

# Revisiting the False Confession Problem

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Despite the existence of important safeguards in our criminal legal system, innocent suspects often succumb to forceful and deceptive interrogation techniques. Among those over-represented members of the false confessor population are minors, people with cognitive and intellectual disabilities, and those with psychiatric disorders. Some of the confessions made by these at-risk populations can hardly be considered voluntary or reliable, but they are generally admitted at trial, regardless of their prejudicial effect. Forensic psychiatrists should become more involved in the overall process of evaluating confessions, not only testifying in courts, but also assisting policymakers in reforming the interrogation process and influencing the legal process. Thus, forensic psychiatrists may give their expert opinion by providing proper training to police interrogators and examining videotaped interrogations. In addition, forensic experts can be instrumental in contributing to three legal solutions that we propose to the false confession problem: a constitutional approach, an evidence law approach, and a jury instruction approach. Each of these approaches requires forensic psychiatrists to help judges and jurors understand the coercive nature of the interrogation process and its effect on suspects' behavior.

**J Am Acad Psychiatry Law 46:34–44, 2018**

On March 1, 2006, Brendan Dassey, a 16-year-old high school student with a below-average IQ and cognitive limitations, confessed to witnessing and participating in the November 2005 rape and murder of Teresa Halbach in Wisconsin. He was charged as an adult with first-degree intentional homicide, mutilation of a corpse, and first-degree sexual assault. He recanted his confession after claiming he incriminated himself because the investigators “got into [my] head” after a series of long, stressful, and highly coercive interrogations.<sup>1</sup> His confession was admitted into evidence.

On April 25, 2007, Mr. Dassey was found guilty on all counts and was sentenced later to life in prison. After unsuccessful appeals in the Wisconsin courts, His lawyers filed a *habeas* claim in federal court. On August 12, 2016, a federal magistrate judge vacated

the conviction.<sup>2</sup> The judge found that the investigators coerced Mr. Dassey into confessing through constitutionally impermissible promises, rendering the statements involuntary and inadmissible. On appeal, a three-judge panel of the U.S. Court of Appeals for the Seventh Circuit affirmed the magistrate judge's decision. Nevertheless, on December 8, 2017, the Seventh Circuit sitting *en banc* reversed the decision and held that although Brendan was a juvenile who was alone when interrogated, his confession was voluntary and admissible because he met with the interrogators voluntarily and with his mother's consent, understood his constitutional rights, and was not subject to any physical coercion. Brendan's conviction was allowed to stand.<sup>3</sup>

The story of Brendan Dassey, up to his conviction and sentencing, was well documented in the Netflix documentary series, “Making a Murderer.”<sup>1</sup> It is unclear whether he falsely confessed, but his case ultimately highlights some of the intrinsic flaws of the criminal justice system. The admission of a coerced (and perhaps unreliable) confession by a 16-year-old with cognitive limitations reveals a system that focuses almost exclusively on the procedural fairness of police interrogations and overlooks their substantive fairness.

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Disclosures of financial or other potential conflicts of interest: None.

In a 2009 article in the *Journal*, Richard Leo stated that a false confession consists of an admission to a crime that the confessor did not commit and a post-admission narrative of how and why the crime occurred.<sup>4</sup> One may ask, why would an innocent person confess to a crime he did not commit, let alone provide a detailed description of it? Many would find it counterintuitive that individuals could act against their self-interest in this manner. As a result, many false confessors are wrongfully convicted. For this reason, forensic psychiatrists must explain the unique interplay between coercive interrogations and human behavior.

The National Registry of Exonerations has reported more than 2,155 wrongfully convicted individuals who have been exonerated in the United States since 1989.<sup>5</sup> In 2012, the number of exonerations since 1989 stood at 873. Since then, the Registry has reported new exonerations at a rate of 200 a year.<sup>5</sup> According to a report titled “Exonerations in the United States, 1989–2012,” false confessions were present in 15 percent of exonerations and in 25 percent of homicide exonerations.<sup>6</sup>

According to The Innocence Project, the leading effort in the United States to exonerate falsely convicted felons, false confessions were present in 31 percent of DNA-exonerated cases and 63 percent of homicide DNA exonerations between 1989 and 2016.<sup>7</sup> This increase in the DNA-exonerated population suggests that one of the reasons that false confessions are not easily disproven is because of the great weight that the justice system places on them.<sup>5</sup> Because these percentages reflect only the number of exonerated false confessors, it is safe to assume that the actual number of false confessions is much higher. According to Leo,<sup>4</sup> these reported cases represent the proverbial tip of the iceberg. In many cases, there is no DNA to test, and postconviction relief is not pursued because of lost or destroyed evidence.<sup>7</sup> Although the exonerations have continued to increase steadily in recent years, little has been done to solve the related problems of false confession and conviction.

## A Historical Background of False Confessions

Our understanding of involuntary confessions has evolved with the passage of time. By the end of the 18th century, an English court ruled in *Rex v. Warickshall*<sup>6</sup> that involuntary confessions were inherently

unreliable and, hence, inadmissible. The court did not consider an interrogator’s false “promises of favor” to be objectionable, *per se*. Instead, it established a “voluntariness” evidentiary rule and excluded a confession on the grounds of reliability.<sup>9</sup>

Over a century later, the U.S. Supreme Court held in *Bram v. United States*<sup>10</sup> that involuntary confessions violated the Fifth Amendment privilege against self-incrimination. Bram’s interrogators suggested that he must have had an accomplice and that confessing would allow him to share the blame instead of leaving it “on [his] own shoulders.” (Ref. 10, p 539; Ref. 11, p 12) His interrogators implied that incriminating someone else would lessen his punishment. The Court held that the interrogators’ actions violated Bram’s constitutional right not to be compelled to be a witness against himself and overturned his conviction. The Court stated that “a confession, to be admissible, must be free and voluntary: that is, it must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.”<sup>10</sup>

In *Brown v. Mississippi*,<sup>12</sup> three African-American men confessed to murder after police officers physically abused and tortured them. The Court overturned the convictions. The self-incrimination clause relied upon in *Bram* was not applicable to the State of Mississippi, because the Bill of Rights had not yet been incorporated into the Fourteenth Amendment, which applies to the states. Consequently, the Court announced a new voluntariness test rooted in the Due Process Clause of the Fourteenth Amendment. In accordance with *Brown*, courts began to exclude involuntary confessions because they violated the defendant’s due process rights, as opposed to the privilege against self-incrimination.<sup>13</sup>

Despite the development of the voluntariness doctrine, many defendants confessed to crimes because they were unaware of their constitutional rights. This was the case with Ernesto Miranda, who was charged with the kidnap and rape of an 18-year-old woman.<sup>14</sup> After two hours of interrogation, Miranda signed a confession and swore that he was doing so voluntarily and with full knowledge of his legal rights. He was convicted. In the landmark case of *Miranda v. Arizona*, the Supreme Court overturned Miranda’s conviction because he was not informed of his constitutional rights, specifically his rights to

counsel and to remain silent.<sup>14</sup> The Court established a new framework requiring a series of warnings of the suspect's constitutional rights to be provided at the outset of a custodial interrogation. In arriving at this framework, the Court shifted its attention away from those particularized inquiries that focused on the reliability and trustworthiness of confessions and, instead, emphasized the procedural fairness of police interrogations.

After *Miranda*, courts rarely have excluded confessions because they violate the Due Process Clause. They have rejected the idea of a bright-line rule proscribing threats of violence or promises of leniency.<sup>13,15</sup> Many courts have found deceit, bluffing, and trickery to be permissible.<sup>13,15-17</sup> Threats or promises are now considered in light of the totality of the circumstances, such as the use of coercive tactics, the suspect's behavior and state of mind, age, academic preparation, experiences with the police, and place and length of interrogation.<sup>13</sup>

### Interrogation-Induced Confessions and At-Risk Populations

Scholars, such as Leo in his 2009 article,<sup>4</sup> generally refer to three types of false confessions: voluntary, compliant, and persuaded. We focus on the last two categories, which we call interrogation-induced false confessions. A compliant false confession occurs when the suspect knowingly succumbs to "police coercion, stress, or pressure to achieve some instrumental benefit" (Ref. 4, p 338) to finish and escape the stressful experience of an interrogation, take advantage of a perceived promise of leniency, or avoid a feared outcome or punishment. In contrast, a persuaded false confession occurs when a detective causes a suspect to second guess his memory and become persuaded, by some rational explanation from the detective, that it is more likely than not that the suspect committed the crime.

In a 2010 commentary in the *Journal*,<sup>18</sup> Deborah Davis and Richard Leo advised forensic experts not to assume that they can support a false confession claim without explaining the coercive nature of interrogations. We agree that the most effective type of testimony is one that evaluates the process and its influence on the defendant's behavior, what Davis and Leo called situation-based testimony. Experts should also be aware of any vulnerabilities of the defendant. Cognitive deficiencies and psychiatric disorders are not preconditions for false confessions,

but they are important elements that, when combined with the specific forces at play in an interrogation, could support a false confession claim. There are certain groups we call at-risk populations that are especially vulnerable to interrogations. Forensic experts should explain the vulnerability of these groups in relation to the coercive tactics used.

These at-risk populations include minors, persons with cognitive and intellectual disabilities, and those with psychiatric disorders.<sup>4,19-21</sup> Minors, who are often questioned without their parents' knowledge or presence, comprise over one-third of false confessors.<sup>22</sup> In a 2009 commentary in the *Journal*, Robert Weinstock and Christopher Thompson explained that adolescents and juveniles are vulnerable to police interrogations because of cognitive deficits and psychosocial immaturity.<sup>20</sup> Adolescents generally have a rudimentary understanding of their rights and are more likely to be coerced into agreeing with authority figures.<sup>20,23</sup> Similarly, adolescents are more likely to value short-term benefits (i.e., finishing the interrogation and leaving the detention facility) over long-term benefits (i.e., refusing to confess, to have a better chance of being acquitted).<sup>20</sup>

Mental illness is another prominent feature in false confession cases.<sup>4,21</sup> When some of these predisposing factors are combined, as seen in justice-involved youths with mental illnesses, a heightened risk of a false confession is created in the interrogation room.<sup>24</sup>

### The Coercive Nature of the Interrogation Process

Leo identified three "sequential errors" (Ref. 4, p 333) that often lead to false interrogation-induced confessions and wrongful convictions. First, detectives presume the suspect to be guilty (i.e., a misclassification error). Then, they subject the suspect to a "guilt-presumptive, accusatory interrogation" (Ref. 4, p 333) that combines coercive elements (i.e., coercion error). Finally, detectives secure the confession and obtain a postadmission narrative that is jointly constructed by supplying the suspect with previously unknown facts of the crime (i.e., contamination error). Expert testimony explaining these errors is crucial to dispel the skepticism surrounding false confessions.

Most law enforcement agencies in the United States are trained to use the Reid technique.<sup>4,25</sup> The goal is to establish guilt by means of the defendant's

behavior early in the interrogation.<sup>4,26,27</sup> Reid, a polygraph expert, believed that a defendant's guilt is manifested by signs of anxiety through body language.<sup>27</sup> An early interpretation of behavior fuels the interrogator to pursue more direct techniques to elicit a confession.<sup>28</sup> Although this strategy is effective in yielding confessions, a worrisome percentage of them is false, owing in great part to an intrinsic flaw in the approach: its main goal is to elicit anxiety while interpreting anxiety as a determinant of guilt.<sup>27</sup>

Related interrogation techniques include maximization and minimization. During maximization, the interrogator conveys the belief that the suspect is guilty through bluffing and lying.<sup>11</sup> By bluffing, interrogators claim that incriminating evidence exists without directly implicating the suspect. By lying, interrogators lead suspects to believe there is direct evidence against them (i.e., DNA, eyewitnesses, video recordings) and that there is no point in denying guilt.<sup>29</sup> Paradoxically, suspects often confess because they hope their innocence will ultimately be proven. Minimization techniques decrease anxiety and belittle the severity of the crime through moral justification.<sup>11</sup> The interrogator often implies leniency, making the innocent suspect more prone to confessing.

As Leo points out, “[t]he custodial environment and physical confinement are intended to isolate and disempower the suspect” (Ref. 4, p 335). The length of the interrogation and the combination of techniques can result in both compliant and persuaded confessions. With respect to compliant confessions, suspects believe it is in their best interest to confess because denying the detectives' accusations will only make the situation worse. As Leo states, many suspects are “worn down” and “fatigued” (Ref. 4, p 335) by the interrogation and believe that they can escape this stressful and unpleasant experience by complying with the interrogators' wishes. With respect to persuaded confessions, police officers may convince suspects that no one will believe their innocence and that their guilt has been clearly established. Suspects could second-guess their memories and believe that they committed the crime, a process known as “internalization [of guilt]” (Ref. 30, p 126).

Without attempting to distinguish between a false or true confession, forensic psychiatrists can testify as to how the vulnerability of at-risk populations affects the relationship between intolerance of distress and rational analysis.<sup>18</sup>

## Studies on False Confessions

Several researchers have studied the effects of interrogation techniques in controlled environments. For example, in 1996 Kassin and Kiechel<sup>30</sup> developed the “ALT key” paradigm in which participants had to perform a computer task without hitting the ALT key on the computer keyboard. The participant was told that hitting the key would cause the computer to malfunction and lose the investigator's data. Invariably, the computer crashed, and the participant was accused of hitting the key. The participant was asked to sign a confession and a confederate was told to testify. In cases where confederates agreed that the participant was innocent, 48 percent of participants nonetheless signed a confession. When confederates testified falsely that the participant pressed the ALT key, 94 percent of participants signed a confession. Internalization of guilt (i.e., belief that it is more likely than not that the accused person committed the crime) increased from 12 percent to 55 percent when confederates introduced false evidence.<sup>29,30</sup> False evidence increased both the likelihood of false confession and the internalization of guilt.

Perillo and Kassin<sup>29</sup> also used the ALT key paradigm and divided the participants into five groups: false-witness evidence group, bluff group, false-witness evidence and bluff group, no-tactics control group, and witness-affirmed innocence control group. This experimental design targeted false confessions and internalization of guilt when suspects were faced with false evidence, bluffing (i.e., suggesting that there is incriminating evidence without directly implicating the suspect), and exculpatory evidence.

The control group (group 4) yielded 27 percent of false confessions compared with 36 percent of the innocence control group.<sup>29</sup> Both groups displayed no internalization of guilt. When false evidence was planted (group 1), 79 percent confessed and 14 percent internalized their guilt. In the bluff setting (group 2), 87 percent confessed and 7 percent internalized guilt. When both false evidence and bluffing were combined (group 3), confessions remained high at 77 percent and internalization rose to 31 percent. In the bluffing scenario, participants were more likely to confess, but less likely to internalize guilt, because they believed that future exculpatory evidence would exonerate them.

In a subsequent experiment, researchers evaluated diagnosticity, defined as the ratio of true to false confessions. Perillo and Kassin<sup>29</sup> based their methodology on the Russano *et al.*<sup>31</sup> cheating paradigm, which consists of a problem-solving task that participants must complete alone and then with a confederate.<sup>29,31</sup> The confederate asks for help, although the participant has been instructed to perform the task alone. Those who refused to cheat were excluded, thereby making all group participants guilty.<sup>29,31</sup> In the control setting, the confederate did not ask for help, so it was impossible to cheat.<sup>29</sup>

After completing the cheating variation, participants were subdivided into a bluff group and a control group without bluffing.<sup>29</sup> In the bluff group, the investigator said that a hidden camera would be checked to confirm guilt or innocence. All participants were asked to sign a confession and to explain the reasons as to why they confessed. In the innocent condition, 27 percent confessed compared with 90 percent of the guilty group.<sup>29</sup> The bluff condition also increased the percentage of confessions: 45 percent in the control no-bluff condition confessed compared with 70 percent in the bluff condition. When measuring the interaction of both conditions, 87 percent of guilty controls confessed, whereas none of the innocent controls did. Meanwhile, in the bluff groups, 93 percent of the guilty participants confessed, and 50 percent of the innocent participants falsely confessed. Consequently, bluffing, although efficient in increasing confession rates, sacrifices diagnosticity.

In another experiment, Narchet *et al.*<sup>32</sup> focused on how the interrogators' biases can give rise to false confessions. The researchers found that interrogators predisposed to believing that participants are guilty yield a higher number of confessions than those in a no-bias control condition. Suspects who are presumed guilty are subjected to more coercive interrogation techniques and are more likely to confess, even falsely, confirming the interrogator's initial bias.

Finally, Kassin *et al.*<sup>33</sup> identified a critical component of false confessions: once elicited, police officers cannot tell them apart from true confessions. In their study, male inmates were asked to confess to the crime they were arrested for and a crime invented by researchers. These standardized interviews were video and audio recorded. A group of college students and one of police investigators were asked to determine whether the individual was guilty and ex-

plain their confidence levels. The overall accuracy rate was 54 percent, which is statistically indistinguishable from chance. Although the investigators were more confident in their judgment, students exhibited a higher accuracy rate (59%) than the investigators (48%). The students who listened to the audiotapes had the highest accuracy rate (64%), whereas investigators watching videotapes were the least accurate (42%). This result may be because investigators are trained to watch for certain mannerisms as indicators of guilt, which can distract from an evaluator's accuracy. Similarly, investigators are trained to be suspicious of denials of guilt, which predisposes them to confirmation bias and misclassification errors.<sup>33</sup>

### The Effects of False Confessions and the Criminal Justice System

The studies cited show that accusatorial, rather than inquisitorial, practices are preferable. Whereas inquisitorial practices tend to rely on extracting confessions from a criminal defendant, an accusatorial system requires that guilt be established "by evidence independently and freely secured," a standard invoked by Justice William Brennan's dissenting opinion in *Colorado v. Connelly*.<sup>34</sup> This preference stems from the proposition "that a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation."<sup>35</sup>

An inquisitorial system is likely to experience a higher number of wrongful convictions. Drizin and Leo<sup>36</sup> conducted a longitudinal review of 125 exonerated defendants in false confession cases. In their sample, 81 percent of false confessors who decided to go to trial were wrongfully convicted. One likely explanation is that an admission "makes the other aspects of a trial in court superfluous, and the real trial, for all practical purposes, occurs when the confession is obtained" and "amounts in effect to a waiver of the right to require the state at trial to meet its heavy burden of proof" (Ref. 37, p 316).

Heavy reliance on interrogation-induced confessions comes at a cost. Interrogations are designed to produce confessions, and once that goal is achieved, there is little incentive to continue investigating. Investigators rarely pursue other leads that could reveal exculpatory evidence or further (and perhaps more

reliable) incriminating evidence. The confession often becomes the “smoking gun” against the defendant, forcing him to plead guilty or pursue exculpatory evidence. To the extent that exculpatory evidence exists, it is generally weighed against the suspect’s confession, which many presume to be accurate. As Kassin stated in the television documentary *The Central Park Five*, “Once that confession is taken and once that confession is in the air, it corrupts everything else. And confessions will trump DNA, confessions will change witnesses’ testimony, confessions are irresistibly persuasive and almost the effects can’t be reversed.”<sup>38</sup>

Certainly, we are not saying that confessions should be discouraged altogether. Truthful confessions enhance trustworthiness of the system by contributing to the exoneration of innocent people and the prevention of wrongful convictions. Law professor and former federal judge Paul Cassell has stated that “truthful confessions protect the innocent by helping the criminal justice system separate a guilty suspect from the possibly innocent ones, while the failure to obtain a truthful confession creates a risk of mistake” (Ref. 39, p 498). Cassell draws a distinction between false and lost confessions. In the first category, innocents are at risk of being wrongfully convicted as a result of an untruthful confession. In the second category, failure to obtain a truthful confession from a guilty party puts innocents at risk of being wrongfully convicted. A reduction in the number of false and lost confessions inevitably results in a reduction of wrongful convictions and false acquittals.

Although it is perhaps the most relevant safeguard against involuntary confessions, the *Miranda* framework does little, if anything, to regulate the interrogations themselves. Once the rights are waived, *Miranda* becomes “virtually worthless as a safeguard against the specific interrogation practices that were characterized as abusive in the *Miranda* decision . . .” (Ref. 39, p 540).

The effect of *Miranda* has been to “insulate the resulting confessions from claims that they were coerced or involuntary” (Ref. 40, p 744). Courts have moved away from individualized and particularized inquiries into the admissibility of confessions and toward a generalized and highly technical approach that focuses almost exclusively on whether the police warned suspects of their rights and whether the suspects knowingly and voluntarily waived such rights.

It is no surprise, then, that “[s]ince *Miranda*, the Supreme Court has only rarely reversed convictions on involuntariness grounds.”<sup>39</sup> False confessions are often obtained in full compliance with *Miranda*. Innocent suspects often believe they will convince the police of their innocence if they waive their rights and show they have nothing to hide. The solution lies in focusing on the procedural fairness of the interrogation process, which was the intent of the *Miranda* framework, and on the reliability and trustworthiness of the confessions themselves.

## Recommendations for Addressing the False Confession Problem

### Practical or De Facto Solutions

We recommend that interrogations (not just confessions) be videotaped to preserve an objective and reviewable record for judges, jurors, and forensic experts.<sup>36</sup> Experts can use these videotaped interrogations to analyze the interaction between the coercive tactics and the suspect’s behavior and vulnerabilities. Transparency protects defendants from police misconduct and shields police from false allegations.

Empirical evidence also highlights the need to modify the interrogation process, particularly with at-risk populations. A suspect’s presumption of innocence can hardly be reconciled with the guilt-presumptive, accusatory nature of most interrogations. Interrogators should identify whether additional precautions should be taken. Great strides have been made in Broward County, FL, where police interrogators receive specialized training to identify vulnerable individuals and tailor interrogations to their particular needs.<sup>36</sup> Interrogators must notify their supervisors, explain carefully to the suspect his constitutional rights, and avoid, to the greatest extent possible, asking leading questions. Before any cognitively limited individual is charged with a crime, elicited statements undergo a postconfession analysis by a supervisor or a panel of specialists to assess voluntariness and reliability.<sup>36</sup> These measures, if expanded nationwide, would offer an added layer of protection to vulnerable innocent suspects.

By adopting these measures, the government is more likely to rely on admissible confessions, increase the probability of a conviction, and avoid the related waste of taxpayer funds. It was recently reported that wrongful convictions cost California nearly \$220 million from 1989 through 2012: spe-

cifically, \$80 million in incarceration costs, \$68 million in lawsuit settlements, and \$68 million on trials and appeals.<sup>41</sup>

Finally, Weinstock and Thompson<sup>20</sup> recommended that adolescents be interrogated with an attorney present. Unlike parents, attorneys can better apprise juveniles of their rights and the legal consequences of waiving them. This recommendation can be extended to other vulnerable suspects, such as those with psychiatric disorders and cognitive limitations. Someone may argue that requiring the presence of an attorney would reward suspects who validly waived their rights and confessed to wrongdoing. This position misunderstands the coercive nature of interrogations and fails to consider the predisposing characteristics of vulnerable suspects. For this reason, forensic experts need to “contextualize . . . the defendant’s behavior and motivations” and help judges and juries understand the factors affecting the reliability of interrogation-induced confessions (Ref. 42, p 79).

### **Theoretical or De Jure Solutions**

It is important to devise a workable framework that supplements *Miranda*. We consider three alternatives that can be implemented independently or together and require different contributions from forensic experts: the constitutional, evidentiary, and jury instruction approaches. The constitutional and evidentiary approaches require an admissibility determination at the pretrial stage. The jury instruction approach requires a credibility determination at trial.

#### *Constitutional Approach*

The U.S. Supreme Court has identified two constitutional rights supporting the voluntariness doctrine: the right in any criminal case not to be compelled to be a witness against oneself (the privilege against self-incrimination) and the right not to be deprived of liberty without due process of law.<sup>10,12,13,43</sup> Whatever is left of the traditional voluntariness doctrine is exclusively based now on the Due Process Clause.<sup>13</sup>

The modern view is that confessions are analyzed under a totality-of-the-circumstances test. We think an objective rule based on the self-incrimination clause is needed. As mentioned earlier, the voluntariness doctrine has its origin in the English case of *Rex v. Warickshall*.<sup>8,9</sup> This doctrine was an evidentiary rule that focused on reliability and was indifferent toward the lawfulness of coercive interrogation tac-

tics.<sup>9,43</sup> This focus is different from the constitutional test, which is ultimately concerned with state action (i.e., police misconduct).

We agree with Professor Mark Godsey and other legal scholars who have advocated for an admissibility determination based on compulsion and rooted in the self-incrimination clause.<sup>43</sup> Godsey proposes an objective penalties test, which allows for the suppression of any confession elicited through the imposition of a penalty to provoke speech or punish silence. This approach considers whether the interrogator imposed sanctions on the suspect’s exercise of the right to remain silent by changing his baseline condition or *status quo* to his detriment. The objective penalties test is consistent with the Constitution’s focus on police misconduct. We will not explore the legal merits of this test, because that would require a prolonged analysis of the relevant case law and the historical developments of confession law. However, there are some criticisms that forensic experts and legal practitioners should acknowledge.

One is that a stricter constitutional rule, such as the objective penalties test or a categorical prohibition on the use of maximization and minimization techniques, would be unnecessarily burdensome on law enforcement officials. These critics would rather maintain a flexible constitutional rule, such as the totality-of-the-circumstances test, and rely on cross-examinations at trial to cast doubt on the reliability of confessions. We think that flexibility in this instance does not protect adequately a defendant’s right to remain silent and does not provide guidance to police officers on what is appropriate during an interrogation. Moreover, relying on cross-examinations as a solution to the false confession problem overlooks the undue weight that jurors place on confessions and ignores the fact that over 95 percent of felony convictions result from guilty pleas before trial.<sup>6</sup>

Another criticism is that a constitutional rule based on compulsion, such as Godsey’s objective penalties test, does not automatically ban all coercive tactics and does not consider psychological pressure an impermissible penalty.<sup>43</sup> We think, however, that coercive techniques that do not result in compulsion (i.e., penalizing the suspect’s right to remain silent) are best evaluated outside the confines of the Constitution and in a setting in which experts can provide valuable testimony before a judge or jury. In addition, the Due Process

Clause is available to proscribe egregious interrogation methods that “shock the conscience.”<sup>44</sup> Therefore, only those techniques that compel incriminating statements (i.e., self-incrimination clause) or shock the conscience by “employing extreme psychological pressure or outrageous tricks” (i.e., contrary to the Due Process Clause) should be prohibited as a matter of constitutional law (Ref. 43, p 539).

#### *Evidentiary Approach*

This approach requires judges to analyze the entire interrogation and weigh relevant factors to determine whether the confession is too unreliable to be admitted into evidence. Relevant factors include the length and place of interrogation, the interrogator’s conduct, the suspect’s state of mind and behavior, and whether the suspect is a member of an at-risk population. This analysis often requires forensic experts to testify at an evidentiary hearing to assist judges in their admissibility determination.

A criticism of this approach is that it may impinge on the jury’s fact-finding role. However, judges frequently evaluate the relevance and reliability of evidence. One example is the *Daubert* standard, codified in Federal Rule of Evidence 702, to determine the admissibility of expert testimony.<sup>45,46</sup> This type of reliability inquiry is part of the judge’s gatekeeping function of excluding prejudicial evidence.

One solution under this approach is to expand the use of Federal Rule of Evidence 403 and its equivalent state counterparts. Rule 403 provides: “The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”<sup>47</sup> Empirical evidence suggests that jurors often presume guilt when there is a confession, even in light of overwhelming exculpatory evidence. To avoid this prejudicial impact, judges can exclude unreliable confessions because their probative value is substantially outweighed by unfair prejudice. Rule 403 can be applied as well to unreliable confessions obtained in the absence of police misconduct, such as in *Colorado v. Connelly*, where a defendant with mental illness (later declared incompetent to stand trial) approached a police officer, waived his constitutional rights, and confessed to murder because God ordered him to.<sup>48</sup>

The exclusion of unreliable confessions will incentivize detectives to continue investigating other aspects of the case, such as witness testimony and physical evidence. The flexibility of Rule 403 could nonetheless be a double-edged sword. It allows judges to make an informed decision regarding the confession’s reliability based on the testimony of forensic experts, but too much flexibility allows judges to err on the side of admitting the confession to avoid a juryless minitrial at the pretrial stage. However, given the overwhelming number of guilty pleas and the dispositive effect of confessions, a judge’s failure to exclude unreliable statements can be overly prejudicial to the defendant.

We also propose a new rule of evidence (at the federal and state level) establishing a burden-shifting framework at the pretrial stage where courts may hold enhanced evidentiary hearings to rule on the exclusion of confessions. First, defendants must show by a preponderance of the evidence (i.e., more likely than not) that, at the time of the confession, they were members of a protected class: juveniles, individuals with cognitive and intellectual disabilities, or persons with psychiatric disorders. In the case of cognitive limitations and psychiatric disorders, defendants must proffer evidence, such as expert testimony, that their specific condition or illness is of the kind that makes them vulnerable to giving a false confession. This type of testimony resembles what Davis and Leo<sup>18</sup> call disposition-based testimony and what Watson *et al.*<sup>21</sup> call the medical model.

Second, defendants must establish that they were subject to coercive interrogation tactics (i.e., maximization and minimization). The drafters of this evidentiary rule can provide either an exhaustive list of tactics or leave it to the judge’s discretion. Forensic clinicians can testify about the defendant’s susceptibility to the interrogation techniques used. If the defendants prove they are members of a protected class subjected to coercive techniques likely to produce unreliable confessions, then a rebuttable presumption is established that the interrogation-induced confession is unreliable and inadmissible.

To rebut this presumption, the prosecution must put forth evidence that corroborates the confession’s reliability and trustworthiness. The government must show that there are circumstantial guarantees of trustworthiness supporting the confession, which is the evidentiary standard used for the residual exception to hearsay (Federal Rule of Evidence 807).<sup>49</sup>

The government may present, for example, extrinsic evidence (circumstantial or direct) linking the defendant to the alleged offense. Only after the trial court finds by a preponderance of the evidence that there are sufficient indicators of reliability corroborating the confession, should the statements be admitted into evidence. If the government is unable to overcome the rebuttable presumption, then the statements must be excluded.

The establishment of a rebuttable presumption under this approach should deter police officers from employing coercive techniques against at-risk populations and from relying exclusively on interrogation-induced confessions. The deterrent effect of this approach requires that officers be properly trained to identify members of a protected class and consider the reliability of statements made during an interrogation. This approach, which is based in part on Justice Brennan's powerful dissent in *Connelly*, is consistent with our system's distrust of inquisitorial practices and its preference for accusatorial practices.<sup>34</sup> This kind of rule would be more effective in preventing the conviction of a "mentally ill defendant based solely upon an inherently unreliable confession."<sup>34</sup> Finally, since evidentiary rules can vary across states, this approach would allow states to act as laboratories of democracy and devise creative solutions to reduce the number of both false and lost confessions.

### *Jury Instruction Approach*

Another solution is the development of a special set of jury instructions to educate jurors about confession evidence. This type of solution is not unprecedented. In August 2011, the Supreme Court of New Jersey issued a unanimous decision in *State v. Henderson*<sup>50</sup> that expanded the state's jury instructions concerning eyewitness identification evidence in criminal cases. The court provided an extensive review of current scientific evidence on the reliability of eyewitness testimony. The court concluded that the existing jury instructions on eyewitness identification evidence did not protect criminal defendants adequately, deter police misconduct, or educate jurors as to how to evaluate identification evidence. The court tasked different groups with drafting new model instructions explaining how different factors can affect human memory and lead to misidentifications.

We recommend the same be done with confession evidence. Jurors should understand how different factors and circumstances, such as the place, stress, and length of the interrogation; the use of coercive techniques; and the mental health/age/cognitive capacity of the defendant, can affect the confession's reliability. The jury instructions should be tailored to the facts of each criminal case and explain that false confessions are not unique to at-risk populations.

States can draft their own model instructions and modify them to reflect new research. These instructions should be developed with the collaboration of behavioral experts, psychiatrists, judges, prosecutors, defense attorneys, law school professors, and other legal practitioners. The federal courts of appeals may also include similar instructions as part of their model criminal jury instructions.

One criticism is that jurors may be less likely to convict because they can interpret these instructions to mean that confessions are unreliable, *per se*.<sup>51</sup> This unintended effect can be mitigated by carefully drafting neutral instructions. The instructions will provide incentive to investigators to build stronger cases by relying on different types of evidence, not just confessions.

## Conclusion

To overcome the mistaken belief that individuals do not falsely confess, we must understand the coercive nature of the interrogation process. We have identified three legal approaches that promote this understanding and that can be implemented either independently or together.

Justice Brennan once said:

If our free society is to endure, and I know it will, those who govern must recognize that the Framers of the Constitution limited their power to preserve human dignity and the air of freedom which is our proudest heritage. The task of protecting these principles does not rest solely with nine Supreme Court Justices, or even with the cadre of state and federal judges. We all share the burden [Ref. 52, p 20].

The forensic community should become more involved in highlighting the intrinsic flaws of the interrogation process and the circumstances giving rise to false confessions. The role of forensic experts should not be limited to testimony in individual cases. Whether it is by discussing the topic in academic settings, assisting policymakers to reform the interrogation process, participating in the development of evidentiary rules and jury instructions, or filing *amicus*

*curiae* briefs to influence important legal decisions, forensic psychiatrists can play a privileged role in transforming our criminal justice system.

If the Constitution is truly about protecting the innocent,<sup>53</sup> then the false confession problem is one that can no longer be neglected in a country committed to the rule of law.

### Acknowledgments

The authors are grateful to Philip Candilis, MD, and James Merikangas, MD, for guidance and contributions.

### References

- Making a Murderer. Written and directed by Ricciardi L., Demos M. A Netflix Documentary Series. Released on December 18, 2015
- Victor D: Conviction against Brendan Dassey of 'Making a Murderer' is overturned. The New York Times. August 12, 2016. Available at: <https://www.nytimes.com/2016/08/13/us/brendan-dassey-making-a-murderer.html>. Accessed January 17, 2018
- Dassey v. Dittmann, 877 F.3d 297 (7th Cir. 2017) (en banc)
- Leo RA: False confessions: causes, consequences, and implications. J Am Acad Psychiatry Law 37:332–43, 2009
- The National Registry, Exonerations, and False Convictions: Registry, Exonerations and False Convictions. A collaborative effort of Newkirk Center for Science & Society at University of California Irvine, the University of Michigan Law School and Michigan State University College of Law, undated home page. Available at: <http://www.law.umich.edu/special/exoneration/pages/learnmore.aspx/>. Accessed January 17, 2018
- Gross SR, Shaffer M: Exonerations in the United States, 1989–2012. Report by the National Registry of Exonerations, 2012. [https://www.law.umich.edu/special/exoneration/documents/exonerations\\_us\\_1989\\_2012\\_full\\_report.pdf](https://www.law.umich.edu/special/exoneration/documents/exonerations_us_1989_2012_full_report.pdf). Accessed January 17, 2018
- DNA Exonerations in the United States. Available at: <https://www.innocenceproject.org/dna-exonerations-in-the-united-states/>. Accessed January 17, 2018
- King v. Warickshall (1783) 168 Eng. Rep. 234 (K.B.)
- Cho K: Reconstruction of the English criminal justice system and its reinvigorated exclusionary rules. Loy LA Int'l & Comp L Rev 259–312, 1999
- Bram v. United States, 168 U.S. 532 (1897)
- Kassin SM, Drizin SA, Grisso T, et al: Police induced confessions: risk factors and recommendations. Law & Hum Behav 34:49–52, 2010
- Brown v. Mississippi, 297 U.S. 278 (1936)
- Marcus P: It's not just about Miranda: determining the voluntariness of confessions in criminal prosecutions. Val U L Rev 40:601–44, 2006
- Miranda v. Arizona, 384 U.S. 436 (1966)
- White WS: False confessions and the Constitution: safeguards against untrustworthy confessions. Harv CR-CL L Rev 32:105–57, 1997
- White WS: Police trickery in inducing confessions. U Pa L Rev 127:581–629, 1979
- Slobogin C: Deceit, pretext, and trickery: investigative lies by the police. Or L Rev 76:775–816, 1997
- Davis D, Leo RA: Commentary: overcoming judicial preferences for person- versus situation-based analyses of interrogation-induced confessions. J Am Acad Psychiatry Law 38:187–94, 2010
- Gudjonsson GH: The psychology of interrogations and confessions: a handbook. Chichester, UK: Wiley, 2003
- Weinstock R, Thompson C: Commentary: ethics-related implications and neurobiological correlates of false confessions in juveniles. J Am Acad Psychiatry Law 37:344–8, 2009
- Watson C, Weiss KJ, Pouncey C: False confessions, expert testimony, and admissibility. J Am Acad Psychiatry Law 38:174–86, 2010
- Redlich AD: The susceptibility of juveniles to false confessions and false guilty pleas. Rutgers L Rev 62:943–57, 2010
- False Confessions or Admissions. Available at: <https://www.innocenceproject.org/causes/false-confessions-admissions/>. Accessed January 17, 2018
- Redlich AD: Double jeopardy in the interrogation room for youths with mental illness. Am Psychol 62:609–11, 2007
- Interviewing and Interrogation. Chicago: John E. Reid and Associates, Inc. Available at: [http://www.reid.com/training\\_programs/interview\\_overview.html/](http://www.reid.com/training_programs/interview_overview.html/). Accessed January 17, 2018
- Starr D: Why are educators learning how to interrogate their students? The New Yorker. March 30, 2016
- Starr D: The interview: do police interrogation techniques produce false confessions? The New Yorker. December 9, 2013
- Hill C, Memon A, McGeorge P: The role of confirmation bias in suspect interviews: a systematic evaluation. Legal & Criminol Psych 13:357–71, 2008
- Perillo JT, Kassin SM: Inside interrogation: the lie, the bluff, and false confessions. Law & Hum Behav 35:327–37, 2011
- Kassin SM, Kiechel KL: The social psychology of false confessions: compliance, internalization, and confabulation. Psychol Sci 7:125–8, 1996
- Russano MB, Meissner CA, Narchet FM, et al: Investigating true and false confession within a novel experimental paradigm. Psychol Sci 16:481–6, 2005
- Narchet FM, Meissner CA, Russano MB: Modeling the influence of investigator bias on true and false confession. Law & Hum Behav 35:452–6, 2011
- Kassin SM, Meissner CA, Norwick RJ: "I'd know a false confession if I saw one": a comparative study of college students and police investigators. Law & Hum Behav 29:211–27, 2005
- Colorado v. Connelly, 479 U.S. 157, 174–188 (1986) (Brennan, J., dissenting)
- Escobedo v. Illinois, 378 U.S. 478, 488–489 (1964)
- Drizin SA, Leo RA: The problem of false confessions in the post-DNA world. NC L Rev 82:891–1004, 2004
- Cleary EW: McCormick on Evidence (ed 2). Eagan, MN: West Publishing Co., 1972
- The Central Park Five. Television Documentary. Written and directed by Burns K, McMahon D, Burns S. Produced by Florentine Films and WETA. Released on November 23, 2012
- Cassell PG: Protecting the innocent from false confessions and lost confessions: and from Miranda. J Crim L Criminol 88:497–556, 1998
- Seidman LM: Brown and Miranda. Calif L Rev 80:673–753, 1992
- The Chief Justice Earl Warren Institute on Law and Social Policy: Criminal (In)justice: A Cost Analysis of Wrongful Convictions, Errors, and Failed Prosecutions in California's Criminal Justice System. Berkeley, CA: Berkeley School of Law, 2015. Available at: [http://static1.squarespace.com/static/55f70367e4b0974cf2b82009/t/56a95c112399a3a5c87c1a7b/1453939730318/WI\\_Criminal\\_InJustice\\_booklet\\_final2.pdf](http://static1.squarespace.com/static/55f70367e4b0974cf2b82009/t/56a95c112399a3a5c87c1a7b/1453939730318/WI_Criminal_InJustice_booklet_final2.pdf). Accessed January 17, 2018
- Weiss KJ: Classics in psychiatry and the law: Francis Wharton on involuntary confessions. J Am Acad Psychiatry Law 40:67–80, 2012
- Godsey MA: Rethinking the involuntary confession rule: toward a workable test for identifying compelled self-incrimination. Calif L Rev 93:465–540, 2005
- Rochin v. California, 342 U.S. 165 (1952)

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45. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)
46. Fed. R. Evid. 702
47. Fed. R. Evid. 403
48. *Colorado v. Connelly*, 479 U.S. 157–171 (1986)
49. Fed. R. Evid. 807
50. *State v. Henderson* (N.J. 2011)
51. Greenfieldboyce N: A judge's guidance makes jurors suspicious of any eyewitness. NPR News. January 26, 2016. Available at: <http://www.npr.org/sections/health-shots/2016/01/26/464300484/a-judges-guidance-makes-jurors-suspicious-of-any-eyewitness>. Accessed January 17, 2018
52. Brennan WJ: My life on the court, in *Reason and Passion: Justice Brennan's Enduring Influence*. Edited by Rosenkranz EJ, Schwartz B. New York: W. W. Norton & Company, Inc., 1997, pp 17–21
53. Amar AR: *The Constitution and Criminal Procedure: First Principles*. New Haven, CT: Yale University Press, 1997