* (NY: Guilford Press, 2009).

reservations about the scientific reliability of expert opinion evidence on false confessions, notwithstanding Justice Iacobucci's acknowledgement in *R. v. Oickle*³⁶ of the large body of literature on why someone would confess falsely. These basic social science principles of social cognition and persuasion that delineate the manipulative tactics of the Reid technique have been identified and elaborated upon for decades.³⁷ This is not "novel science". What is distinctive about it is the application of these principles to the forensic contexts in which false confessions occur, not the principles themselves. As noted by Justice Rosenberg in *R. v. Osmar*, "most people would find it hard to understand why someone would admit to a crime they did not commit".³⁸ Jurors are predisposed to place far more weight on dispositional factors underlying confessions, compared to situational influences: This tendency is referred to as the "attributional error". Even though mock jurors show awareness of the coercive tactics used to elicit a confession, they often vote to convict anyway.³⁹ Expert opinion evidence may assist in safeguarding against this bias. Mock jury research⁴⁰ has shown that expert testimony reduced guilty verdicts and boosted the perceived coerciveness of the interrogation techniques. Such testimony may temper the effects of the attribution error by drawing jurors' attention to the situational determinants of suspects' decisions. More generally, an expert can assist the court when the reliability of a specific confession is being queried. The assessment would not

35. *R. v. Phillion* (2009), 65 C.R. (6th) 255, 241 C.C.C. (3d) 193 *sub nom. Reference re: Phillion*, 246 O.A.C. 317 (C.A.).
36. *Supra*, footnote 1.
37. See commentary in T.E. Moore and C. Wasser, "Social Science and Witness Reliability: Reliable Science Begets Reliable Evidence" (2006), 33 C.R. (6th) 316.
38. *R. v. Osmar* (2007), 217 C.C.C. (3d) 174 at para. 69, 44 C.R. (6th) 276, 84 O.R. (3d) 321.
39. S.M. Kassin and H. Sukel, "Coerced Confessions and the Jury: An Experimental Test of the 'Harmless Error' Rule" (1997), 21 *Law and Human Behavior* 27.
40. R. Blandon-Gitlin, K. Sperry and R. Leo, "Jurors Believe Interrogation Tactics are not Likely to Elicit False Confessions: Will Expert Witness Testimony Inform Them Otherwise?" *Psychology, Crime & Law* (February 10, 2010) (iFirst); K.D. Forrest and W.D. Woody, "Police Deception During Interrogation and its Surprising Influence on Jurors' Perceptions of Confession Evidence" (2010), 22 *The Jury Expert* 9.

directly speak to its truth or falsity, but rather address the nature of the interrogation tactics (if used) that are known to raise the risk of false confessions and the role of the appraisal of the post-admission narrative as an aspect of reliability estimation.⁴¹

4. Does the Right to Silence Provide Protection?

Upon arrest, suspects are routinely informed by police of their right to legal counsel and (usually) their right to remain silent. Essentially, these rights are intended to afford suspects some protective power against the authoritative hand of the state. During custodial interrogations accused persons are under state control and are, thus, vulnerable to coercion.⁴² The right to silence originated in order to protect suspects from self-incrimination and false confessions.⁴³ Similarly, in the United States, the *Miranda*⁴⁴ warning was devised to achieve a balance between the inherently powerful resources at the state's disposal and the vulnerability of the detainee. In the United States, when a suspect comprehends (and waives) the right to silence, that waiver constitutes an important aspect of the voluntariness of any subsequent admission. Voluntariness, in turn, affects the admissibility of a confession. In Canada, the matter is less straightforward. The Crown can show voluntariness by demonstrating that the accused was treated fairly, including by being given a meaningful opportunity to consult counsel. If the accused was denied the right to consult counsel the voluntariness claim may be compromised; however, separate analyses of the right to counsel and the right to silence are required. A breach of the right to counsel may, on its own, cause the exclusion of a statement, even a voluntary statement. An involuntary statement, however, will be excluded, regardless of whether or

41. *Infra*, section 6.

42. L. Stuesser, "The Accused's Right to Silence: No Doesn't Mean No" (2002-2003), 29 *Manitoba L.J.* 149; R. Leo, *Police Interrogation and American Justice* (Cambridge: Harvard University Press, 2008); C. Sherrin, "False Confessions and Admissions in Canadian Law" (2005), 30 *Queen's L.J.* 601.

43. D.M. Paciocco and L. Stuesser, *The Law of Evidence* (Toronto: Irwin Law, 2008).

44. *Miranda v. Arizona*, 384 U.S. 436 (1966), reaffirmed in *Dickerson v. United States*, 530 U.S. 428 (2000).

not the right to counsel was respected. The burden is on the Crown to show that statements were made voluntarily and were not induced by promises, threats or oppressive treatment.

The chart below shows that there are significant legal and procedural differences between the United States and Canada with respect to the "right to silence". Notwithstanding these disparities, in neither country is there strong evidence that the right to silence affords much protection. In order to validly waive the right, detainees must understand what it is they are relinquishing. Rogers and his colleagues have shown that there is wide variability in both the content and comprehensibility of *Miranda* cautions, with reading levels ranging from grade four to second year college level.⁴⁵ Similarly, the Canadian cautions are not uniform across jurisdictions or provinces. The wording in many cases is remarkably obtuse and stilted: "You have nothing to hope from any promise or favour and nothing to fear from any threat whether or not you say anything."⁴⁶

Despite differences in the length and content of the caution, with rare exception the Canadian right to silence cautions *all* indicate that any statement from the accused may be used "in evidence".

45. R. Rogers, K.S. Harrison, D.W. Shuman, K.W. Sewell and L.L. Hazelwood, "An Analysis of *Miranda* Warnings and Waivers: Comprehension and Coverage" (2007), 31 *Law and Human Behavior* 177; R. Rogers, L.L. Hazelwood, K.S. Harrison, K.W. Sewell and D.W. Shuman, "The Language of *Miranda* in American Jurisdictions: A Replication and Further Analysis" (2008), 32 *Law and Human Behavior* 124.

46. See J. Eastwood, B. Snook and S. Chaulk, "Measuring Reading Complexity and Listening Comprehension of Canadian Police Cautions" (2010), 37 *Criminal Justice and Behavior* 453.

Features of the Charter's (Canada) and <i>Miranda's</i> (U.S.) "Right to Silence" Caution		
	Canada	United States
right to silence	yes	yes
duty of police to inform detainee	no	yes
described to detainee as a "right"	no	yes
right to have counsel present during questioning	no	yes
questioning must stop upon assertion of right to silence	no	yes
after consulting counsel questioning cannot resume without counsel's presence	no	yes

For example the caution in most of Ontario reads:

You are charged with X. Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you wish to do so, but whatever you say may be given in evidence.

Such legal jargon is fertile ground for miscommunication because a suspect could easily infer (falsely) that they have an opportunity to get an exculpatory statement on record. Such statements, however, can be of no assistance to the accused at trial. As McIntyre J. stated in *R. v. Simpson*: "As a general rule, the statements of an accused person made outside court . . . are receivable in evidence against him *but not for him*."⁴⁷ The law with respect to the admissibility of an accused's statements at his own behest can be complicated for counsel, let alone for an uneducated accused faced with the "choice" of giving a statement or not. The confusion becomes relevant when an accused (as was the case in *R. v. Singh*⁴⁸) gives a statement denying culpability in the incident charged, but providing other information such as innocent explanations only to have those explanations or denials come back to form admissions at trial when tied to other police evidence.⁴⁹

47. *R. v. Simpson*, [1988] 1 S.C.R. 3 at p. 22, 38 C.C.C. (3d) 481, 62 C.R. (3d) 137 (emphasis added).

48. [2007] S.C.J. No. 48, 225 C.C.C. (3d) 103, [2007] 3 S.C.R. 405.

49. *Ibid.*, at paras. 11-13.

Studies in the United States reveal that most adult offenders have not completed a high school education, and further, their reading level is much lower than their years of education.⁵⁰ In addition, individuals with mental retardation are overrepresented in the criminal justice system.⁵¹ Consequently, it has been suggested that a warning requiring anything above a grade six reading level would likely be incomprehensible to a significant proportion of suspects.⁵² Research in Canada reveals similar problems of comprehension regarding the right to silence caution.⁵³

Particular groups of individuals are at increased risk of being unable to understand and implement their rights—specifically, youth and individuals with mental retardation.⁵⁴ They are uniquely vulnerable to certain interviewer tactics. For example, not only do interviewees with mental retardation demonstrate poor comprehension of the *Miranda* warnings, they are also more likely to change their response in order to please the interviewer following friendly rather than unfriendly or neutral feedback.⁵⁵ This finding is of particular interest because police often act amicably in order to develop "rapport" with the suspect, in the hopes of eliciting a confession. The fifth theme of the second step in the Reid technique specifically instructs police interrogators to take advantage of suspects' needs for

50. *Supra*, footnote 45.

51. M.J. O'Connell, W. Garmoe and N.E.S. Goldstein, "Miranda Comprehension in Adults with Mental Retardation and the Effects of Feedback Style on Suggestibility" (2005), 29 *Law and Human Behavior* 359.

52. *Supra*, footnote 45.

53. T. E. Moore and K. Gagnier, "'You Can Talk If You Want To': Is the Police Caution on the 'Right to Silence' Understandable?" (2008), 51 *C.R.* (6th) 233; K. Davis, C. Fitzsimmons and T.E. Moore, "The Right to Silence: Investigating the Comprehensibility of a Canadian Police Caution" (2011), 26 *Journal of Police and Criminal Psychology* 87. J. Eastwood and J.B. Snook, "Comprehending Canadian Police Cautions: Are the Rights to Silence and Legal Counsel Understandable?", *Behavioral Sciences and the Law* (2009); J. Eastwood, B. Snook and S. Chaulk, "Measuring Reading Complexity and Listening Comprehension of Canadian Police Cautions" (2010), 37 *Criminal Justice and Behavior* 453.

54. M. Cloud, G.B. Shepherd, A. Nodvin Barkoff and J.V. Shur, "Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects" (2002), 69 *U. Chi. L. Rev.* 567; N.L. Ryba, S.L. Brodsky and A. Shlosberg, "Evaluations of Capacity to Waive *Miranda* Rights: A Survey of Practitioners' Use of the Grisso Instruments" (2007), 14 *Assessment* 300.

55. O'Connell *et al.*, *supra*, footnote 51.

gratification and attention and to develop rapport by using compliments and false praise: "the uneducated and underprivileged are more vulnerable to flattery than the educated person".⁵⁶

In Canada, a study of juveniles' comprehension of the caution found that fewer than half of the 192 students interviewed invoked their right to silence,⁵⁷ and in another study those who *did* assert their right to silence did not fully comprehend their rights or the implications of waiving them.⁵⁸ Although it is common for youth and people with cognitive disabilities to misunderstand their right to silence, comprehension may be a problem under the best of circumstances. Even well educated samples (undergraduate university students) under ideal conditions do not fully understand the purposes of the caution.⁵⁹ Apart from stilted phrasing and unfamiliar terminology, the manner in which the caution is delivered may further impair its comprehension. There is an accelerating decline in speech comprehension for native speakers when the speech rate exceeds 200 words per minute.⁶⁰ Snook and his colleagues examined a sample of police interviews conducted over a 10-year period in Atlantic Canada. The average speed of delivery was an astonishing 263 words per minute, and in some instances the rate exceeded 300 words per minute — 50% faster than the upper range for adequate comprehension. Apart from the speed of delivery, it is not unusual for the police to imply to the detainee that notifying him of his rights is an insignificant preliminary formality.⁶¹

56. *Supra*, footnote 4, at p. 271.

57. R. Abramovitch, M. Peterson-Badali and M. Rohan, "Young People's Understanding and Assertion of their Rights to Silence and Legal Counsel" (Canada) (1995), 37 *Can. J. Crim.* 1.

58. R. Abramovitch, K. Higgins-Biss and S.R. Biss, "Young Persons' Comprehension of Waivers in Criminal Proceedings" (1993), 35 *Can. J. Crim.* 309.

59. *Supra*, footnote 53.

60. C. Jones, L. Berry and C. Stevens, "Synthesized Speech Intelligibility and Persuasion: Speech Rate and Non-native Listeners" (2007), 21 *Computer Speech and Language* 641; E. Foulke and T. Sticht, "Review of Research on the Intelligibility and Comprehension of Accelerated Speech" (1969), 72 *Psychological Bulletin* 50; R.T. Griffiths, "Speech Rate and NNS Comprehension: A Preliminary Study in Time-benefit Analysis" (1990), 40 *Language Learning* 311.

61. L.S. Wrightsman, "The Supreme Court on *Miranda* Rights and Interrogations: The Past, the Present, and the Future" in G. Daniel Lassiter and

Okay, alright. We got to go through some things with you before we get started, okay . . . Things on either side of you are microphones . . . [T]his is the best way of capturing the interview and *you and I can sit down and talk with one another*, okay. [delivered *prior* to the caution being read [emphases added]

And in another case:

. . . ok, also basically stating that ah you are not obliged to tell me anything unless you wish to do so, so you are under no obligation to talk to me right now about this at all, ok, that's something else ah I'll explain to you and if you want to talk to me *I hope you are going to want to talk to me to clear this up*. [emphasis added]

Because of its wording, the caution may not be properly understood in the first place, it may or may not be properly delivered, and those who are most in need of it (the innocent) are predisposed to waive it. Rarely does a police questioner explain the caution in simple terms, or more preferably, *ask* the suspect to explain what they understand the caution to mean and/or its implication in their decision to speak or remain silent. Such an explanation would speak volumes about the suspect's level of understanding, and as such, the reliability of any confession subsequently given.

Establishing that a suspect understands the full implications of his or her right to silence is a goal that is inconsistent with the purposes of the interrogation — obtaining a confession. The interrogator is often the same agent that communicates the caution, which, if properly grasped, is going to preclude any interrogation taking place. Consequently, when explaining legal rights to a suspect, police may (consciously or not) minimize their importance, present the rights as mere formalities,⁶² neglect to ensure actual understanding,⁶³ or pressure suspects into compliance.⁶⁴ As Michalyshyn has

Christian A. Meissner, eds., *Police Interrogations and False Confessions: Current Research Practice, and Policy Recommendations* (Washington: American Psychological Association, 2010); W. White, *Miranda's Waning Protections: Police Interrogation Practices after Dickerson* (Ann Arbor: University of Michigan Press, 2001).

62. R.A. Leo, "Miranda's Revenge: Police Interrogation as a Confidence Game" (1996), 30 *Law & Society Review* 259; G. DeClue, "Oral Miranda Warnings: A Checklist Model and Presentation" (2007), 35 *The Journal of Psychiatry and Law* 421.

63. *Supra*, footnote 51; J. Baldwin, "Police Interview Techniques: Establishing Truth or Proof?" (1993), 33 *British Journal of Criminology* 325.

noted, the police are essentially in a conflict of interest: "... if the purpose of the right to counsel is to inform a detained or arrested person how to exercise his right against self-incrimination, it is anomalous to burden police — one side in the adversary process — with the informing role".⁶⁵ Suspects who are sensitive to their wishes having been ignored might easily infer that they have no choice but to answer the questions.

Kassin⁶⁶ has proposed that actual *innocence* may put innocent suspects at risk of waiving their right to silence. Innocent people are predisposed to falsely believe that their innocence is protective and that their virtue will soon be readily apparent. Unrealistically, they anticipate that they will be able to explain to investigators the errors of their ways. They may also have an exaggerated belief that their intentions and emotional states are conspicuous to others.⁶⁷ When research participants are asked to imagine that they are either innocent or guilty of a crime, and are then asked whether or not they would like to waive their right to silence, innocent people waive their right to silence more often than guilty people.⁶⁸ In summary, the protection that the right to silence is supposed to provide is largely spurious. The notion that it constitutes a powerful safeguard has been characterized by Kassin as a "myth".⁶⁹ Similar concerns have been raised in Canada. In *Singh*,⁷⁰ by a 5-4 majority, the Supreme Court sanctioned the use by the police of persistent questioning, notwithstanding the suspect's objection that he did not wish to speak. *Singh* had declared his right to silence 18 times. The decision subsumes the

64. *Supra*, footnote 57.

65. P. Michalyshyn, "Brydges: Should the Police be Advising of the Right to Counsel?" (1990), 74 C.R. (3d) 151 at p. 152.

66. S.M. Kassin, "On the Psychology of Confessions: Does Innocence put Innocents at Risk?" (2005), 60 *American Psychologist* 215.

67. M. Hartwig, P.A. Granhag and L.A. Strömwall, "Guilty and Innocent Suspects' Strategies during Police Interrogations" (2007), 13 *Psychology, Crime and Law* 213; M. Hartwig, P.A. Granhag, L.A. Strömwall and A. Vrij, "Detecting Deception via Strategic Disclosure of Evidence" (2005), 29 *Law and Human Behavior* 469.

68. S.M. Kassin and R.J. Norwick, "Why People Waive their Miranda Rights: The Power of Innocence" (2004), 28 *Law and Human Behavior* 211; T.E. Moore and K. Gagnier (2008), *supra*, footnote 53.

69. S. Kassin, "Confession Evidence: Commonsense Myths and Misconceptions" (2008), 35 *Criminal Justice and Behavior* 1309.

70. *Supra*, footnote 48.

right to silence within the voluntariness rule, and has attracted criticisms:⁷¹

Justice Abella held for the Supreme Court in *R. v. Turcotte*⁷² that adverse inferences should not be drawn against someone who is silent at the pre-trial stage as it would be a "snare and delusion" to advise about the right to silence and then to turn around and use silence as a sign of guilt. Why isn't it a snare and delusion to say a suspect has the right to silence but allow police to ignore its exercise?

In *Singh* the court noted that although the suspect can seek refuge in silence, there is no right "not to be spoken to by state authorities".⁷³ The distinction is significant and essentially makes the right to silence meaningless.⁷⁴ Typically, a suspect will have been instructed by counsel to remain silent. Upon the assertion of this right, it is routinely ignored and subverted by the police. The suspect's resolve may crumble in the face of evidence (real or fabricated) and his possible confusion regarding legal advice to remain silent juxtaposed with the police's unremitting questions. At this juncture, the suspect might wish to seek further assistance from counsel. Following the recent decision in *Sinclair*,⁷⁵ he will not get it. In a 5-4 decision the Supreme Court ruled that the right to counsel is a one-time-only opportunity, with few exceptions. The majority further opined that the essential purpose of the right to counsel is informational rather than protective. *Sinclair* had been arrested for murder. After being advised of his right to counsel, he had two three-minute telephone conversations with his lawyer prior to a police interrogation that lasted five hours. During this time, *Sinclair* stated several times that he had nothing to say regarding the investigation and also asked repeatedly that he be allowed to talk to his lawyer (e.g., "don't

71. D. Stuart, "Criminal Justice — Many More Kudos than Brickbats" (in press). In David Wright and Adam Dodek, eds., *Public Law at the McLachlin Court: The First Decade* (Toronto: Irwin Law, 2011), p. 35.

72. (2006), 31 C.R. (6th) 197, 200 C.C.C. (3d) 289, [2005] 2 S.C.R. 519.

73. *Supra*, footnote 48, at para. 28.

74. D. Ives and C. Sherrin, "*R. v. Singh* — A Meaningless Right to Silence with Dangerous Consequences" (2008), 51 C.R. (6th) 250. In *R. v. Fitzgerald* (2009), 71 C.R. (6th) 183, 203 C.R.R. (2d) 238, [2009] B.C.J. No. 2333 (B.C.S.C.), the suspect's confession was ruled inadmissible and involuntary when she asserted her right to silence 137 times over a three-hour period.

75. *R. v. Sinclair*, [2010] 2 S.C.R. 310, 259 C.C.C. (3d) 443, 77 C.R. (6th) 203.

know what to do right now. . . I wanna wait and think and . . . talk to my lawyer"). He was told that it was his choice to talk or not, but his request to consult with his lawyer again was denied. The interrogation continued. At one point he was informed that his DNA had been found on the bedding from the hotel room (it had not). Eventually, Sinclair gave a detailed confession. The decision means that neither an expressed wish to remain silent, *nor* a request to consult counsel (again) can prevent the ongoing (and relentless) custodial interrogation. In light of the growing concerns and awareness of the risks of false confessions, this state of affairs is especially worrisome. In conjunction with *Singh*, the effect of *Sinclair* is to create "a new right on the part of the police to the unfettered and continuing access to the detainee, for the purposes of conducting a custodial interview to the point of confession".⁷⁶ In our opinion, the majority decision erodes constitutional protections of detainees. Police powers are expanded at the cost of fewer safeguards for suspects. In a sharply worded dissent, Justices Fish, LeBel and Abella argued that the presumption of innocence places the burden of proof squarely and exclusively on the state. The accused ought not to be compelled to produce information that assists in his own downfall. Further, the ruling denies the accused the assistance of counsel at a time when he is most in need of it, namely when he is in custody and at the mercy of the full range of the state's resources.

5. Tunnel Vision, Confirmation Bias and the Elasticity of Evidence

The much decried "tunnel vision" is frequently invoked to account for a wrongful conviction.⁷⁷ The term refers to various cognitive biases and fallibilities that compromise rational decision-making. In the forensic arena, exclusive concentration on a specific suspect constricts the focus of attention and precludes consideration of disconfirming evidence or

76. D. Stuart, "Sinclair Regrettably Completes the *Oickle* and *Singh* Manual for Coercive and Lawless Interrogation" (2010), 77 C.R. (6th) 303.

77. D. Martin, "Lessons about Justice from the Laboratory of Wrongful Convictions: Tunnel Vision, the Construction of Guilt, and Informer Evidence" (2002), 70 U.M.K.C. L. Rev. 847.

alternative paths of investigation. Racehorses are sometimes fitted with "blindings", the purpose of which is to keep the horse fixated on what is in front of him. In a racing context, restricting the horse's attention is adaptive, but in criminal investigations a preoccupation with a suspect who is prematurely assumed to be guilty is counterproductive because potentially important counterevidence is ignored, overlooked or misinterpreted. Single-minded fixation is functional for the racehorse, but such a posture is the antithesis of what is required for an objective criminal investigation.

Tunnel vision is not just a consequence of investigative overreach on the part of occasional zealots blinded by their passionate desire for a conviction. The psychological makeup or idiosyncratic motives of individual investigators are irrelevant if the methods of investigation routinely subject innocent suspects to psychological pressures that are known to be powerfully influential. In the scientific community it is recognized that "objectivity" is not a state of mind. True impartiality requires more than just good intentions. Objectivity is enshrined in the methods, design features, control groups, etc. that characterize scientific rigor. Researchers appreciate that they need to protect themselves from their own biases. In the domain of police interrogations, the necessary controls are not in place and strong biases remain unacknowledged and uncorrected.

In many respects, tunnel vision is systemic and inherent in the investigative process. Findley and Scott⁷⁸ use the term "*prescribed tunnel vision*" to refer to police training that explicitly and deliberately cultivates tunnel vision. For example, consider the effect on front line investigators of the belief that innocent suspects are immune to the ploys of the Reid technique. If the interrogation methods are not initially successful in eliciting a confession from the assumed-to-be-guilty suspect, the logical next step would entail the interrogator redoubling his or her efforts. Because it is assumed that innocent suspects will not succumb to the pressures, there are no risks associated with becoming even

78. K.A. Findley and M.S. Scott, "The Multiple Dimensions of Tunnel Vision in Criminal Cases", [2005] Wisconsin L. Rev. 291.

more aggressive and more confrontational. The ensuing confession confirms the value of both the interrogation tactics themselves, and the "indicators of deception" that triggered the interrogation in the first place. Confessions are compelling to jurors. If a conviction is secured, the reliability of the interrogation method that elicited the "confession" is reconfirmed. The entire exercise is self-reinforcing, but the empirical foundation for its assumed success is illusory.

The guilt-presumptive nature of the interrogation also extends to other aspects of the investigation. Forensic information that is inconsistent with the confession is often ignored or its reliability downplayed when it is incompatible with acceptance of the confession.⁷⁹ Some types of evidence may be more easily manipulated to confirm an investigator's suspicions than others. For example, evidence arising from eyewitness identifications is somewhat "elastic" and susceptible to varying interpretations.⁸⁰ Police trainees were provided with case materials from a homicide where the evidence pointed to a specific suspect. After indicating their perceptions of culpability and the strength of the evidence, a new piece of evidence was introduced that was either consistent or inconsistent with the presumption of guilt. When the new evidence was consistent with the presumption of guilt, respondents emphasized aspects of the evidence that enhanced its reliability (e.g., viewing distance, lighting conditions). Paradoxically, the very same features cited as enhancing evidence reliability in the *consistent* condition were used to discredit reliability in the *inconsistent* condition (e.g., "the witness was very near the suspect", vs. "the distance of 10m makes the reliability questionable").⁸¹

Confessions have even been shown to contaminate the impact of what would otherwise have been independent exculpatory evidence.⁸² When eyewitnesses to a mock crime

79. S.M. Kassir, "The Psychology of Confessions" (2008), 4 *Law and Social Science* 193.

80. K. Ask, A. Rebelius and P.A. Granhag, "The 'Elasticity' of Criminal Evidence: A Moderator of Investigator Bias" (2008), 22 *Applied Cognitive Psychology* 1245.

81. *Ibid.*; at p. 1255.

82. L.E. Hasel and S.M. Kassir, "On the Presumption of Evidentiary

were told that a different lineup member than the one they had selected had confessed, a majority changed the identifications. Of those who had not made an initial identification, half subsequently "selected" the confessor once his identity was revealed. Even fingerprint evidence is more open to interpretation than we might suppose. Dror and Cole⁸³ described studies that show that expert fingerprint examiners, when examining the same prints within different contexts, sometimes reach different and contradictory conclusions.

While the interrogation is largely guilt-presumptive from the outset, the process is not necessarily carried out with a conscious intention to confirm culpability. The ensuing "confession", however, is a signal that the method used to elicit it is valid. From the perspective of the interrogator, the personal experience of success, combined with other sources of positive feedback (e.g., praise from superiors, convictions) establishes a degree of confidence in the procedure that belies the objective empirical evidence. The actual reliability of the exercise cannot be greater than the reliability of the initial prescreening test that identifies "deception" — a test known to be woefully unreliable.⁸⁴ As we noted earlier⁸⁵ the cues to deception elucidated by the Inbau *et al.* manual⁸⁶ are numerous, although unreliable. A suspect who is, by nature, insecure, deferential and inarticulate may be predisposed to exhibit "symptoms" of deceit (e.g., averted gaze, submissive posture, muted speech). These suspects are at increased risk for producing false confessions because the very characteristics that (falsely) expose them as "deceitful" are the same

Independence: Can Confessions Corrupt Eyewitness Identifications?" (2009), 20 *Psychological Science* 122.

83. I.E. Dror and S.A. Cole, "The Vision in 'Blind' Justice: Expert Perception, Judgment, and Visual Cognition in Forensic Pattern Recognition" (2010), 17 *Psychonomic Bulletin & Review* 161.

84. C.F. Bond and B.M. De Paulo, "Accuracy of Deception Judgments" (2006), 10 *Personality and Social Psychology Review* 214; B.M. DePaulo, J. Lindsay, B.E. Malone, L. Muhlenbruck, K. Charlton and H. Cooper, "Cues to deception" (2003), 129 *Psychological Bulletin* 74; K. Watkins and J. Turtle, "Investigative Interviewing and the Detection of Deception: Who is Deceiving Whom? (Problems with Deception)", *Canadian Journal of Police and Security Services* (June 2003), p. 115.

85. *Supra*, text at footnote 10.

86. *Supra*, footnote 4.

characteristics that may render them especially susceptible to the abrasive tactics of the subsequent interrogation.

6. The Importance of the Post-Admission Narrative

Kassin⁸⁷ has characterized false confessions arising from the Reid technique as “Hollywood productions”. Many have features that jurors associate with credibility. A persuasive confession is one that contains a motive, a method and corroborative details. An innocent suspect’s self-incriminating admissions may well contain precise information about the crime scene, descriptions of the weapon, commentary about the state of the victim, etc., but many of these details are ultimately unconfirmable, generic or as attributable to external sources as to personal experience. In addition, the suspect may supply poignant testimony about his or her emotional condition during and subsequent to the crime. Because the account is so richly nuanced and textured, it can have the ring of authenticity. What jurors may not know is that much (or all) of the detail was made available to the suspect during the interrogation by means of leading questions, photographs or newspaper accounts. The resulting narrative is not easily distinguished from one that is based on actual experience.

The Reid manual (Steps 8 and 9) instructs the interrogator to develop the details of the offence and convert a verbal confession into a written statement.⁸⁸ An innocent suspect will not know the intimate details of the crime and he will need the officer’s “help” to turn his “I did it” admission into a credible written confession. This “help” comes in one of two forms. It has been provided to the suspect either by the media or by the police. In cases of false confession it is improbable that all the minute, crucial details that the suspect provided were either leaked to the public or correctly guessed. Rather, such details are, intentionally or not, supplied by the police. During the post-admission phase of an interrogation, police continue to be accusatorial and confrontational, and to use manipulative

87. S.M. Kassin, “A Critical Appraisal of Modern Police Interrogations” in T. Williamson, ed., *Investigative Interviewing: Rights, Research, Regulation* (Devon, UK: Willan Publishing, 2006), pp. 207-28.

88. *Supra*, footnote 4.

interrogation techniques (*e.g. minimization and maximization*) if the suspect’s statements are inconsistent with the officer’s beliefs about how and why the crime was committed.⁸⁹ Investigators attempt to fashion a confession that appears to be both credible and unprompted — as though it came *from* the suspect and was not fed *to* him. To do so, they employ an array of suggestive interrogation techniques that, deliberately or inadvertently, shape the suspect’s account.⁹⁰ For example, by means of leading questions, a “brick” becomes a piece of concrete,⁹¹ the material used to bind a murder victim’s hands evolves from a rope, a belt, a clothesline, and finally, the cord from a Venetian blind.⁹² In an unreported case in northern Ontario, crime scene analysis showed that during the murder of an elderly pensioner, the killer had hung bed sheets over the apartment windows and had fastened them in place with kitchen knives. This fact was never made public. Some months later, a prison inmate serving time for an unrelated crime voluntarily confessed (falsely) to the murder in an attempt to garner respect (and fear) from other inmates who had been mistreating him. During the course of a four-hour interrogation, this incontestably unique aspect of the crime (bed sheets held up with knives) was “extracted” from the suspect by means of a series of suggestive questions.

At trial, a confession is often so compelling⁹³ that contradictory evidence appears trivially inconsequential once a defendant has confessed.⁹⁴ Part of what makes the admissions believable is the procedures police use to script a credible, and

89. Richard A. Leo, *Police Interrogation and American Justice* (London: Harvard University Press, 2008).

90. B.L. Garrett, “The Substance of False Confessions” (2009), 62 *Stanford L. Rev.* 1051.

91. *Ibid.*, at pp. 1069-70.

92. *Ibid.*, at p. 1081.

93. J.P. Blair, “The Roles of Interrogation, Perception and Individual Differences in Producing Compliant False Confessions” (2007), 13 *Psychology, Crime and Law* 173; L.B. Oberlander and N.E. Goldstein, “A Review and Update on the Practice of Evaluating Miranda Comprehension” (2001), 19 *Behavioral Sciences and the Law* 453; R. Rogers, M.J. Jordan and K.S. Harrison, “A critical review of published competency-to-confess measures” (2004), 28 *Law and Human Behavior* 707.

94. L. Hasel and S. Kassin, “On the Presumption of Evidentiary Independence: Can Confessions Corrupt Eyewitness Identifications?” (2009), 20 *Psychological Science* 122; S.M. Kassin, C.A. Meissner and R.J. Norwick, “‘I’d Know

apparently spontaneous, narrative. False confessions sometimes withstand trial and appellate scrutiny because the post-admission narrative beguiles lawyers, judges and juries. Judges tend to focus their attention on the determinants of voluntariness and reliability, and they instruct jurors to do the same. They strive to establish that the suspect was not coerced or forced to conform to the investigator's account of how the crime happened. Prosecutors contribute to the problem by downplaying inconsistencies and emphasizing the powerful non-public facts "volunteered" in the confession.⁹⁵

The Reid technique is not the only investigative procedure at risk of eliciting false confessions. The "Mr. Big" undercover operation⁹⁶ goes to great lengths to create a carefully staged situation in which it is clearly in the suspect's self interest to confess to a crime that he may (or may not) have committed. The final "confession" is videotaped and shown to the jury. Often there is little by way of corroborating evidence of guilt. The confession may not go beyond the stark admission of responsibility. Without the "confession" the police would have little or no substantive evidence implicating the target in the crime. Consequently, in such situations part of the assessment of reliability should contain an appraisal of the post-admission narrative.⁹⁷ How, where and when was the crime committed? Does the confession provide investigators with forensic details that could lead to independently incriminating evidence? Does the defendant supply accurate corroborating evidence that was not otherwise available from the media or from the investigators themselves? In one undercover operation⁹⁸ two different suspects were ensnared in the subterfuge. Both

a False Confession if I Saw One': A Comparative Study of College Students and Police Investigators" (2005), 29 Law and Human Behavior 211.

95. Findley and Scott, *supra*, footnote 78.

96. T.E. Moore, "Deceit, Betrayal and the Search for Truth: Legal and Psychological Perspectives on the 'Mr. Big' Strategy" (2009), 55 C.L.Q. 349. T.E. Moore, "Lying for the Truth: Do 'Mr. Big' Tactics Generate Reliable Admissions? (paper presented to Osgoode Hall Law School Professional Development Series on Wrongful Convictions and Unmerited Acquittals. Good Science, Bad Evidence? New Perspectives on the Reliability of Evidence in Criminal Proceedings, Osgoode Hall, Toronto, December 5, 2009).

97. R. Ofshe and R. Leo, "The Decision to Confess Falsely: Rational Choice and Irrational Action" (1997), 74 Denv. U.L. Rev. 979.

confessed, and both reported having acted alone. There are numerous other instances⁹⁹ in which the admissions contained improbable or incorrect elements or omitted details that the actual killer would certainly have known. Despite a dearth of independent confirmation, confessions alone are often enough to persuade juries to convict.

7. Alternatives to Reid

Research is emerging that offers alternatives to the Reid methods of lie detection and of interrogation. More detailed descriptions can be found in the cited works. We briefly outline three approaches that are based on sound, well-documented psychological principles.

(1) Strategic Disclosure of Evidence

In 2003, DePaulo¹⁰⁰ and her colleagues undertook a large-scale meta-analysis of psychological studies in an attempt to distinguish reliable cues to deception from unreliable ones. The Strategic Use of Evidence (SUE) technique is based largely on the findings from this meta-analysis. Here, the interviewer withholds certain pieces of evidence from the suspect in an attempt to catch the suspect in a lie.¹⁰¹ Guilty detainees' lies may be exposed if they are unaware of the evidence against

98. Kakegamic trial (2005), "Police informant was second suspect", *Kenora Daily Miner and News* (October 7, 2005).

99. *R. v. Unger* (2005), 196 Man. R. (2d) 280 (Q.B.), supp. reasons 196 Man. R. (2d) 280 at p. 294; *R. v. Fischer*, [2005] B.C.J. No. 1042, 350 W.A.C. 199, 197 C.C.C. (3d) 136 (C.A.), leave to appeal to S.C.C. refused [2005] 3 S.C.R. vi; *R. v. Osmar*, *supra*, footnote 38. *New York v. Wise*, Affirmation in Response to Motion to Vacate Judgment of Conviction, Indictment No. 4762/89 (December 5, 2002).

100. B. DePaulo *et al.*, *supra*, footnote 84.

101. M. Hartwig, P.A. Granhag, L.A. Strömwall and A. Vrij, "Detecting Deception via Strategic Disclosure of Evidence" (2005), 29 Law and Human Behavior 469; see also P.A. Granhag and M. Hartwig, "A New Theoretical Perspective on Deception Detection: On the Psychology of Instrumental Mind-reading" (2008), 14 Psychology, Crime and Law 189; M. Hartwig, P.A. Granhag and L.A. Strömwall, "Guilty and Innocent Suspects' Strategies during Police Interrogations" (2007), 13 Psychology, Crime and Law 213; M. Hartwig, P.A. Granhag, L.A. Strömwall and O. Kronkvist, "Strategic Use of Evidence during Police Interviews: When Training to Detect Deception Works" (2006), 30 Law and Human Behavior 603.

them. For example, a suspect may deny ever having been to the victim's house if he did not know that his fingerprints were found there. If the suspect *did* know of the fingerprint evidence, he could easily incorporate a benign visit to the victim into his story. The researchers hypothesized that revealing potentially inculpatory information later (as opposed to earlier) in the interrogation would elicit inconsistencies in the suspect's account that could be used as a marker of deception. The hypothesis was supported. Research participants who viewed videos of interrogations were able to identify deceptive statements with much higher accuracy when evidence was disclosed late (68%), compared to early (41%) in the interview. This approach is a promising substitute to the Reid method of behaviour analysis because it has an empirical basis and a sophisticated theoretical rationale.

(2) Asking Unanticipated Questions

This tactic can be employed when two or more suspects are being interviewed individually about their joint involvement in a given crime. Vrij and his colleagues¹⁰² found that the responses of pairs of liars corresponded less with each other than those of pairs of truth-tellers when responding to unanticipated questions. In this study, pairs of lying and truthful "suspects" that claimed to have been at a restaurant together at the time the crime was committed were asked a series of questions regarding their visit to the restaurant. When asked anticipated questions (*e.g.*, "at what time did you meet?"; "what did you talk about?"), agreement between pairs of liars did not differ from that between pairs of truth-tellers. However, when asked unanticipated questions, the correspondence between pairs of liars and truth-tellers diverged. The unanticipated questions were spatial in nature (*e.g.*, "In relation to the front door and where you sat, where were the closest diners?") or temporal (*e.g.*, "In which order did you discuss the different topics you mentioned earlier?"). They were also asked to draw the layout of the restaurant. This approach

102. A. Vrij, S. Leal, P.A. Granhag, S. Mann, R.P. Fisher, J. Hillman, *et al.*, "Outsmarting the Liars: The Benefit of Asking Unanticipated Questions" (2009), 33 *Law and Human Behavior* 159.

merits more research. As noted above, catching liars through inconsistencies in their stories is a more reliable method than reliance on unsupported "hunches" based on behavioural cues.

(3) Imposing Cognitive Load

The traditional cognitive load approach is based on the assumption that lying is more cognitively demanding than telling the truth and as such, generates observable signs of cognitive burden.¹⁰³ The cognitive theory underlying the approach suggests that the following tasks necessary for the liar, (1) formulating and (2) activating a lie, (3) suppressing the truth, (4) not taking their own credibility for granted, (5) monitoring the interviewer's reaction (to check if they are getting away with the lie), and (6) constantly reminding themselves to act "truthfully" all exact a cognitive toll on the liar, but not on the truth teller.¹⁰⁴ If the mental demands of lying produce slower response times and decreased movements, perhaps these features can be exploited to help distinguish between honesty and deceit. To test this notion, researchers *imposed* a cognitive load on participants, hypothesizing that introducing mentally taxing "add-ons" would increase the diagnostic value of the interview. In the first of two studies, half the participants (both truth tellers and liars) were asked to tell their stories in reverse order while the other half were not given this instruction. Observers watching the videotaped interviews were better able to distinguish truth tellers from liars in the "reverse order" group than in the control group.¹⁰⁵ In a second study employing the same design, observers were better able to distinguish truth tellers from liars among the group of participants asked to maintain eye contact with the interviewer than among the group given no such instruction.¹⁰⁶ Research on the "imposing cognitive load"

103. M. Zuckerman, B.M. DePaulo and R. Rosenthal, "Verbal and Nonverbal Communication of Deception" in L. Berkowitz, ed., *Advances in Experimental Social Psychology* (New York: Academic Press, 1981), vol. 14, pp. 1-57.

104. A. Vrij, R. Fisher, S. Mann and S. Leal, "A Cognitive Load Approach to Lie Detection" (2008), 5 *Journal of Investigative Psychology and Offender Profiling* 39.

105. A. Vrij, S.A. Mann, R.P. Fisher, S. Leal, R. Milne and R. Bull, "Increasing Cognitive Load to Facilitate Lie Detection: The Benefit of Recalling an Event in Reverse Order" (2008), 32 *Law and Human Behavior* 253.

approach has been limited to the laboratory to date. More research, especially field studies, is the logical next step for this promising alternative to Reid.

Practical reforms to the interrogation practices in both Canada and the United States have been untenably slow. The Reid technique, despite numerous critiques,¹⁰⁷ is omnipresent in North America. One wonders if the justice system is largely unaware of much of the research being conducted or if the justice system is simply resistant to recommendations from outsiders. Perhaps the onus rests on the psychologists who conduct newer research to redouble their efforts to make their findings known and to encourage their application. In any case, the impact of psychology on law, at least in the domain of interrogations, has been disappointing.

On a brighter note, strides are being made in the United Kingdom, New Zealand and Norway, where law-enforcement officers have begun to receive training in an approach called PEACE¹⁰⁸ that advocates the use of investigative interviewing as opposed to coercive interrogation.¹⁰⁹ "PEACE" refers to the five stages through which an officer is to proceed in an investigative interview: (1) Preparation and Planning, (2) Engage and Explain, (3) Account, (4) Closure and (5) Evaluation. The model, grounded in the empirically based principles of the cognitive interview,¹¹⁰ encourages officers to carefully plan an interview, to explain the process to the detainee and to use non-leading, open-ended questions to gather information. If an officer's emotional involvement in a case contributes to tunnel vision,¹¹¹ it follows that to shift from

106. A.Vrij, S. Mann, S. Leal and R. Fisher, "'Look into my eyes': Can an instruction to maintain eye contact facilitate lie detection?" (2010), 16 *Psychology, Crime & Law* 327.

107. *Supra*, footnote 5.

108. R. Milne and R. Bull, *Investigative Interviewing: Psychology and Practice* (Chichester: Wiley, 1999).

109. S.M. Kassin and G.H. Gudjonsson, "The Psychology of Confessions: A Review of the Literature and Issues" (2004), 5 *Psychological Science in the Public Interest*. Special Issue: The Psychology of Confessions: A Review of the Literature and Issues 33.

110. R.P. Fisher and R.E. Geiselman, "Memory Enhancing Techniques for Investigative Interviewing: The Cognitive Interview" (Springfield: Charles Thomas, 1992).

111. *Supra*, footnote 46.

a "heated", accusatorial, confrontational interrogation to a cognitive, inquisitorial interview may serve to quell the negative effects of investigator bias, and possibly elicit fewer false confessions. Indeed, research on the PEACE model suggests that it is as effective as current coercive interrogation practices in eliciting confessions from criminals, but reduces the incidence of false confessions since it does not subject innocent suspects to psychological coercion.¹¹²

Where Reid appears to "prescribe" tunnel vision, PEACE permits investigators to remain open-minded and to build a case by searching for the objective truth. Officers gather information through careful planning and investigation, rather than determining guilt based on little more than a "gut" feeling (Reid's preinterrogation step) and extracting confessions through psychological intimidation. The PEACE model represents a much-needed shift toward better diagnosticity. Incorporating some of the tactics described above¹¹³ is likely to contribute to further refinements.

Dr. Brent Snook and his colleagues at Memorial University in Newfoundland are among the leading researchers on police reforms in Canada. They have conducted research on caution comprehension (right to silence and right to counsel),¹¹⁴ the Reid method,¹¹⁵ and most recently on the PEACE model of interviewing.¹¹⁶ In this latest article, initial steps toward reform in Newfoundland are described. The PEACE model has been used in a pilot project at Memorial University, where 45 officers from the Royal Newfoundland Constabulary have already been trained in the method. Training has since been extended to officers from Ontario. It is encouraging that steps are being taken to implement proposed reforms in Canada and elsewhere. The advent of the PEACE model may be an

112. *Supra*, footnote 69.

113. *Supra*, footnotes 101-106.

114. *Supra*, footnote 46.

115. L. King and B. Snook, "Peering Inside a Canadian Interrogation Room: An Examination of the Reid Model of Interrogation, Influence Tactics, and Coercive Strategies" (2009), 36 *Criminal Justice and Behavior* 674.

116. B. Snook, J. Eastwood, M. Stinson, J. Tedeschi, J.C. House, "Reforming Investigative Interviewing in Canada" (2010), 52 *Canadian Journal of Criminology and Criminal Justice* 203.

indication that the voices of experimental psychologists criticizing the Reid technique are beginning to be heard.

8. Conclusion

Findley and Scott's observation¹¹⁷ that some aspects of tunnel vision are *prescribed* in the Reid technique is important. Most homicide detectives are intelligent, conscientious, and committed to a just outcome. They conduct their interrogations in compliance with the training they received — almost invariably according to the principles of the Reid technique. As we have attempted to show, the principles are scientifically indefensible. Ofshe and Leo¹¹⁸ noted in 1997:

[I]nterrogation manual writers and trainers persist in the self-serving and misguided belief that contemporary psychological methods are not apt to cause an innocent suspect to confess — a fiction that is flatly contradicted by all the scientific research on interrogation and confession.

Nothing has changed that would alter this conclusion today, except that the weight of the empirical evidence refuting the validity of the assumptions behind the Reid technique is now much greater. Front line officers are encouraged to depend on unreliable indicators of deception to make inferences about truthfulness. Interrogators are trained to believe that their intuitions about candor are trustworthy when, in fact, they are not. Interrogators are told that innocent suspects will not succumb to the confrontational pressures of the interrogation when, in fact, they often do. Innocent suspects are told that their fingerprints or DNA were found at the crime scene and they may be psychologically manipulated into believing that providing a false confession is in their best interests. The Reid technique's vast edifice of pseudoscience, misinformation, self-delusion and outright deceit does not advance the objectives of the criminal justice system. In the 1950s, it was heralded as a vast improvement over the barbaric methods it replaced.¹¹⁹ Such justification stopped being applicable decades ago. There are viable alternatives to the Reid technique. It is time to start using and refining them.

117. *Supra*, footnote 78.

118. *Supra*, footnote 97, at p. 983.

119. *Supra*, footnote 30.