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THE DECISION TO CONFESS FALSELY: RATIONAL CHOICE AND IRRATIONAL ACTION

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I.	INTRODUCTION	981
II.	HOW POLICE ELICIT TRUE AND FALSE CONFESSIONS: AN OVERVIEW	985
	A. <i>Introduction</i>	985
	B. <i>Detective Work and Suspects</i>	986
	C. <i>Miranda</i>	988
	D. <i>Two Steps to Admission</i>	989
	E. <i>The Post-Admission Narrative</i>	990
	F. <i>Types of False Confessions</i>	997
	1. <i>Stress-Compliant False Confessions</i>	997
	2. <i>Coerced-Compliant False Confessions</i>	998
	3. <i>Persuaded False Confessions</i>	999
III.	ILLUSTRATING THE DECISION MODEL	1001
	A. <i>The Miranda Warning</i>	1001
	B. <i>The Two Parts of Interrogation: Pre-Admission Influence and Post-Admission Narrative</i>	1003
	1. <i>Pre-Admission Step One: Shifting The Suspect From Confident to Helpless</i>	1004
	a. <i>Accusation</i>	1004
	b. <i>Overcoming Objections</i>	1005
	c. <i>Evidence Ploys</i>	1008
	i. <i>General Claims of Strong Evidence</i>	1008
	ii. <i>Demeanor Evidence</i>	1014
	iii. <i>Eyewitness Evidence</i>	1015
	iv. <i>Co-Perpetrator Witness Evidence</i>	1018
	v. <i>Technical and Scientific Evidence</i>	1023
	(a) <i>Introduction</i>	1023
	(b) <i>Marks Made by Fingers, Mouths, and Shoes</i>	1025
	(c) <i>DNA Evidence</i>	1029

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(d) <i>Off-the-Shelf Technology</i>	1032
vi. Lie Detector Ploys	1036
d. <i>Shifting the Innocent from Confident to Hopeless</i> ...	1041
2. Step Two: Eliciting the Admission	1051
a. <i>Introduction</i>	1051
b. <i>Low End Incentives: Moral and Self-Image Benefits</i> .	1056
c. <i>Systemic Benefits: Indirect Threats and Promises</i> ...	1060
d. <i>More or Less Explicit Threats and Promises</i>	1072
e. <i>High End Threats and Promises</i>	1077
f. <i>The Accident Scenario Technique</i>	1088
i. <i>Introduction</i>	1088
ii. <i>The Unformatted Accident Scenario</i>	1089
iii. <i>The Formatted Accident Scenario</i>	1096
3. Persuaded False Confessions	1107
a. <i>Introduction</i>	1107
b. <i>Edgar Garrett's False Confession</i>	1110
IV. CONCLUSION	1114

I. INTRODUCTION¹

How do police elicit confessions from the innocent? Why do the innocent confess to crimes that carry lengthy prison sentences, life imprisonment or execution? Though researchers have studied psychological interrogation and false confession for more than eighty-five years,² these questions have not been adequately answered. This is largely because only recently has the process of interrogation been studied directly.³ Over the past thirty years researchers have undertaken many observational,⁴ retrospective⁵ and labora-

1. We thank Paul Cassell and Welsh White for helpful comments. This article extends and documents the model of interrogation influence that we first developed in RICHARD J. OFSHE & RICHARD A. LEO, *THE SOCIAL PSYCHOLOGY OF POLICE INTERROGATION: THE THEORY AND CLASSIFICATION OF TRUE AND FALSE CONFESSIONS* 189-251 (1997) [hereinafter OFSHE & LEO, *SOCIAL PSYCHOLOGY*].

The interrogation transcripts and interviews excerpted herein come from more than 125 cases of disputed interrogation that Richard J. Ofshe evaluated between 1987 and 1997 and from additional interrogation transcripts and case materials that Richard A. Leo collected during the same period. Although not all of the interrogations are mentioned in this article, the disputed interrogations that resulted in statements were classified as either voluntary true, coerced true, stress-compliant false, coerced-compliant false, persuaded or coerced-persuaded false confessions. Voluntary false confessions that were not elicited by police interrogation are also contained in the archive. The excerpts are unedited, with the exception of ellipses inserted by the author when deleting redundant statements.

All specific examples of interrogation tactics are taken from recordings of interrogations in major felony or murder cases. All of these interrogations resulted in confessions. The persons classified as guilty were convicted at their trials or entered guilty pleas. The persons classified as false confessors are almost all individuals who were either proven innocent by indisputable evidence before trial and therefore not tried, proven innocent and acquitted at trial, acquitted at trial or found guilty and subsequently proven innocent. In a few instances the persons identified as false confessors were convicted at trial or entered a guilty plea despite maintaining their innocence. An independent analysis of the case facts has led to their classification as false confessors for research purposes. For a discussion of case classification, see Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY (forthcoming 1997) [hereinafter Leo & Ofshe, *Consequences*].

2. See, e.g., EDWIN BORCHARD, *CONVICTING THE INNOCENT* (1932); JEROME FRANK & BARBARA FRANK, *NOT GUILTY* (1957); C. RONALD HUFF ET AL., *CONVICTED BUT INNOCENT: WRONGFUL CONVICTION AND PUBLIC POLICY* (1996); HUGO MUNSTERBERG, *ON THE WITNESS STAND: ESSAYS ON PSYCHOLOGY AND CRIME* (1908); EDWARD D. RADIN, *THE INNOCENTS* (1964); THEODORE REIK, *THE COMPULSION TO CONFESS: ON THE PSYCHOANALYSIS OF CRIME AND PUNISHMENT* (1945); O. JOHN ROGGE, *WHY MEN CONFESS* (1959); MARTIN YANT, *PRE-SUMED GUILTY: WHEN INNOCENT PEOPLE ARE WRONGLY CONVICTED* (1991); Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987).

3. For a review of this literature, see OFSHE & LEO, *SOCIAL PSYCHOLOGY*, *supra* note 1; Saul M. Kassir, *The Psychology of Confession Evidence*, 52 AM. PSYCHOL. 221-33 (1997).

4. See, e.g., John Baldwin, *Police Interview Techniques: Establishing Truth of Proof?*, 33 BRIT. J. OF CRIMINOLOGY 326 (1993); Barrie L. Irving, *Police Interrogation: A Case Study of Current Practice* (Royal Comm'n on Criminal Procedure, Research Study No. 2, 1980); Barrie L. Irving & Linden Hilgendorf, *Police Interrogation: The Psychological Approach* (Royal Comm'n on Criminal Procedure, Research Study No. 1, 1980); Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266 (1996) [hereinafter Leo, *Inside the Interrogation Room*]; Paul Softley, *Police Interrogation: An Observational Study in Four Police Stations* (Royal Commission on Criminal Procedure, Research Study No. 4, 1980); Michael L. Wald et al., *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L. J. 1519 (1967).

5. See, e.g., GISLI H. GUDJONSSON, *THE PSYCHOLOGY OF INTERROGATIONS, CONFESSIONS AND TESTIMONY* (1992) [hereinafter GUDJONSSON, *PSYCHOLOGY OF INTERROGATIONS*]; LAW-

tory⁶ studies that have allowed for the testing of hypotheses about how interrogation procedures influence suspects and lead to the decision to confess.⁷ Understanding the interrogation influence process has also been greatly aided by the mandatory recording of interrogation in Alaska (since 1985),⁸ Minnesota (since 1994),⁹ and England (since 1984),¹⁰ together with the spreading practice of recording by police agencies across the United States.¹¹ The studies and records of interrogation that have accumulated now make it possible to empirically describe and analyze the process of interrogation and the decision to confess.¹²

RENCE S. WRIGHTSMAN & SAUL M. KASSIN, *CONFESSIONS IN THE COURTROOM* (1993); Phillip M. Coons, *Misuse of Forensic Hypnosis: A Hypnotically Elicited False Confession with the Apparent Creation of a Multiple Personality*, 36 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 1 (1988); Gisli Gudjonsson & James MacKeith, *A Proven Case of False Confession: Psychological Aspects of the Coerced-Compliant Type*, 30 MED. SCI. & L. 329 (1990); Gisli H. Gudjonsson & James MacKeith, *False Confessions, Psychological Effects of Interrogation*, in RECONSTRUCTING THE PAST: THE ROLE OF PSYCHOLOGISTS IN CRIMINAL TRIALS 253-69 (A. Trankel ed., 1982); Leo & Ofshe, *Consequences*, *supra* note 1; Mickey McMahon, *False Confession and Police Deception: The Interrogation, Incarceration and Release of an Innocent Veteran*, 13 AM. J. FORENSIC PSYCHOL. 5 (1995); Stephen Moston et al., *The Effects of Case Characteristics on Suspect Behavior During Police Questioning*, 32 BRIT. J. CRIMINOLOGY 23 (1992); Richard J. Ofshe, *Coerced Confessions: The Logic of Seemingly Irrational Action*, 6 CULTIC STUD. J. 1 (1989) [hereinafter Ofshe, *Coerced Confessions*]; Richard J. Ofshe, *Inadvertent Hypnosis During Interrogation: False Confession Due to Dissociative State; Mis-Identified Multiple Personality and the Satanic Cult Hypothesis*, 40 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 125 (1992) [hereinafter Ofshe, *Inadvertent Hypnosis*]; T.N. Thomas, *Polygraphy and Coerced-Compliant False Confession: 'Serviceman E' Redevidus*, 35 SCI. & JUST. 133 (1995); Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105 (1997); Philip Zimbardo, *Coercion and Compliance: The Psychology of Police Confessions*, in THE TRIPLE REVOLUTION 492-508 (C. Perruci & M. Pilisuk eds., 1971); Richard A. Leo, *False Memory, False Confession: When Police Interrogations Go Wrong*, presented at the Annual Meetings of the Law & Society Association, Toronto, Can. (June 1995) (unpublished manuscript, on file with the *Denver University Law Review*) [hereinafter Leo, *False Memory*].

6. See, e.g., Darryl J. Bem, *Inducing Belief in False Confessions*, 3 J. PERSONALITY & SOC. PSYCHOL. 707 (1966); Saul M. Kassir & Lawrence Wrightsman, *Coerced Confessions, Judicial Instructions, and Mock Juror Verdicts*, 11 J. APPLIED SOC. PSYCHOL. 489 (1980); Saul M. Kassir and Karlyn McNall, *Police Interrogations and Confessions: Communicating Promises and Threats by Pragmatic Implication*, 15 LAW & HUM. BEHAV. 233 (1991) [hereinafter Kassir & McNall, *Police Interrogations*]; Saul M. Kassir & Lawrence M. Wrightsman, *Prior Confessions and Mock Juror Verdicts*, 10 J. APPLIED SOC. PSYCHOL. 133 (1980); Saul M. Kassir & Katherine Keichel, *The Social Psychology of False Confessions: Compliance, Internalization and Confabulation*, 7 PSYCHOL. SCI. 125 (1996); Christina Maslach, *The 'Truth' About False Confessions*, 20 J. PERSONALITY & SOC. PSYCHOLOGY 141 (1971).

7. The most recent observational study of interrogation in America found that suspects gave partial or full confessions 42% of the time. Leo, *Inside the Interrogation Room*, *supra* note 4, at 270.

8. *Stephan v. State*, 711 P.2d 1156, 1157-58 (Alaska 1985) (stating that "an unexcused failure to electronically record a custodial interrogation conducted in a place of detention violates a suspect's right to due process"); *Mallott v. State*, 608 P.2d 737, 743 n.5 (Alaska 1980) (establishing the recording requirement).

9. *State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994).

10. Police and Criminal Evidence Act, 1984, ch. 60 (Eng.).

11. See William A. Geller, *Videotaping Interrogations and Confessions*, NAT'L INST. OF JUST.: RESEARCH IN BRIEF, Mar. 1993, at 1; William A. Geller, *Police Videotaping of Suspect Interrogations and Confessions* (1992) (report to the National Institute of Justice).

12. Unlike the Supreme Court's analysis in *Miranda v. Arizona*, 384 U.S. 436, 445-55 (1966), it is no longer necessary to rely on interrogation industry accounts to learn what happens in the confines of those base, little rooms in the bowels of police stations across America.

Police-induced false confessions are a serious problem for the American criminal justice system.¹³ Because the "third degree" has virtually disappeared,¹⁴ false confessions might seem unlikely, irrational, and perhaps so rare as to be exotic for those unfamiliar with modern psychological interrogation techniques.¹⁵ However, confessions by the innocent still occur regularly,¹⁶ and will likely continue until police and other criminal justice officials develop a better understanding of the dangers of contemporary interrogation practices and establish safeguards to prevent their misuse. This article documents the process of interrogation and explains why police-induced false confessions, like truthful ones, are rational responses to the influence tactics and manipulation strategies that American police use during interrogation.¹⁷ False confessions occur when interrogation tactics are not understood and are misused by those who implement them, most often when the misuse violates legal rules that are in place for well-settled reasons.¹⁸

No one suggests police set out to extract false confessions or prosecutors intentionally seek to convict the innocent. There is little evidence that such intentional abuses of power happen with significant frequency. While some miscarriages of justice are caused by malicious intent, it appears that poor training and negligence are the principal reasons that false confessions occur. Police are not trained to avoid eliciting them, to recognize their variety and distinguishing characteristics,¹⁹ or to understand how interrogation tactics can cause the innocent to falsely confess. Instead, interrogation 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 confess²⁰—a fiction that is flatly contradicted by all of the scientific research on interrogation and confession.

A confession—whether true or false—is arguably the most damaging

13. See Leo & Ofshe, *Consequences*, *supra* note 1.

14. See Richard A. Leo, *From Coercion to Deception: The Changing Nature of Police Interrogation in America*, 18 CRIME, L. & SOC. CHANGE 35 (1992) [hereinafter Leo, *From Coercion to Deception*].

15. See Paul G. Cassell, *The Exotic and the Routine: An Empirical Essay on the Tradeoffs Between False Confessions and Lost Confessions*, 88 J. CRIM. L. & CRIMINOLOGY (forthcoming 1998).

16. See Leo & Ofshe, *Consequences*, *supra* note 1.

17. See OFSHE & LEO, SOCIAL PSYCHOLOGY, *supra* note 1; E.L. Hilgendorf & Barrie Irving, *A Decision Model of Confessions*, in PSYCHOLOGY IN LEGAL CONTEXTS 67 (S.M. Lloyd-Bostock ed., 1981); Irving & Hilgendorf, *supra* note 4.

18. See discussion *infra* Parts III.B.2.c.-III.B.2.f.

19. See discussion *infra* Part II.F.

20. See, e.g., FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 147 (3d ed. 1986) ("None of what is recommended will induce an innocent person to confess."). The only advice this manual gives interrogators with respect to avoiding taking a false confession is that before doing something about which there might be a concern, the investigator should ask himself, "[i]s what I am about to do, or say, apt to make an innocent person confess? If the answer is no the interrogator should go ahead and do or say what is contemplated." *Id.* at 217. The authors of this well-known, widely read, and highly influential interrogation training manual do not even have an index reference for "false confessions." See also Brian C. Jayne & Joseph P. Buckley, *Criminal Interrogation Techniques on Trial*, SEC. MGMT., Oct. 1992, at 69 (stating that "none of these techniques, in and of themselves, is unique to interrogation, and none of them would cause an innocent suspect to confess to a crime").

evidence the government can present in a trial.²¹ As a result, when police elicit a false confession, they are likely to cause the wrongful conviction and imprisonment of an innocent person. Someone who confesses is presumed guilty and treated more harshly by every criminal justice official and at every stage of the trial process.²² Once police elicit a confession—even if it is obtained by questionable or prohibited means, is internally inconsistent, is contradicted by the case facts, and does not lead to corroboration—they will almost always arrest the confessor and consider the case solved.²³ Criminal justice officials typically will not believe a defendant's retraction²⁴ and may see it as further evidence of deceitfulness. Defendants who have confessed are likely to experience greater difficulty making bail, a disadvantage that significantly reduces their likelihood of acquittal.²⁵ If a person has confessed, prosecutors are likely to file charges, "charge high," and make the confession the centerpiece of their case.²⁶ Prosecutors are less likely to initiate or accept a plea bargain, and defense attorneys are more likely to pressure their clients to plead guilty because of the high risk of conviction.²⁷ At trial, the jury is likely to treat the confession as more probative of the defendant's guilt than any other evidence²⁸ and, if convicted, the defendant is likely to be sentenced more harshly because he²⁹ failed to show remorse.³⁰

This article first sets forth and illustrates a decision-making analysis that explains why contemporary interrogation methods, if misdirected, used ineptly, or utilized improperly, sometimes convince ordinary, psychologically and intellectually normal individuals to falsely confess. The illustrations of police tactics come from recordings of interrogations conducted throughout the United States.³¹ Part II of this article briefly presents the decision model in the context of an abstract interrogation and explains the influence process that underlies interrogation. Part III explicates the decision model using field data to illustrate the steps through which psychological interrogation proceeds.³²

21. JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 820b, at 303 (James H. Chadbourne ed., 1970).

22. See OFSHE & LEO, SOCIAL PSYCHOLOGY, *supra* note 1; DAVID SIMON, HOMICIDE: A YEAR ON THE KILLING STREETS (1991); Kassin, *supra* note 3; Leo, *Inside the Interrogation Room*, *supra* note 4, at 298.

23. See Leo, *Inside the Interrogation Room*, *supra* note 4.

24. *Id.*

25. See SAMUEL WALKER, SENSE AND NONSENSE ABOUT CRIME AND DRUGS: A POLICY GUIDE (3d ed. 1994).

26. Paul G. Cassell & Bret J. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839, 905-12 (1996).

27. See PETER F. NARDULLI ET AL., THE TENOR OF JUSTICE: CRIMINAL COURTS AND THE GUILTY PLEA PROCESS (1988).

28. Gerard R. Miller & F. Joseph Boster, *Three Images of the Trial: Their Implications for Psychological Research*, in PSYCHOLOGY AND THE LEGAL PROCESS (Bruce Dennis Sales ed., 1977).

29. Because the majority of interrogators and criminal suspects are men, we use male pronouns throughout this paper.

30. See Leo & Ofshe, *Consequences*, *supra* note 1.

31. See *supra* note 1 and accompanying text.

32. We often choose not to indicate whether quoted material was taken from the interrogation of an innocent or a guilty party. The confessor's guilt or innocence makes little or no difference in how the tactics of contemporary American interrogation are implemented. Often, inter-

Finally, Part IV discusses how to better identify false confessions, reduce their frequency and thereby reduce the miscarriages of justice they needlessly cause.

II. HOW POLICE ELICIT TRUE AND FALSE CONFESSIONS: AN OVERVIEW³³

A. Introduction

Contemporary American methods of interrogation have been developed for the purpose of influencing a rational person who knows he is guilty to rethink his initial decision to deny culpability and choose instead to confess. An interrogator strives to neutralize the person's resistance by convincing him that he is caught and that the marginal benefits of confessing outweigh the marginal costs. To accomplish this, interrogators manipulate the individual's analysis of his immediate situation and his perceptions of both the choices available to him, and of the consequences of each possible course of action. An interrogator's goal is to lead the suspect to conclude that confessing is rational and appropriate.

Psychological interrogation is effective at eliciting confessions because of a fundamental fact of human decision-making—people make optimizing choices given the alternatives they consider.³⁴ Psychologically-based interrogation works effectively by controlling the alternatives a person considers and by influencing how these alternatives are understood. The techniques interrogators use have been selected to limit a person's attention to certain issues, to manipulate his perceptions of his present situation, and to bias his evaluation of the choices before him. The techniques used to accomplish these manipulations are so effective that if misused they can result in decisions to confess from the guilty and innocent alike.³⁵ Police elicit the decision to confess from the guilty by leading them to believe that the evidence against them is overwhelm-

rogators have considerable evidence indicating the guilt of someone they decide to interrogate, but in investigations that culminate in a confession from an innocent, this is never true. When an innocent is interrogated, all of the evidence an interrogator claims to possess is invented or erroneous. Even when the suspect is guilty and an interrogator has some evidence against him, much of what is claimed may be invented.

Although the truth of an interrogator's claim to any piece of evidence is questionable, and his picture of what the future holds for the suspect is deliberately distorted, these truths cannot be guessed based either on his statements or his conduct. For an innocent to decide to confess, he must believe that the evidence the interrogator claims to have actually exists, even if he believes it is entirely mistaken or has been fabricated. He must also believe that his future is as certain as the interrogator paints it, even though it is unjust.

The reader is invited to sometimes pause after reading an interrogation excerpt, suspend disbelief, imagine being confronted with whatever the interrogator has just said and, presuming that the suspect believes it, ponder this question: Might a reasonable, innocent person fully enmeshed in the sort of interrogation described by the quoted materials become demoralized, fearful, hopeless and so panicked that he might comply and make the choice to falsely confess?

33. This analysis presumes that the crime under investigation is homicide.

34. See DECISION MAKING (W. Edwards & A. Tversky eds. 1967); ANATOL M. RAPOPORT & A. CHAMMAH, PRISONER'S DILEMMA (1965); JOHN VON NEUMANN & OSKAR MORGENSTERN, THEORY OF GAMES AND ECONOMIC BEHAVIOR (1944).

35. The decision-making model presented in this paper applies both to interrogations that produce true confessions as well as interrogations that produce false confessions. For purposes of this paper, however, we focus almost exclusively on false confessions. For an analysis that focuses both on true and false confessions, see OFSHE & LEO, SOCIAL PSYCHOLOGY, *supra* note 1.

ing, that their fate is certain (whether or not they confess), and that there are advantages that follow if they confess. Investigators elicit the decision to confess from the innocent in one of two ways: either by leading them to believe that their situation, though unjust, is hopeless and will only be improved by confessing; or by persuading them that they probably committed a crime about which they have no memory and that confessing is the proper and optimal course of action.

B. *Detective Work and Suspects*

Suspects fall in two categories: likely suspects, for whom there exists solid evidence suggesting their guilt; and possible suspects, which includes everyone whose name comes up during an investigation. When police interrogate suspects whose guilt is a mere possibility rather than a reasonable likelihood, they run a significant risk of eliciting a false confession.³⁶ Not surprisingly the chain of events that leads to a false confession starts with the error of choosing to use methods of psychological interrogation against the wrong target.³⁷

No matter why a suspect is selected, the interrogation process that follows will, at least superficially, be the same. However, at every step of the process, the commonly used tactics of interrogation will not produce their intended and normal influence effects when directed at an innocent suspect. A suspect's knowledge that he is innocent necessarily interacts with each tactic and will produce a different understanding of what is happening than will the cognitions that result from the interaction of an interrogation tactic with a person's knowledge that he committed the crime. While the major effects of these different interactions are not necessarily observable in the behavior of the person under interrogation, their impact on the sequential decision making of guilty and innocent suspects will eventually lead to conduct that distinguishes them.

If an interrogation is poorly founded—based on guesses, hunches, or pseudoscientific behavioral cues³⁸—a detective necessarily lacks a valid founda-

36. In the Phoenix Temple murder case, Maricopa County Sheriff's detectives subjected five mistakenly chosen individuals to psychological interrogation and succeeded in eliciting three false confessions to mass murder, a batting average of .600. Richard Ofshe, *I'm Guilty If You Say So, in CONVICTING THE INNOCENT: THE STORY OF A MURDER, A FALSE CONFESSION, AND THE STRUGGLE TO FREE A "WRONG" MAN* (Donald S. Connery ed., 1996); see also Roger Parloff, *False Confessions*, AM. LAW., May 1993, at 58-62; Russell Kimball & Linda Greenberg, *False Confessions*, PHOENIX MAG., Nov. 1993, at 85-95.

37. See GUDJONSSON, *PSYCHOLOGY OF INTERROGATIONS*, *supra* note 5; OFSHE & LEO, *SOCIAL PSYCHOLOGY*, *supra* note 1; WRIGHTSMAN & KASSIN, *supra* note 5; Coons, *supra* note 5; Leo & Ofshe, *Consequences*, *supra* note 1; Ofshe, *Coerced Confessions*, *supra* note 5; Ofshe, *Inadvertent Hypnosis*, *supra* note 5; McMahon, *supra* note 5; Thomas, *supra* note 5; White, *supra* note 5; Zimbardo, *supra* note 5; Leo, *False Memory*, *supra* note 5.

38. Police trainers and interrogation manuals mislead detectives into believing that they can divine whether a suspect is innocent or guilty from simple non-verbal and behavioral responses to their questions. See INBAU ET AL., *supra* note 20; see also DAVID ZULAWSKI & DOUGLAS WICKLANDER, *PRACTICAL ASPECTS OF INTERVIEW AND INTERROGATION* (1993). There are no non-verbal or behavioral signs that somehow distinguish truth-tellers from liars. See Paul Ekman & Maureen O'Sullivan, *Who Can Catch a Liar?*, 46 AM. PSYCHOL. 913 (1991).

tion from which to accuse and confront the suspect. The weakness of the interrogator's position and the suspect's knowledge of his innocence will likely affect the style of the suspect's resistance and the strength with which he resists. Dealing with a strongly resistant suspect will tend to frustrate the investigator because it makes his task more difficult. The difficulty of the interrogation may lead him to use a very aggressive or a hostile questioning style that emphasizes the power and authority of his role, and eventually to use coercive tactics. An investigator may employ tactics that coerce confessions by blatantly threatening the suspect, or he may use an indirect approach by leading a suspect to reason by pragmatic implication³⁹ that he will receive an extreme punishment if he continues to deny guilt, but lenient treatment if he confesses.

If a detective is inadequately trained, interrogates a poorly selected suspect, is inept, and/or uses certain techniques improperly, he runs a risk of obtaining a false confession. For example, too often the pressure of high-profile cases causes investigators to make the mistake of interrogating a suspect who is, at best, only a possible perpetrator and under normal circumstances would not be considered a sufficiently strong suspect to warrant interrogation. Circumstances may, however, force a detective to try to obtain a confession from his best suspect no matter how weak the evidence suggesting guilt may be. With no evidence pointing to anyone, the investigator will know that he has to rely only on his intuition and interrogation to close the case. When this happens, interrogations may be conducted unwisely and in their most extreme, stressful, and error-producing forms.

Once investigators identify a likely or a possible suspect, they often conduct what appears to be an interview. This session may truly be an investigative interview or it may be an opening move in what the investigator intends to develop into an interrogation. At this point investigators neither take a hostile tone nor tell the individual that he is a suspect. Instead, they treat him respectfully and are likely to say they need his help in solving the crime. Under the non-threatening guise of information-gathering, the interrogator typically begins by obtaining an account of the suspect's relations with the victim, his knowledge of the offense, and his whereabouts at the time of the crime. The goal is to obtain information that elevates the person into a likely or principal suspect and ties him to a baseline account that establishes his knowledge of, and alibi for, the crime.

By using an interview format, the investigator is better able to develop a rapport with the suspect and to initially define their interaction as an exchange between persons involved in a cooperative effort to solve the crime. Even after the interrogation has turned openly accusatorial, the investigator is advantaged if he continues to personalize the interaction by finding common ground with

39. "Pragmatic implication" refers to information processing that occurs "between the lines," or is inferred from what the speaker is saying or suggesting. See Kassir & McNall, *Police Interrogations*, *supra* note 6; see also Richard E. Nisbett & Timothy DeCamp Wilson, *Telling More Than We Can Know: Verbal Reports on Mental Processes*, 84 *PSYCHOL. REV.* 231 (1977); Richard J. Harris & Gregory E. Monaco, *Psychology of Pragmatic Implication: Information Processing Between the Lines*, 107 *J. EXPERIMENTAL PSYCHOLOGY* 1 (1978).

the suspect; by claiming to understand what led him to commit the crime; by telling the suspect that he does not think badly of him despite his certain belief in the suspect's guilt; and by telling him that it is others in the criminal justice system, who do not understand or empathize with him, who will make the important decisions in his case and apply the law without mercy.

By personalizing the interaction, the interrogator avoids reminding the suspect of the irrevocably adversarial nature of their roles and the power differences between them. To the extent that the investigator is able to conduct the interrogation in an interaction style appropriate for two people working on a problem-solving task, he facilitates the suspect's decision to say "I did it" and his subsequent confession. It is far easier to admit wrongdoing to someone who appears to be a sympathetic acquaintance, if not a friend, than to someone whose role is simply to build the most damning case possible and to help send one to prison.

An investigator who acts like a zealous agent of the state is not as believable as someone who sympathizes with the suspect's plight, understands his transgression, and might be willing to bend the rules to help him. An investigator who casts himself in the role of an understanding person obliged to gather evidence and solve the crime is more likely to be believed when he offers advice about the suspect's best course of action and indicates how he can help once the suspect admits his guilt and confesses.

Although during the interview investigators often learn information that causes them to exclude an individual from suspicion, their goal is to discover information that is incriminating. It doesn't matter whether a detective had always planned to abandon the interview format and shift into an accusatory interrogation style or whether he decides to do so during the interview. The quality of the evidence underlying his decision, however, has consequences for what tactics will be effective during questioning. If the investigator's decision is well founded he will have evidence such as witnesses' statements, co-perpetrators' confessions, or laboratory reports with which to confront the suspect, and he will be able to prove he has the evidence when and if it is necessary. Moreover, if the guilty party has been selected, he will be genuinely vulnerable to the interrogator's tactics, and is likely to be more easily convinced he is caught and led to make an admission.

C. Miranda

An interrogator who presses forward will eventually abandon the interview style and turn the interaction into a full-blown interrogation. The reading and waiver of *Miranda* rights typically signal the transition. The optimal point at which to advise a suspect of his constitutional rights and obtain a waiver is prior to the start of the accusatory part of the interrogation. The non-threatening interview format contributes to a suspect's decision to allow questioning to proceed.⁴⁰ Up to this point police have portrayed questioning as

40. Empirical studies have found that the vast majority of suspects—ranging from approximately 78% to 96%—waive their *Miranda* rights. See Leo, *Inside the Interrogation Room*, *supra*

relatively risk free; they have treated the suspect solicitously or in a business-like manner; and they have not informed him that he is their prime suspect—all of which makes it easier for him to waive his rights to silence and counsel.

Neither an innocent nor a guilty party is likely to appreciate the full significance of the *Miranda* warnings. An innocent person will likely believe that he is not in any jeopardy by waiving his rights and answering questions because police have sought out his help in solving the crime and, after all, he is innocent. He may also believe that the *Miranda* warnings are merely a bureaucratic formality that are significant only for the guilty. The guilty person will likely risk waiving his rights because he doesn't believe the police have decided to arrest him, wants to find out what evidence they have, and hopes to direct their attention elsewhere.

D. *Two Steps to Admission*

Interrogation begins in earnest after the *Miranda* advisement. Both the tone and the content of the interaction change dramatically. No longer friendly or solicitous, an investigator may become confrontational and demanding. He no longer asks the suspect for information, but instead accuses him of committing the crime. Interrogation is not simply insensitive to a suspect's denials and protestations of innocence; it requires that both be strongly rejected. Presuming the suspect's guilt, an investigator's objectives are to overcome the suspect's denials, neutralize his resistance to making an admission, obtain the admission, and, finally, elicit a confession that describes why and how the crime was committed.

Because a guilty party who lies when denying responsibility and an innocent person who truthfully denies it are often indistinguishable to an investigator, they are in exactly the same functional position throughout the interrogation and will be treated in ways that are more similar than they are different. While a guilty party will likely be very unhappy that he is being accused and confronted with evidence that supports the accusation, he is somewhat insulated from shock because he has always been aware of possible detection and can understand that he has been caught.

An innocent suspect is likely to experience considerable shock and disorientation during the interrogation because he is wholly unprepared for the confrontation and accusations that are the core of the process, and will not understand how an investigator could possibly suspect him. An innocent individual may become progressively more distressed, confused, and desperate as he is told of evidence that incriminates him. He will express doubt and dismay when the investigator claims to possess a lengthening list of damning evidence. When an investigator assures an innocent that the evidence does in fact exist, the suspect will likely insist that someone has made an error or is trying to frame him.

note 4; George C. Thomas III, *Plain Talk About the Miranda Empirical Debate: A 'Steady State' Theory of Confessions*, 43 UCLA L. REV. 933 (1996).

Two sub-goals must be accomplished before a suspect can be expected to make an admission of guilt. The first is convincing him that he will soon be arrested. The second is motivating him to say "I did it" rather than continue to deny guilt or to remain silent. The first goal is achieved by shifting the suspect's perception of his situation from confident that his denials of guilt will be adequate to protect him from arrest, to recognizing that all his future holds is certain arrest, certain prosecution, and certain conviction. The second task can only be worked on effectively after the first goal has been achieved. Once a suspect fully appreciates his dismal situation, the investigator can influence him to admit guilt if he is led to believe that making an admission will improve his position.

As the influence process moves forward, an investigator cannot stop to ponder whether a suspect is guilty or innocent. He focuses his attention and efforts on convincing his target that the case against him is airtight. The investigator accomplishes this by repeatedly accusing the suspect of committing the crime; by exuding unwavering confidence in his guilt; by pointing out or inventing logical and/or factual inconsistencies, omissions, contradictions, and the implausibility in his account; and, most importantly, by repeatedly confronting him with supposedly *incontrovertible* evidence of his guilt. The investigator impresses upon the suspect that his best arguments are unconvincing, that there is no way out, and that his immediate future inevitably involves arrest, prosecution, and imprisonment or execution.

The next step in interrogation is to motivate a now resigned and despairing suspect to admit guilt. When an investigator judges the suspect to be at a low point, he offers the suspect incentives to motivate him to re-evaluate his decision to deny responsibility for the crime. The strategy presumes that a suspect who realizes that his arrest and incarceration are certain will find that the incentives associated with admitting guilt make doing so appear to be the alternative that leaves him best off. The range of incentives that investigators use to tip the scale can be arrayed along a continuum ranging from weak to strong. At one end are intangible and nonmaterial psychological and interpersonal benefits such as an assuaged conscience, an improved self-image, the investigator's respect, the community's respect, or the liberation that comes with telling the truth. At the other end are outright threats of harm and promises of leniency. Investigators sometimes suggest that a suspect's failure to confess will lead to a death sentence, while confessing will lead to a lesser charge or even avoidance of any prosecution. Whether the investigator offers incentives at the low or high end of the continuum and whether he communicates them through pragmatic implication or direct statement, he seeks to convince the suspect that his new situation will only be improved if he admits guilt, but that it will continue to worsen if he denies guilt or remains silent.

E. *The Post-Admission Narrative*

Once a detective elicits an admission, the most important task of interrogation commences. While the dramatic high point of interrogation scenes in film occurs when the suspect says, "I did it," in real life this moment signals

that a suspect is ready to make a confession and to provide the investigator with the internal indicia of reliability and independent evidence he needs to obtain a conviction. Any investigator who is not fully aware of the limited psychological and legal significance of the words "I did it" is always in danger of arresting an innocent who has been overwhelmed by the interrogation process.

While a suspect who says "I did it" is far more likely to be guilty than innocent, this may not be true in any particular interrogation. Because both guilty and innocent suspects can be made to say "I did it," a mere general admission, absent additional indicia of reliability provided by the *fit* between the confessor's description of the crime and the crime facts and/or corroborating evidence derived from the confession (e.g., location of the missing murder weapon, loot from a robbery, the victim's missing clothing, etc.), is not a sufficiently strong indicator of guilt on which to base an arrest. Investigators are not trained to realize that the words "I did it" are not a certain admission of true guilt when uttered after hours of confrontational and manipulative interrogation that is possibly, in a legal and psychological sense, coercive. These words establish merely that the investigator has succeeded in overcoming the suspect's resistance, reversing his denials and eliciting an admission. This is equally true whether the "I did it" statement is, in fact, a voluntary or an involuntary admission from a guilty party, or a compliant or persuaded admission from an innocent.⁴¹

Admissions and confessions are different in the law.⁴² An admission does not itself prove guilt and is far less significant than a confession, which requires a description of the circumstances of the crime. Such descriptions are usually obtained as part of a suspect's post-admission narrative. While the legal definitions of "admission" and "confession" probably contribute to why interrogators are trained to take post-admission narratives, their conscious goals are more simple. The investigator seeks to obtain evidence that will prove the suspect's guilt and produce a conviction. A guilty party's post-admission narrative will likely demonstrate his personal knowledge of the crime, often leads to new evidence, and can explain anomalous crime facts.

The likely truth of a suspect's admission can be evaluated by analyzing the fit of his post-admission narrative with the crime facts, and/or establishing that the confession statement leads to new physical evidence. While it is not possible to verify every post-admission statement, a skillful interrogator will seek as much verifiable information about the crime as he can elicit.⁴³ If the

41. See *infra* Part II.F.

42. A criminal admission is "[t]he avowal of a fact or of circumstances from which guilt may be inferred, but only tending to prove the offense charged, and not amounting to a confession of guilt." BLACK'S LAW DICTIONARY 48 (6th ed. 1990). A confession is a "voluntary statement made by a person . . . wherein he acknowledges himself to be guilty of the offense charged, and discloses the circumstances of the act or the share and participation which he had in it." *Id.* at 296.

43. As interrogators are presently trained, they fail to obtain corroboration of a confessor's statement in many of the ways that are possible. Typically, an interrogator will seek to demonstrate the validity of one or more points that are dramatic (i.e., method of killing, unusual method of binding or silencing the victim, etc.). There are a host of far less dramatic pieces of information

confessor's description of the crime fits the verifiable facts and is not inconsistent with the physical evidence, it is likely that the confessor possesses the personal knowledge that would be known only to the perpetrator. The more verifiable information elicited from a suspect during the post-admission period and the better it fits with the crime facts, the more clearly the suspect demonstrates his responsibility for the crime.

Using this fit standard to evaluate the validity of an admission is well understood by law enforcement. For example, police are trained to use the post-admission portion of the interrogation to develop actual evidence of the suspect's guilt through both fit and derived evidence. They also regularly rely upon this standard to identify a true admission that might be mixed in with a collection of volunteered false statements.

If an element of a crime is particularly heinous or novel, police often keep this fact from the press so that it can be used to demonstrate a confessor's guilty knowledge. Police sometimes deliberately include an error in media releases or allow incorrect statements to go uncorrected so that a true perpetrator will be able to demonstrate his personal knowledge of the crime.

The problem of finding the true confession in a pile of false statements occurs regularly in high profile cases. Such cases often provoke voluntary false confessions from the mentally troubled.⁴⁴ Police routinely evaluate the validity of these statements by testing the fit of the confessor's description of the offense against crime facts that have not been made public but that the perpetrator would surely know.⁴⁵

Seeking corroboration during the post-admission phase of interrogation is fundamental to investigating a crime.⁴⁶ Police routinely demonstrate the value of obtaining a complete narrative following an admission. They recognize that the strongest form of corroboration comes through the development of new evidence using a suspect's statement.⁴⁷ Police also seek proof that the suspect knows at least one piece of information that is particular to the crime and so unusual that it is highly improbable that anyone would guess it. If information—such as the fact of a certain sort of mutilation of the victim—has been kept from the public and if the interrogator has not deliberately or inadvertently suggested it, then a person who reveals it corroborates his confession.

A guilty suspect who voluntarily makes an admission is thereby demonstrating a willingness to cooperate with the interrogator to some extent.⁴⁸ Since a suspect is unlikely to realize the distinction between an admission and

that a true perpetrator would be likely to know and would be at least, or perhaps more, likely to surrender. While these sorts of facts are not dramatic, they are just as valuable for establishing that the suspect has personal knowledge of the crime. Such things might include a description of the room in which the crime happened, especially if it has distinctive furnishings (assuming that the suspect has never before been there), the type of clothing the victim was wearing, the method of entry into the residence, etc.

44. See, e.g., Miles Corwin, *False Confessions and Tips Still Flow in Simpson Case*, L.A. TIMES, Mar. 25, 1996, at A1.

45. See INBAU ET AL., *supra* note 20, at 198.

46. See *id.* at 172.

47. *Id.* at 173.

48. *Id.* at 73, 192-93.

a confession, he is likely to think that he has already confessed when he utters the words "I did it," and is likely to view his post-admission narrative as nothing more than an elaborated "I did it" statement. A suspect who says "I did it" should also be willing to tell some, if not all, of the story of the crime.

This logic applies equally to involuntary admissions made by both guilty and innocent suspects who have been coerced. Because the interrogator has promised each suspect that he will receive a benefit and avoid a harm by making an admission, coerced suspects should also be willing to contribute the story of the crime if asked for it. Both guilty and innocent suspects are likely to view their admission as functionally equivalent to a confession, and both are likely to think of the post-admission narrative process as part of the deal that led them to make the admission. The innocent who has been persuaded of his guilt is also likely to be motivated to answer the interrogator's questions because he feels both shock and genuine remorse about what he has concluded he has done.

The post-admission narrative can in many instances be used to distinguish the innocent from the guilty.⁴⁹ Because the person's post-admission narrative is a statement about the crime, it is evidence of something—the question is whether it is evidence of guilt or innocence. Whereas a guilty suspect can corroborate his admission because of his actual knowledge of the crime, the innocent cannot. The more information the interrogator seeks, the more frequently and clearly an innocent will demonstrate his ignorance of the crime. His answers will turn out either to be wrong, to defy evaluation, or to be of no value for discriminating between guilt and innocence. Assuming that neither the investigator nor the media have contaminated the suspect by transferring information about the crime facts, or that the extent of contamination is known, the likelihood that his answers will be correct should be no better than chance.⁵⁰ The only time an innocent person will contribute correct information is when he makes an unlucky guess. The likelihood of an unlucky guess diminishes as the number of possible answers to an investigator's questions grows large.⁵¹

Although an investigator's purpose in taking a post-admission narrative is to develop evidence of the suspect's guilt, he may develop evidence of the suspect's innocence. If a suspect's post-admission narrative accurately describes the crime and leads to missing evidence, the narrative is strong evidence of guilt. If, however, his answers about missing evidence are proven wrong, he cannot supply verifiable information that should be known to the perpetrator, and he inaccurately describes verifiable crime facts, then the post-admission narrative provides evidence of innocence.

49. *Id.* at 105, 180-81.

50. Techniques currently taught to investigators tend to contaminate the suspect. *Id.* at 189.

51. When the alternative answers are small in number ("Was the body face up or face down?"), a correct answer does not necessarily reveal anything about whether the person knew the answer or made an accurate guess—someone who is ignorant will be right 50% of the time. When the number of possible answers are enormous ("Exactly where did you hide the murder weapon in the 72 hours since the crime?") and the suspect's answer leads the investigator to the evidence, the significance of a hit can be as great as a DNA match with a probability of error in the tens of millions.

While a guilty suspect can prove his accurate knowledge of the crime, an innocent person cannot prove his ignorance. Because a suspect's post-admission narrative can never prove that he does not possess certain information, his incorrect answers can only be taken as evidence consistent with a lack of actual knowledge of the crime. Therefore, while a good fit between a suspect's confession narrative and the crime facts is strong evidence of his guilt, a poor fit is, at best, consistent with innocence.

The relationship between the fit of a suspect's post-admission narrative and his guilt or innocence is illustrated by the interrogations and prosecutions of Johnny Lee Wilson,⁵² Edgar Garrett,⁵³ the Phoenix Temple murder suspects,⁵⁴ George Abney,⁵⁵ and Richard Bingham.⁵⁶ Johnny Lee Wilson was pardoned by the governor of Missouri in 1995 although he had confessed to arson, robbery, and murder in 1986.⁵⁷ During interrogation, Mr. Wilson told police many facts that could be proven to be wrong and did not contribute any accurate information that would certainly have been known to the perpetrator.⁵⁸ For example, he told the interrogators where to find the loot from the robbery—but it was not there. Also, he was unable to tell them that a stun-gun was involved in the crime, that it had been lost in the house, and that the killers had set a fire to destroy it. Years later, the real killer came forward, confessed, and proved his guilt. Although the stun-gun's existence had been kept secret, the true killer was able to tell the police all about it.⁵⁹

Police in Goshen, Indiana, persuaded Edgar Garrett that he killed his daughter, Michelle, who had mysteriously disappeared.⁶⁰ During fourteen hours of interrogation, Edgar Garrett gave an increasingly detailed confession describing how he murdered his daughter, whose body had not yet been found. No independent evidence linked him to the crime or corroborated his confession. At the same time, his post-admission narrative contradicted all the major facts in the case. Edgar Garrett confessed to walking into a park with his daughter through new-fallen snow, bludgeoning her with an axe handle at a river's edge, and dumping her body in the river. However, the police officer who arrived first at the crime scene did not see footprints in the snow-covered field at the entry to the park but, instead, saw tire tracks entering the park, bloody drag marks leading from the tire tracks to the river's edge, and a single set of footprints going to and returning from the river. Obviously, someone had unloaded Michelle Garrett's body from a vehicle and dragged it to the

52. Interrogation Transcript of Johnny Lee Wilson, Lawrence County, Mo., Sheriff's Dep't (Apr. 18, 1986).

53. Interrogation Transcript of Edgar Garrett, Goshen, Ind., Police Dep't (Jan. 27, 1995) (Case No. 20C01-9502-CF-003).

54. Interrogation Transcripts of Dante Parker, Leo Bruce, and Mark Nunez, Maricopa County, Ariz., Sheriff's Office (Sept. 12, 1991); *see supra* note 36 and accompanying text.

55. Interrogation Transcripts of George Abney, Flagstaff, Ariz., Police Dep't (Aug. 28-Sept. 1, 1987).

56. Interrogation Transcript of Richard Bingham, Sitka, Alaska, Police Dep't (May 15, 1996).

57. *See* OFSHE & LEO, SOCIAL PSYCHOLOGY, *supra* note 1, at 222-26.

58. Interrogation Transcript of Wilson, *supra* note 52.

59. *See* OFSHE & LEO, SOCIAL PSYCHOLOGY, *supra* note 1.

60. *See infra* Part III.B.3.b.

river, but Edgar Garrett did not own a car and no evidence was ever developed that he had access to one that day. Michelle Garrett's coat was recovered from the river separately from her body and had no punctures, suggesting that she had been killed indoors and transported to the river bank.

Edgar Garrett's confession regurgitated the theory the police held at the time of the interrogation: that his daughter had been clubbed to death. Weeks later, when Michelle Garrett's body was recovered, police learned that she had been stabbed thirty-four times; that her body showed no evidence of significant head trauma; and that the axe handle Edgar Garrett confessed to club her with showed no traces of her hair or blood. At trial, the jury acquitted Edgar Garrett.⁶¹

None of the three individuals from whom Maricopa County, Arizona, detectives coerced false confessions during the Phoenix Temple mass murder investigation could tell police where to find the missing loot or independently describe the physical facts of the crime.⁶² The real killers were eventually identified because they were in possession of the murder weapon on the night of the killings. When police searched their homes, loot from the robbery was found. The perpetrator who confessed was able to describe how the crime was planned, its execution, and a significant fact withheld from the public—that certain graffiti had been left at the crime scene to mislead the police.

A Flagstaff, Arizona, interrogator persuaded George Abney that he had murdered a woman he had never met. He promised Abney that if he cooperated he would not go to prison but rather would receive hospital treatment for the mental illness that allegedly caused him to kill. During the post-admission questioning, Abney was invariably wrong in his guesses about the crime facts, including the most basic essentials of the victim's description. Among many other things, Abney's interrogator insisted on knowing where the victim's missing clothing could be found. On the night Abney confessed, he was taken to the murder scene to help him remember the location of the clothing. He failed. Because he had been told that only by demonstrating remorse through cooperation would he receive hospital care rather than prison, more than a day later he called the interrogator to his cell and literally begged to be allowed to try again. He failed a second time. It was later discovered that Abney had an airtight alibi, which was corroborated by several witnesses who came forward as soon as his arrest was reported in the press. For these and many other reasons, including the identification of the likely killer, a jury acquitted Abney at trial.⁶³

Richard Bingham confessed to murdering a young woman by himself in a forest in Sitka, Alaska, and was immediately arrested. At the time of Bingham's arrest, police had not tested the semen found in the victim's body, the foreign hairs found on her body or the fingerprint evidence found at the

61. *Indiana v. Garrett*, No. 20C01-9501-CF-003 (Ind. Cir. Ct., Goshen, Ind., Nov. 7, 1995).

62. Interrogation Transcripts of Parker et al., *supra* note 54. See Parloff, *supra* note 36; Kimball & Greenberg, *supra* note 36.

63. *State of Arizona v. George Abney*, No. 13314 (Coconino Cty. Sup. Ct., Flagstaff, Ariz., July 19, 1988).

crime scene. When the DNA testing, the hair testing and the fingerprint comparisons were completed, the results all excluded Bingham. In addition, the perpetrator had silenced the victim by carefully packing a great quantity of mud into her mouth. The interrogators raised the subject of how the victim was silenced several times during the post-admission portion of the interrogation. Each time Bingham offered a commonplace guess that was wrong. At trial, the jury acquitted Bingham.⁶⁴

While interrogators routinely seek post-admission narratives, in some instances they may not be able to move a suspect, whether guilty or innocent, beyond making an admission. If a suspect says "I did it" but provides no confession narrative, the interrogation has failed at its primary objective: developing evidence of an individual's guilt in a way that will lead to conviction, or revealing his innocence in a way that will deter an unjust arrest. When this occurs, the results of the interrogation should be carefully considered, and the reason why the interrogator failed to obtain a post-admission narrative should be examined. For example, the interrogation may have ended prematurely because the investigator did not even try to obtain more than a general admission. Or he may have considered collecting a post-admission narrative unnecessary because of the great strength of the independent evidence corroborating the suspect's guilt.

If, however, an investigator attempts to debrief a suspect but fails to get a full confession narrative, the history of the interrogation needs to be considered when weighing the admission. What were the circumstances under which it was given? What caused the post-admission portion of the interrogation to fail? It makes a difference, for example, whether the interrogator had a valid evidentiary basis for interrogating the suspect or was playing a hunch; whether the evidence of the suspect's guilt was real or fabricated; what motivational tactics the interrogator employed to elicit the admission; whether the interrogator's tactics were coercive; whether the suspect demonstrated a simple reluctance to answer any more questions but never recanted his admission; whether he terminated the interview by requesting an attorney; whether he reasserted his innocence before terminating the interrogation; or whether the investigator terminated the interview after the suspect reasserted his innocence.

Psychological interrogation methods will inevitably continue to produce many true and some false confessions. The procedure of evaluating a post-admission narrative provides a decision rule for weighing the importance of a confession when evaluating a suspect's likely guilt or innocence. If a narrative leads to previously undiscovered evidence known only to the perpetrator, or demonstrates a suspect's personal knowledge of the crime, the confession must be given great weight. Because one correct answer is sufficient to prove personal knowledge, there must be no question of possible contamination, and the answer must be so improbable that there is no reasonable likelihood that it could have been correctly guessed.

If the interrogator fails to explore whether a narrative lacks indicia of

64. *Alaska v. Bingham*, No. 9601712 (Alaska Super. Ct., June 20, 1997).

reliability and whether it fails to provide accurate information on numerous points that can be objectively evaluated, then it must be concluded that the interrogation has failed to produce evidence of the suspect's personal knowledge of the crime. Since a failure to demonstrate something is not proof of its non-existence, an evaluator of the statement cannot conclude that the absence of this information proves an absence of personal knowledge. The failure to demonstrate actual knowledge can only lead to the conclusion that the admission is suspect, and that both it and the narrative are of little or no value as evidence of guilt.

If an interrogator inquires about provable matters and/or seeks to derive new evidence from the suspect and the confession statement is replete with demonstrable errors about the crime scene and does not lead police to new evidence, then the narrative should be recognized as consistent with the capabilities of someone who has given a false confession, and it should be considered evidence demonstrating the unreliability of the statement and tending to support a suspect's innocence.

F. *Types of False Confessions*

The improper use of interrogation procedures can result in four types of false confession: *stress-compliant*, *coerced-compliant*, *non-coerced persuaded*, and *coerced-persuaded*.⁶⁵

1. Stress-Compliant False Confessions

The inherent stressors normally present in the accusatorial phase of interrogation, together with exceptional factors associated with either the interrogation or the suspect, can so overwhelm a person that he chooses to give a type of confession known as a stress-compliant false confession. He makes this choice to escape an experience that for him has always been excessively stressful or one that has become intolerably punishing because it has gone beyond the bounds of a legally proper interrogation.

Interrogation in America is anxiety-provoking by design. Many of the variables that make interrogation effective tend to distress a person to some extent. At a minimum, suspects are confined in an unfamiliar setting, isolated from any social support, and perceive themselves to be under the physical control of the investigator. They exercise little or no control over the timing, duration, or emotional intensity of the interrogation, the outcome of which remains uncertain. To overcome a suspect's resistance, an investigator employs influence techniques that are intended to induce significant distress and anxiety, attack the person's self-respect, eviscerate his self-confidence, and reinforce the claim that his guilt is well known and certain.

For example, an investigator may invade a suspect's personal space; falsely confront him with *incontrovertible* evidence of his guilt; misrepresent the seriousness of the crime; accuse him of fictitious crimes; press him with lead-

65. See OFSHE & LEO, SOCIAL PSYCHOLOGY, *supra* note 1, at 207-20.

ing questions; assert the futility of denying guilt; alternate displays of sympathy with displays of hostility; cut off any attempt to verbalize his innocence; or offer to support or personally help him only if he confesses. An investigator is likely to use these techniques repeatedly and in combination. As a result, a suspect may become physically exhausted, emotionally distraught, and/or confused.

An investigator may suggest, or a suspect may come to reasonably believe, that the interrogator will not let up unless the suspect says "I did it." If an innocent suspect fails to realize that he can terminate the process by invoking his *Miranda* rights, is ignored when he does invoke, or believes that he will be arrested as soon as the interrogation concludes, he may continue the interaction until he can no longer stand the strain and must escape the physical confinement, fatigue, and distress of relentless questioning.

Confessing may seem his best choice by the time he reaches the point at which he is no longer able to protest his innocence.⁶⁶ Some persons are not able to withstand the intensity of interrogation. This may be due to unusual characteristics of the person, such as an abnormal reactivity to stress,⁶⁷ activation of a phobia,⁶⁸ an intellectual limitation that has led to learning to become submissive,⁶⁹ or some other unusual characteristic that comes into play. Or this may be due to the character of the interrogation—it may reach an exceptional level of intensity, its length may fatigue and debilitate an otherwise normal individual, or it may incorporate some other exceptional and improper element.⁷⁰ Although interrogation is an inherently distressing experience, it should not cause a stress-compliant false confession when reasonably conducted and directed at a normal individual.

2. Coerced-Compliant False Confessions

In response to classically coercive interrogation techniques such as threats of harm and/or promises of leniency, some suspects will knowingly give a coerced-compliant false confession. More than any other category of police induced statements, coerced-compliant false confessions are recognized in the law as overbearing a suspect's will.⁷¹ While the use of explicit threats and

66. Interrogation is a time-sequenced process. As it progresses, a suspect's perceptions of his situation change due to the tactics through which interrogation is carried out. Early in the process a suspect's perception of the consequences of each of the three possible choices open to him will be different than what it is later. At the start he may believe that both invoking his *Miranda* rights and maintaining his denial of responsibility are associated with arrest and trial. In the beginning, he may believe that only confession leads to certain punishment for something he did not do. Later, in reaction to the investigator's strategy, he will likely associate both invoking his *Miranda* rights and maintaining denial with arrest and the *harshest* possible punishment; he will associate confessing with minimizing his inevitable punishment. Under these circumstances, a person who can no longer tolerate the stress of interrogation will reason that it is better to escape it by complying with the investigator's demands and confessing rather than by remaining silent or invoking his *Miranda* rights.

67. See GUDJONSSON, *PSYCHOLOGY OF INTERROGATIONS*, *supra* note 5.

68. *Id.*

69. *Id.*

70. See *Brown v. Mississippi*, 297 U.S. 278 (1936); *Ashcraft v. Tennessee*, 327 U.S. 274 (1946).

71. For example, in *Lynnum v. Illinois*, 372 U.S. 528 (1963), Chicago Police officers threat-

promises may not be as common as it once was, American investigators using psychological methods can communicate coercive threats and promises by subtle, indirect, and camouflaged means. For example, investigators sometimes suggest that they will accept an account of the offense in which the central act is described as an accident or an act of self-defense.

In its most extreme form, the "accident scenario technique," also known as "maximization/minimization,"⁷² includes formatting and suggesting a version of the crime facts that drastically lowers the legal seriousness of the offense and the appropriate charge. For example, if the crime is obviously a premeditated murder, the investigator leads a suspect to believe that the crime facts can be recast so that the appropriate charge is involuntary manslaughter, a reasonable response to the victim's provocation, or perhaps that the killing happened in self-defense. This tactic is effective at eliciting admissions for the same reason that more explicit promises of prosecutorial leniency work: because the interrogator communicates that the suspect will receive a reduced level of punishment, or no punishment at all, if he admits to a description of the offense that the interrogator finds acceptable.⁷³

3. Persuaded False Confessions

Both types of "persuaded" false confessions—non-coerced and coerced—are given after a person has become convinced that it is more likely than not that he committed the crime, despite possessing no memory of having done so. Both are elicited when an interrogator attacks and shatters a suspect's confidence in his memory. A non-coerced persuaded false confession is elicited when an investigator relies on routine influence techniques of interrogation, whereas a coerced-persuaded false confession is elicited when threats, promises, or other legally coercive interrogation techniques are added to this mix.

Although persuaded false confessions are typically neither intended nor recognized by investigators, they follow a common pattern. Investigators typically open an interrogation by confronting the suspect with evidence of his guilt. If the suspect is innocent, the supposed evidence will be either erroneous

ened to arrest Lynumn—which, they told her, would lead to a cut-off of her welfare payments, the loss of her children, and a prison term—if she did not confess to selling marijuana. Lynumn confessed and was subsequently sentenced to 10-11 years. The Supreme Court unanimously ruled that police coerced her confession and reversed her conviction. In *Leyra v. Denno*, 347 U.S. 556 (1954), a police psychiatrist elicited a confession from Leyra after explicitly promising him that he would be let off easily if he admitted murdering his parents. As in *Lynumn*, the Supreme Court ruled that Leyra's confession was coerced and reversed his conviction. *Id.* at 537.

While the use of explicit threats and promises may no longer be as common as in the 1950s and 1960s, interrogators currently employ more subtle and camouflaged threats and promises to elicit confessions of guilt. The accident scenario technique, for example, is nothing more than a device for delivering veiled threats and promises: it communicates the expectation that the suspect will receive a lower level of punishment if he confesses (leniency), but that he will receive a significantly higher level of punishment if he does not confess (threat). See *infra* Part III.B.2.f.

72. See Kassir and McNall, *Police Interrogations*, *supra* note 6.

73. *Id.* at 248 ("Although the courts take promises and threats more seriously when they are made explicitly than when they are implicit in an interrogator's remarks, our data indicate that because people often process information 'between the lines' . . . these different means of communication are functionally equivalent in their impact.")

or fabricated. If an innocent person believes that the evidence exists, he may become confused because he cannot account for the incriminating facts that contradict his memory of where he was when the crime occurred and his knowledge that he has no awareness of committing the crime. The investigator may lead the suspect to resolve his dilemma by persuading him that he has experienced some form of amnesia.

Because guilty suspects sometimes also claim no memory of committing the crime, interrogators have developed a routine counter to this disingenuous denial. An interrogator will typically respond by suggesting some convenient reason for the suspect's otherwise inexplicable absence of memory—for example, a drug or alcohol-induced blackout,⁷⁴ a momentary lapse in consciousness,⁷⁵ a repressed memory,⁷⁶ or perhaps even multiple personality disorder.⁷⁷

The guilty and the innocent react differently to these ploys. When dealing with a guilty suspect, the interrogator's counter can easily and effectively blunt the suspect's attempt to use this denial. An innocent suspect, however, is likely to be confused and shaken by the investigator's tactics. If the innocent reasons that the evidence objectively proves his guilt, he may accept the amnesia suggestion because it explains his absence of any memory of committing the offense. If an investigator is knowledgeable about a suspect, he will propose an amnesia theory that fits the suspect's background. For example, if the suspect is an alcoholic or a drug abuser, the interrogator will likely suggest some form of alcohol or drug-induced blackout. If the suspect has a history of alcohol- or drug-induced mental illness, the interrogator will likely suggest some form of psychogenic amnesia.

The issue of amnesia is likely to become a major turning point in the interrogation and can, in combination with other interrogation tactics, lead the suspect to conclude that "I probably committed this crime." A persuaded person's belief in his guilt is tentative and unlikely to rise to the level of certainty. But it is sufficient to lead him to agree that he is probably guilty and motivate him to confess by confabulating answers (i.e., make good faith guesses) to questions about how the crime occurred, inferring how the crime must have occurred from the investigator's suggestions, and/or regurgitating the investigator's theory of the crime.

74. Interrogation Transcript of Tom Sawyer, Clearwater, Fla., Police Dep't (Nov. 6-7, 1986) (Case No. 86-28504); Interrogation Transcript of Garrett, *supra* note 53.

75. Interrogation Transcript of Peter Reilly, Connecticut State Police Headquarters, Hartford, Conn. (Sept. 29, 1973).

76. Interrogation Transcript of Bradley Page, Oakland, Cal., Police Dep't (Dec. 10, 1984); Interrogation Transcript of Paul Ingram, Thurston County, Wash., Sheriff's Dep't (Nov. 28-29, 1988); *see also* Ofshe, *Inadvertent Hypnosis*, *supra* note 5.

77. Interrogation Transcript of Diane Colwell, San Diego, Cal., Police Dep't (Nov. 8, 1994) (Case No. 94-20678).

III. ILLUSTRATING THE DECISION MODEL

A. *The Miranda Warning*⁷⁸

Investigators tend to introduce the *Miranda* advisement in a manner that is to their advantage. They might do so by presenting it as a bureaucratic formality and deliver the warnings in a perfunctory manner; they might actively de-emphasize the significance or implications of *Miranda* and suggest that it is unimportant or something to be ignored; or they might try to persuade the suspect that it is in his best interest to waive *Miranda* altogether by telling him that if he does not consent to questioning, people will think him guilty.⁷⁹ At this point, investigators encourage suspects to believe that answering their questions is relatively risk free.

Sometimes police question "outside *Miranda*" by ignoring a suspect's explicit invocation, or by telling him that nothing said during the interrogation can be used in a court of law.⁸⁰ The likely outcome of ignoring *Miranda* is exclusion of the improperly obtained admission into evidence at trial; the admission can, however, be used for impeachment if the defendant testifies.⁸¹ Therefore, interrogators have little to lose by ignoring a suspect's invocation of *Miranda*, but may gain incriminating information and possibly have it admitted at trial.

In some cases, American police do not give *Miranda* warnings because they reason that a suspect is not technically in custody since he is not under arrest and is free to leave the station house.⁸² An investigator reasons that if he informs the suspect of these facts, then he does not have to remind him of his constitutional rights. For example, investigators in three different California locations told suspects:

Interrogator: Okay. Now I want you to understand, you're not under arrest, okay? The door is right there, it's not locked, you're free to leave at any time. Okay?⁸³

Interrogator: You know that if you want to leave you're able to leave. I've only shut the door for our privacy and it's unlocked, so you just say I don't want to talk about it and off you go.⁸⁴

Interrogator: Shane, uh, let's get a couple ground rules straight here. You're not under arrest. We don't suspect you did wrong. You're here to help us out, okay? If you don't

78. The illustration of the decision model begins here since the *Miranda* advisement often signals the beginning of the obviously accusatory portion of the interrogation process.

79. See Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621 (1996) [hereinafter Leo, *Miranda Revisited*].

80. This sometimes occurs even during recorded interrogations.

81. See *Harris v. New York*, 401 U.S. 222, 224 (1971).

82. See Leo, *From Coercion to Deception*, *supra* note 14, at 43-44.

83. Interrogation Transcript of Tom Jordan, Placer County, Cal., Sheriff's Dep't 3 (Apr. 8, 1993).

84. Interrogation Transcript of Albert Gonsalves, Sacramento, Cal., Police Dep't 1 (Dec. 16, 1992).

wanna talk to us, you don't have to. If there's anything that you don't wanna answer, you don't have to answer it. Anytime you wanna stop or leave, you can. So, that's how it is.⁸⁵

An investigator in Barrow, Alaska, was even more explicit about the voluntary nature of a suspect's presence:

Interrogator: You do know that you're not in custody or anything like that and the same rules apply. We're not, you know, you're free to get up and go or when you, the only reason the doors closed and we're sitting in here is for privacy purposes and not cause you're under arrest or anything like that, ok?

Suspect: Yeah.

Interrogator: You understand that.

Suspect: Yes.

Interrogator: Okay. And you come down here voluntarily to talk with us, right? Ok.

Suspect: Yes.⁸⁶

Even clearly custodial suspects most often waive their *Miranda* rights and consent to interrogation.⁸⁷ Although innocent suspects are likely to waive their rights because they do not perceive a risk in speaking to police, some view invoking *Miranda* as either wrong and/or tantamount to an admission of guilt. For example, shortly after falsely confessing, a middle class university student described why he did not invoke his *Miranda* rights when he was first accused:

Suspect: Somehow it seems—it feels to me that if I ask for a lawyer that I'm admitting guilt and I know I'm not, but it's, you know, it's just a preposterous idea to me that it's even considered.⁸⁸

Sometimes interrogators increase the likelihood of receiving a waiver by first heightening the suspect's motivation to speak and then reading the *Miranda* warnings. A Sacramento, California, investigator handled the *Miranda* advisement of a man who had been taken into custody, photographed, and was already being questioned as follows:

Interrogator: I don't think this woman was telling us the whole truth. Okay. I think that it's not, probably not as significant as she's letting on at this point. Okay. So this is why you're here. Now I'd like to talk to you about what this woman is saying, we've more or less ah, you know, if we just talk to her and she alleges this felony crime

85. Interrogation Transcript of Shane Schmitt, Sacramento, Cal., Police Dep't 1 (Aug. 27, 1992).

86. Interrogation Transcript of John Adams, Barrow, Alaska, Police Dep't 5 (Sept. 3, 1993).

87. See *supra* note 40.

88. Interrogation Transcript of Page, *supra* note 76, Tape 3, at 4-5.

occurred, then we're more or less obligated to make an arrest.

Suspect: Uh-huh.

Interrogator: And I know there's more to it and I know, I know you were there. That's not a problem because, because we have, that, that ain't no big deal. But I also need to know the real truth because I'm not sure she's telling us the whole story.

Suspect: What, what is she trying to say?

Interrogator: Well, she's alleging that you pointed the gun at her.

Suspect: Uh-huh (negative). Nah-uh.

Interrogator: (Unintelligible). Alright before we, before we do that, I, like I said I know there's more to this story than she's telling us. But —

Suspect: I don't even know her, you know what I'm saying (unintelligible) —

Interrogator: Whoa, whoa, whoa. I can't take your statement until we get through that *Miranda* issue.

Suspect: Oh.

Interrogator: You can't tell me anything until we get through that.⁸⁹

Because they do not see any reason to distrust the police, the innocent are unlikely to realize that they are about to undergo a highly stressful and fatiguing experience that has been designed to change the course of their lives and may do so for the wrong reasons.

B. *The Two Parts of Interrogation: Pre-Admission Influence and Post-Admission Narrative*

Although interrogation occurs during the course of an investigation, it is not usually part of the information-gathering process that leads a detective to believe someone is guilty. Even the leading interrogation training manual recommends that an accusatory interrogation should be undertaken only when an investigator is certain of the suspect's guilt.⁹⁰ The purpose of interrogation is not to discover or evaluate an alibi, but to obtain an admission of guilt and a complete account of how the crime happened. As one Seattle, Washington, detective commented, "Interviews are just to see what the truth is, an interrogation is an in-your-face situation."⁹¹

89. Interrogation Transcript of Kentrick McCoy, Sacramento, Cal., Police Dep't 14-15 (Sept. 1, 1996).

90. See INBAU ET AL., *supra* note 20, at 77.

91. Interview by Richard Ofshe with Rick Geis, Detective, Seattle, Wash., Police Dep't 9 (Jan. 17, 1996).

1. Pre-Admission Step One: Shifting the Suspect from Confident to Hopeless

a. *Accusation*

Even after an investigator has issued *Miranda* warnings, he may continue to use a non-threatening interview format to question the suspect about his alibi or any other subject that may provide information that contradicts or confirms facts he has already learned from the investigation. At some point, however, the investigator's manner, tone, and style shift from neutral, friendly, and non-threatening to accusatory—serious, aggressive, and confrontational. No longer pretending to seek general and background case information, an investigator now claims full knowledge about the suspect's culpability and demands that he admit guilt.

The investigator typically commences the accusatory phase of interrogation by pointing out something that contradicts what a suspect has said or that the suspect has been inconsistent in his statements. He may also commence his overt attempts to manipulate the suspect with a direct and often surprising accusation. A Pasco County, Florida, interrogator told a suspect:

Interrogator: She left with you. Look at me Jeff.

Suspect: Say what?

Interrogator: She left with you.

Suspect: What are you tellin' me?

Interrogator: What I'm tellin' you. I think you killed your wife. I think you got into an argument, I think she hit you. She's got a temper.⁹²

At this early stage, a detective's accusation is usually simple and straightforward. As a San Diego, California, detective told a suspect:

Interrogator: Robert, this is our case, on Mary Shelton. You could see we've done a lot of work. Our shit is together. We know what we have. We know that you did it and you know that you did it.⁹³

Early on and repeatedly throughout the pre-admission part of interrogation, an investigator will implore the suspect to "tell the truth." As a Kern County, California, sheriff's detective told a suspect:

Interrogator: We've been nice to you and we're giving you a lot of credit, from what you're telling us. Don't lie to us. Because it doesn't change anything. It changes absolutely nothing. You sit here and you tell us the truth.⁹⁴

Detectives sometimes feign anger or actually lose their tempers and resort

92. Interrogation Transcript of Jeffrey Christian Crouch, Pasco County, Fla., Sheriff's Office 7 (Jan. 28, 1987) (Case No. 87-008093).

93. Interrogation Transcript of Robert Byars, San Diego, Cal., Police Dep't 84 (Dec. 21, 1993).

94. Interrogation Transcript of Michelle Duke, Kern County, Cal., Sheriff's Office 27 (Aug. 27, 1995) (Case No. 95-95-33322).

to screaming at the suspect and demanding that he confess. This heated exchange occurred during an interrogation in San Diego, California:

Interrog. 1: Tell us about it!

Interrog. 2: Tell us about it! You give up! Tell us about it! Tell us about it! For once in your life, tell us about what the hell happened! For once in your life!

Suspect: I don't know what the hell happened, to her, who, somebody killed her! Or who, who, it was that killed her! I don't know!

Interrog. 1: You killed her!

Suspect: No! I sure in the hell didn't!

Interrog. 1: Now, listen to me.

Suspect: That's a fuckin' lie!

Interrog. 1: You killed her.

Suspect: No I did not!

Interrog. 1: Okay.

Suspect: I did not! That's a damn.

Interrog. 1: You caused her death, okay?

Interrog. 2: I think it's over.

Suspect: It is! I did not kill her!! You wanna, can you prove it!?

Interrog. 2: Yes!

Suspect: I didn't kill that woman, I don't go out killin' nobody. I had no gun! I had no kind of gun or nothin', or no knives!

Interrog. 2: (Unintelligible).

Suspect: I can, I don't use my hands on nobody! Unless I have to.

Interrog. 2: Bullshit!

Suspect: Unless I have to!

Interrog. 2: Bullshit!

Interrog. 1: Bullshit! Don't, that's all you got! That's all you need!

Suspect: But I don't hit no, no woman with 'em!

Interrog. 1: Bullshit!⁹⁵

b. *Overcoming Objections*

One of an investigator's first challenges is to overcome a suspect's tendency to object when accused of committing a crime and his preference for protesting his innocence. By taking the position that he is certain of the correctness of his accusation, the investigator puts the suspect on the defensive

95. Interrogation Transcript of Elmer Lee Nance, San Diego, Cal., Police Dep't, Tape 2, at 29-30 (Sept. 27, 1991).

from the beginning. The investigator attempts to set up the interaction so that the suspect tries to convince the investigator of his innocence—something that is unlikely to happen. Because of the context in which interrogation is set, an investigator cannot dare to obviously seek information that might, with additional checking, allow him to evaluate whether the suspect's denials are true or his alibi is valid. Because an appearance of certainty makes claims about having evidence more likely to be believed, the investigator can never depart from his position of certainty. From this position all of the suspect's denials must be reacted to as if they are recognized as attempted deceptions. Any denial is called a lie and lies are not going to be tolerated. A San Diego, California, detective told a suspect:

Interrogator: Now, why do you think we are here? You know, if you lie to me that's not really good for you because, you know, I've interviewed, Mark and I've been up all night interviewing people so we know what's going on and we know if you're going to lie to us and we just want the truth. We just want to hear your side of the story. Because all the other people we've talked to we've heard their side of the story and now we want to hear your side. So, just be up front with me. You know, just tell me like a, like a man, you know. You're 18, you're an adult. Tell me what happened.⁹⁶

An angry display of impatience may be accompanied by an accusation that the suspect is trying to manipulate and deceive the investigator:

Interrogator: I don't think you do understand our situation.

Suspect: You know you are trying to get.

Interrogator: We are trying to find out who killed that woman by asking you for your cooperation and you're jacking us around, Lee!⁹⁷

Whether it is a genuine outburst or a calculated tactic, yelling at a suspect and demanding that he confess is a primitive interrogation tactic. However, some investigators seek to elicit admissions simply by startling and intimidating a suspect, aggressively posturing, and forcefully demanding that he confess. If, however, an investigator chooses to show extreme displeasure, for more well-developed tactical reasons he is likely also to attack the suspect's self-image. A San Diego, California, investigator told a suspect:

Interrogator: Don't lie to me, okay?

Suspect: I'm not I'm not lying to you.

Interrogator: Just don't fuckin' lie to me. Just listen to me. You've been lying your whole fuckin' life. You've been blaming other people for all your problems and that's bullshit. It's time you faced the music. It's time to say

96. Interrogation Transcript of Eric Jerrod, San Diego, Cal., Police Dep't 4 (Sept. 24, 1995).

97. Interrogation Transcript of Nance, *supra* note 95, at 16-17.

yeh, okay, I did fuck up. Now's the time in your life to get your act together and finally stand up, be a man and say okay, God-damn it this is the truth, I'm gonna tell the truth and I'm gonna be proud of myself, other than being such a shit ball.

Bullshit, you just sat here and you said yeh, I saw her and I know what happened. That's what you just said Mr. Nance and you said nobody'd believe me. And you haven't even started to explain it. 'Cause number one, either you're such a chicken-shit that you don't want to tell the truth or number two, you're afraid to tell the truth or number three you've been lying so God-damn long your whole fuckin' life, you don't know what the truth is, now which is it?⁹⁸

Sometimes investigators refute a suspect's denials by bluntly asserting that he is lying, as in this passage from another San Diego, California, interrogation:

Interrog. 1: That's a crock of shit Jason. Who in the hell's gonna believe that? You're really setting yourself out to hang here buddy. I mean that figuratively. Not literally. What I'm saying is you're sticking your butt out there and there's no protection. Come on. That's not what happened. I know it. Donaldson knows it. And you know it.

Interrog. 2: The ship is sinking and you're the captain of the ship, buddy.

Interrog. 1: Start doing something here. Start telling us the truth.

Interrog. 2: You are sinking fast.⁹⁹

Frequently an investigator will communicate his certain belief in the suspect's guilt by trying to downplay interest in gaining more evidence or even having any discussion about this question. The attitude he expresses is that there is already enough evidence to satisfy him of the suspect's guilt. Having no interest in any discussion of guilt or innocence, the investigator expresses interest in a secondary matter—why the crime happened. Any discussion of this, of course, requires the suspect to first admit responsibility. A Sonoma County, California, investigator told an adolescent defendant:

Defendant: Well, I can't give you any answers because I didn't do it.

Interrogator: Well, it's not a matter of you not or, doing it or not. We know you did it, okay? And we're

Defendant: (Inaudible).

Interrogator: Listen. I would like to be very fair with you and open

98. *Id.* at 41-42.

99. Interrogation Transcript of Jason Albritton, San Diego, Cal., Police Dep't 148-49 (July 20, 1995) (Case No. CD114372, P66142).

with you and up front with you about this, okay? And that's why I'm telling you this. Um, I don't feel an obligation to go through all the evidence The game is over, okay, and I hope you're not lookin' at it as a game. Because it's not a game. Um, you know, some people were, uh, some, some people were killed and we would like to know the reason behind that It's not a matter of whether or not you did it, so, um, that's not what we're here for. We know that you did it. And we have a quite provable case.¹⁰⁰

The investigator repeated this theme a few minutes later:

Interrogator: I hope, I hope that you're not sittin' here tryin' to conspire how can I get out of this, how can I beat this. You know? It's not a matter of if you did it. That's not the issue. You need to understand that no, we're not here asking you if you did it. If we didn't know, we wouldn't have arrested you. We would have brought you in and asked you if you did it. We know that you did it. We don't know why you did it, Alan. You understand what I'm tellin' ya?¹⁰¹

c. Evidence Ploys

i. General Claims of Strong Evidence

The message of interrogation in the pre-admission phase is that the evidence already in hand leads to the conclusion that the suspect's factual guilt has been established beyond any doubt.¹⁰² Although sometimes it is possible to be entirely truthful when making this claim, it is permissible for the claim to be a complete lie. By forcefully presenting a claim that he knows is entirely fabricated to someone he guesses is guilty, the investigator hopes to create the impression of an airtight case and convince the suspect that resistance is futile. When real evidence is lacking the investigator knows full well that it is only by getting the suspect to give a full and detailed confession that he will be able to find the evidence that will prove correct his speculative, intuitive, and risky guess.¹⁰³

When the investigator who interrogated the Sonoma County adolescent discussed above began to reveal his evidence, he was careful to distinguish

100. Interrogation Transcript of Alan Adams, Sonoma County, Cal., Sheriff's Office 2 (July 4, 1991) (Case No. 910605-16).

101. *Id.* at 7.

102. The most recent observational study of interrogation in the America found that in 85% of the interrogations observed, investigators used the tactic of confronting suspects with the evidence of their guilt. In 43% of the interrogations, investigators attempted to undermine the suspect's confidence in his denial. In 30% of the interrogations, suspects were confronted with false evidence. See Leo, *Inside the Interrogation Room*, *supra* note 4, at 267.

103. INBAU ET AL., *supra* note 20, at xiii-xiv.

between the evidence he had and the evidence he anticipated he would find. Because the suspect had committed the crime, both he and the detective knew that the as yet untested categories of evidence would strengthen the case against him:

Interrogator: Listen. I'm not gonna insult your intelligence. Uh, and please, don't insult ours, okay? We've been doin' this for a long time. But the problem is here, is that we have a case that is proven, a proved case, and it's, it's all matters of fact. We're not here guessing.

Suspect: I don't understand how it's proven.

Interrogator: Well, actually, um, we have witnesses to the fact that you made the purchases. Um, we haven't yet rolled your fingerprints but we are going to be rolling them, to compare those. Uh, there's also other physical evidence in terms of microscopic evidence that you're not aware of, but we are, because of the business that we're in. You're gonna have to explain to us, uh, or you should explain to us how in the hell the weapon is at your house, that's gonna ballistically match back up to the one that killed the victims, Oscar and Betty, as well as all the other bullets, and the casings. There are casings (inaudible) uh, the property that was purchased with the cards after the fact. We already have some of them. We're retrieving more. In fact, um, some of it I expect will be in your truck. So you see, the case is, is, is well-proved. I don't know why you did it. Maybe you don't know why you did it. But the fact is that you did it.¹⁰⁴

Sometimes interrogators grossly overstate their case and claim to possess a great deal of evidence that simply does not and never will exist. For an innocent suspect who naively trusts the police and believes that they would not lie, the cumulative effect of an endless stream of false evidence can be devastating. A young suspect interrogated in South Carolina recounted his experience:

Interviewer: Did it ever, did you ever think about the possibility that maybe they were intentionally lying to you?

Suspect: No. You see, um, you have to understand, when I was, I was always grew up my Mom and Dad always told me "You trust a cop," you know "They're not going to lie to you." You know and I always had faith in them until now.

Interviewer: OK. So the possibility of their playing games with you, your telling me, just didn't even pop into your mind.

Suspect: Right. You know and um, so they kept on talking to me

104. Interrogation Transcript of Adams, *supra* note 100, at 3-4.

and we started talking about my Mom, you know, then I brought up the subject up of my Mom, um, they told me, they said "Why don't you go ahead and tell us now, and quit lying to us. We know you did it." And then he said that, they said "Your Mom even says it's time for you to tell the truth. Says she loves you but you know this whole thing needs to be over."

And, um, at that point in time I didn't, well it blew my mind. You know, they was telling me about my Mom, and um, they told me that, um, they went up there, you know, they talked with Mom and you see they left me about 45 minutes alone one time.¹⁰⁵

I mean it just, when you think about your Momma, you know she's always going to be there no matter what. You know you could always turn to your mother if you can't turn to nobody else and um, um, it was like, you know, she was, I guess you could say was, I feel like my Momma is my backbone, you know. Cause she has helped me out a lot and it's just like I lost it. You see where I'm coming from.

Interviewer: Uh hum.

Suspect: And, you know it's like, when I lost her it was all, you know, it's like well it's over.¹⁰⁶

They told me they had a DNA match on me. They said that it's never been beaten before in court. That it was no way on earth that it was wrong, and that, you know, it was mine.

Interviewer: What was your reaction when they told you they had a DNA match?

Suspect: Um, my reaction was, you know, it just can't match, I mean, I told them, I come out and told them said it's "Mine don't match, I volunteered to give it to you." Um, I told them, I said, why would I want to come down here and sign my own death certificate. They said, see here, it's just a matter of time you gonna find out it's me, you know, I told them if I'd have done it I sure wouldn't volunteered to give it to them, they'd have to make me give it to them.¹⁰⁷

An investigator's claim of an ever increasing amount of valid, incriminating evidence is likely to eventually cause a guilty party to recognize that the game is over and that he is caught. In response to the repeated evidence ploys, an innocent is likely to perceive his situation as frustrating, unreal, desperate,

105. Interview of Kenneth Register by Richard Ofshe at 15-16 (Aug. 24, 1992).

106. *Id.* at 17-18.

107. *Id.* at 22-23.

and tending toward hopeless.

Although an investigator will not know whether all or some of a suspect's denials and answers are true or are a collection of entirely implausible, inconsistent, and impossible lies, it does not matter since the investigator's strategy is to treat every major component of the account as utterly false. For example, in a Richmond, California, interrogation, a detective sought to obtain a confession by insisting that the suspect would not have sought out a prostitute for any reason other than the thrill of committing a rape:

Interrogator: You got a gun in your car and you've got prior gun convictions, okay? Looking at all these things, I think you're giving me a little bit of bullshit. And I don't think you're being a hundred percent truthful. And a little bit of bullshit, you may as well bullshit me the whole way and tell me you're President Clinton's brother or something, okay? I need the truth. I want the absolute truth. That's what we work on. This story makes no damn sense, it makes no sense whatever.

Suspect: Sir, I didn't tell her, I didn't.

Interrogator: Prostitutes, you don't stick your tongue down a prostitute's throat.

Suspect: I didn't stick my tongue down her throat.

Interrogator: You don't kiss prostitutes. You don't lick their ears, you don't suck their nipples, you don't bite their nipples, okay? That, that doesn't happen. When you screw them you use a condom. Okay? When they give you head, you use a condom. All right? When your girlfriend's sitting in the shower, she lives less than five minutes away from you, you guys live together, you don't find a prostitute, you go lay your girlfriend, let her give you head. It makes no sense.¹⁰⁸

During the interrogation of an adolescent about a murder that had occurred earlier in the day, a San Diego, California, detective worked to undermine the suspect's position as follows:

Interrogator: We have neighbors that see things, and we collect evidence, and you could sit here and lie all night if you want, but all that stuff, bloody clothes that you're wearing, the scratches on your body, the neighbors that saw ya, the lady that you almost ran over, the man that was standing right there at the corner, and you know what else?

Suspect: What?

Interrogator: We've already talked to Danielle? She's up front with

108. Interrogation Transcript of Newell DePuy, Richmond, Cal., Police Dep't 39-40 (May 20, 1995).

us. And you're sitting here giving us a B.S. story, but this does not make sense.

Suspect: I'm not.

Interrogator: It just doesn't make sense, okay? Everything you're saying just doesn't make sense. Let me just tell you something. The neighbors saw you, okay, it's, it's simple as that. They, they described you to a "T," what you were wearing and everything. So, so your, your story just doesn't make sense, okay, and I'm, I'm being up front with you. This is the only time to bail yourself out. This is the only time to start telling the truth. George didn't sit here and take all these clippings and all these evidence and blood stains and everything from ya, okay. Together we've been do, probably doing this kind of work for almost 40 years.

Suspect: Yeah.

Interrogator: Okay. And, and what you're saying doesn't make sense. I've asked you two or three times the same question, and each time you give a different answer. Okay. I, I think, I think you're being honest in, in the aspect of your describing everything except you, you're being dishonest in one aspect of it.¹⁰⁹

A Kern County, California, interrogator told a female murder suspect:

Interrogator: I know exactly what you're telling us and we find that very hard to believe because there's blood in the kitchen where you went and got a soda, you know, on the floor and there's blood on two paper towels in the kitchen, tissue paper, you know, sitting right there at the first chair when you were getting in the refrigerator to get your Sprite, the chair that would be against your back there, right there. Right in full view of the living room. I mean, if you are in the living room, you can see right there. And there was nobody in that house during the time the guy was found and the time you guys were there so where did these mystery tissues come from. You're out in the living room the whole time. You know how they got there.¹¹⁰

Whether it is real or fabricated, interrogators represent that their evidence against the suspect is conclusive. For example, during a Salt Lake City, Utah, interrogation:

Suspect: If you are implying that I killed Irene to get away from the kid, then you are dead wrong.

109. Interrogation Transcript of Viktor Jarod, San Diego, Cal., Police Dep't 48-49 (Sept. 24, 1995).

110. Interrogation Transcript of Duke, *supra* note 94, at 18-19.

- Interrog. 1: Then why did you kill her?
- Suspect: I didn't kill her.
- Interrog. 1: Who did?
- Suspect: I don't know. Finding this out, I would like to know.
- Interrog. 1: Why would some people and all of the evidence say that you killed her.
- Suspect: I didn't kill her. I can get really pissed and I can beat the snot out of someone if I wanted to. I couldn't kill anyone man.
- Interrog. 2: Well that's not what the evidence is pointing to.
- Interrog. 1: I think you're having a hard time sleeping at night.
- Suspect: No I haven't been, I have no reason to.
- Interrog. 2: We're not just talking about Irene's life, we're talking about a fully developed six month old fetus.
- Suspect: And you're telling me that it was my baby.
- Interrog. 1: And we're talking about on the night that she died, some people that saw you with her and Steve, here in Summit County. We're talking about a guy who told us that he saw you do it. We're talking about a lot of other evidence.
- Interrog. 2: Overwhelming evidence.¹¹¹

Evidence ploys are intended to overcome a suspect's resistance to the realization that he has been caught. The fact that the suspect's denials of the evidence has failed to convince the investigator of the his innocence is intended to serve as a demonstration. The implication is that he will also be unable to convince a prosecutor, a judge, or a jury of his innocence. The investigator strives to create the impression that because his opinion is based on hard facts, all other equally reasonable and informed persons will reach the same conclusion.

Vallejo, California, detectives portrayed a defendant's continuing denials as pointless.¹¹²

- Interrog. 1: Okay, that, the problem we're having Eugene is this, first off in order to make it clear to us exactly what participation you had in this crime, because I'm not gonna, ya know like I said from the get, we're not gonna sugarcoat it. We're talkin' to you. This is a crime. Obviously you know what happened. We have overwhelming evidence to indicate that you were involved. We're here from California to give you this opportunity. Now I don't know how much clearer I can get

111. Interrogation Transcript of Calvin Shane Myers, Salt Lake City, Utah, Police Dep't 11-12 (Case No. 94-6578).

112. Eventually this man confessed to avoid a threatened penalty. At trial he was acquitted. See *infra* notes 263-265 and accompanying text.

with you on that. What you need to understand is, first off, is you're still denying to us that you were even involved in this, is that correct?

Defendant: This is correct.

Interrog. 2: Okay, and until you can realize and understand that the evidence we have that implicates you in this crime is too overwhelming to deny that. It's going to be a losing battle for you Eugene.¹¹³

ii. Demeanor Evidence

Investigators use a variety of evidence ploys to explain why they are confident of a suspect's guilt. Sometimes they assert that the suspect's guilt is revealed by his demeanor. While this is arguably the weakest type of evidence ploy, it is also the easiest to claim and the safest. A suspect may ignore it, but cannot disprove it.

Because interrogations that follow from well-developed investigations sometimes allow the investigator to literally destroy the guilty suspect's often absurd defensive claims with the same evidence that will be used in court, an experienced investigator is likely to have observed some dramatic examples of the impact of revealing evidence to a guilty suspect. The response is often an obvious and striking inability to mobilize resistance. This sort of dramatic reaction would tend to convince most casual observers that the response is a reasonable indicator of guilt. An experienced investigator's confidence that he can read a suspect's guilt is probably, in part, based on having sometimes seen these sorts of reactions from guilty suspects.

The problem is that these reactions are not invariable for all guilty suspects nor are all emotional reactions to interrogation tactics so crystal clear. While these peak moments stand in sharp contrast to the confused, anguished, and desperate expressions that permeate the record of an interrogation in which an innocent suspect is being confronted with an accusation based on false evidence, confusion, anguish, and desperation are not unique to innocent suspects. Many guilty parties will reveal considerable distress and anguish about what they have done or because they have been found out.

Investigators are not trained to realize that hunch-based interrogations will often bring them into contact with an innocent, perhaps vulnerable, suspect who will show distress at being confronted with an accusation of murder and the possibility of life in prison or a death sentence. They may also not have been trained to appreciate the variability with which people express distress. Therefore they may easily categorize a suspect's distress as an indicator of guilt and both convince themselves that their initial guess was correct and feed back to the suspect their misperceptions of the suspect's conduct.

113. Interrogation Transcript of Eugene Livingston, Vallejo, Cal., Police Dep't, Solano County, Cal., Prosecutor's Office, and Federal Bureau of Investigation (FBI), FBI Office in Albany, Ga., 58 (Dec. 18, 1993).

Sometimes an investigator will pretend that he is a human lie-detector and assert that the suspect's body language demonstrates his guilt. A San Francisco, California, detective told a suspect:

Interrogator: The problem is, Robert, you want, you've wanted to tell somebody about this since they arrested you and let you know you had a warrant for murder in San Francisco, you were shocked it took this long for it to come out, and you wanted to tell somebody about this, I could tell by looking at your body language, the way you're acting, you wanna get this off your chest, you wanna resolve this matter, and put it behind you so you can go on with your life.¹¹⁴

A Goshen, Indiana, interrogator told a suspect:

Interrogator: Listen to me. Your eyes are like windows to your soul, Ed. Okay, and your eyes want to tell me.

Suspect: My eyes are all messed up because I haven't hardly—ain't had a hell of a lot of sleep.¹¹⁵

During the interrogation of a female suspect, Orange County, California, police claimed that her reaction to a photograph demonstrated her guilt:

Interrog. 1: Lisa, as soon as we laid that picture down in front of you. It was written all over your face. As soon as you saw that bite mark it was written all over your face.

Interrog. 2: Your eyes said it all.

Translator: We discovered we can tell from your eyes that you knew this wound was bitten by you or not.

Suspect: (Sobbing).

Translator: We put this picture in front of you right? Your attitude and the color of your face that showed it all you know.¹¹⁶

iii. Eyewitness Evidence

One of the most common evidence ploys is to tell a suspect that one or more uninvolved eyewitnesses have identified him. Often these reports are valid, but sometimes what the investigator claims is completely fabricated. Solano County, California, detectives told a suspect:

Interrogator: I know when you get into a bad situation that you want to try to protect your friends and/or yourself. Okay? And to do that, the only way to do it is to lie. Okay? And

114. Interrogation Transcript of Robert Junior Anderson, San Francisco, Cal., Police Dep't 23 (undated).

115. Interrogation Transcript of Garrett, *supra* note 53, at 274.

116. Interrogation Transcript of Lisa Peng, Orange County, Cal., Sheriff's Dep't 95 (Jan. 8, 1994) (translation from Chinese).

right here and now the lies won't work. They're not gonna, you know, to not tell exactly the truth the way it happened, the way you know it happened in your heart, that's the only thing that's gonna work here and now. Okay? And there's a, there's a lot of inconsistencies in your story that I already know about. Okay? And I've got too many eyewitnesses to this whole thing that, that call, that you call your friends that when it comes down to a serious situation, they done sold you out.¹¹⁷

Salt Lake City, Utah, interrogators claimed:

Interrog. 1: How would an old retired couple that's working at Bell's in Silver Creek, remember you being up there with her about 2:00 o'clock in the morning?

Suspect: I wasn't up at Bell's at 2:00 in the morning

Interrog. 1: They remember you being there.

Interrog. 2: And they remember Steve.

Interrog. 1: They remember the three of you.

Suspect: I was not up there.

Interrog. 1: You mean they're lying these people?

Suspect: I'm not going to say they're lying, but I was not there.

Interrog. 2: If it wasn't you, Steve and Irene were there, who would it have been?

Suspect: I don't know, Steven has a lot of friends and he knows a lot of people.

Interrog. 2: But you were with Steven that night? The night they say you were there.

Suspect: Yeah but I wasn't with him at 2:00 o'clock in the morning.

Interrog. 2: Well what time was it?

Suspect: I dropped him off at his house, probably about quarter after one. I went home and went to sleep.

Interrog. 1: In the morning?

Suspect: Yeah.

Interrog. 2: Were you there, were you at Silver Creek.

Suspect: No I wasn't.

Interrog. 2: They say you were.

Suspect: I've seen people that resemble me, walking in the mall.

Interrog. 1: You're saying that it was just coincidental that there were three people.

Interrog. 2: Steve was with you.

Interrog. 1: Steve was with you and they picked you out, they

117. Interrogation Transcript of Childs, Solano County, Cal., Sheriff's Dep't 18-19 (Apr. 26, 1992).

picked him out and they picked Irene out.¹¹⁸

A Boynton Beach, Florida, interrogator told an innocent suspect:

Interrogator: Something's wrong. I mean the boy is saying you were there. There's no reason in the world that a nine year-old's going to lie about who was there.

Suspect: I was not there.

Interrogator: Well, you know, I don't know what to tell you. I can't make you tell me you were there at all, you know, obviously. But the stories just ain't matching up here. Everybody's story matches up except yours.¹¹⁹

Regardless of the validity of the alleged eyewitness evidence, a suspect can blunt its impact by insisting that the eyewitnesses are mistaken or lying. Eyewitness ploys are weak unless embedded in a foundation that makes them just icing on the cake. An interrogator is not likely to be surprised when an eyewitness ploy fails to prove to a suspect that he is caught. The following illustration is from a San Diego, California, investigation:

Interrog. 1: Now, let me tell you another thing. You said a black fellow accused you of kidnapping somebody. While you were here, while, you, well, let me finish to this black fellow, the guy you said that accused you of kidnapping somebody. That is the victim's husband. He's a black guy. He drove in to the map stop, he talked to these people here, Mr. and Mrs. Casias. Mr. and Mrs. Casias pointed you out, you drove into the map stop, is what they said and what the victim's husband, the black fellow, they said, you know, we did not see the girl. But it's funny, you may want to go talk to that gentleman over there in the Chevrolet pickup truck with the camper because he told us, he told us that he saw the girl.

Suspect: That's a lie.

Interrog. 1: The reason, hang on a second, hang on a second. That is the reason why he went over to talk to you and confront you, that's the reason why he accused you, is because he got the information from these folks here.

Suspect: They're both a bunch of damn liars.

Interrog. 1: I don't think, I'm sorry.

Interrog. 2: Hey Mr. Nance, shut up and listen. God damn it, shut up. Now listen to me. We have talked to an awful lot of people here and all through your life, all you've been doing is saying other people lie, other people are full of shit, you, friend are a God-damn liar.¹²⁰

118. Interrogation Transcript of Myers, *supra* note 111, at 9-10.

119. Interrogation Transcript of Martin Salazar, Boynton Beach, Fla., Police Dep't 24 (Feb. 17, 1996).

120. Interrogation Transcript of Nance, *supra* note 95, Tape 1, at 36-37.

iv. Co-Perpetrator Witness Evidence

If investigators know that more than one person is involved in a crime and are either interrogating two or more suspects, or can lead the suspect to believe that his co-perpetrator are also being interrogated, they may play one suspect against another. This tactic is implemented by claiming that the co-perpetrators have already confessed and have provided evidence that will be used against the suspect. If the suspect rejects this claim, the investigator may ask why his friends would lie or why so many others would identify him as a perpetrator.

If the suspect is guilty, the interrogator might be able to bring a co-perpetrator to the door or into the room and might allow the suspect to speak if the co-perpetrator has actually confessed. Sometimes, however, investigators make mistakes. For example, in a Fort Lauderdale, Florida, case detectives allowed a killer to become a witness against a young man who had seen the killing. When the killer was brought into the interrogation room and presented as a police-endorsed witness, the suspect became convinced that his situation was hopeless. Several months later he described his experience during the unrecorded portion of his interrogation when the co-perpetrator confrontation occurred:

Suspect: Well, at first Wiley just, when it first, when he first started getting a little defensive, he said that they got witnesses against me and that they can, he can prove that I did it. And I kept telling him no, that I don't know what he's talking about; that it's the, the two-guys story.

He said, "Yeah?" He said, "All right. We got []¹²¹ in the next room next to you that's telling us that you did it. Now, what do you thing about that?"

I said, "I don't believe you." I said, "I don't believe you." He said, "You don't believe me, huh?"

So he went out of the room. I didn't think nothing of it. And then he comes back. The door is open. He opens up the door, and John is standing right there. He said, "Now tell us what you said, John." He said, "Yeah, that's David Adams. He's the one that killed Butch." At that point my heart dropped. I didn't know what, I didn't know what to do then. I looked at John. I just got scared, started crying.

Interviewer: You said you looked at John and you got scared?

Suspect: Yeah.

Interviewer: What did you get scared of?

121. The name of the man identified as the killer has been deleted because he has never been arrested for this homicide.

Suspect: I remembered what he was telling me, if I say something. I didn't know what to say now. Because he has told me he's going to hurt me and my family if I say something.

And I just, I just started crying. I didn't know what to do, and my mind just started racing a hundred miles per hour at that minute. I didn't, I was, I was like in a situation like, I said, "Screw it. I did it."¹²²

As a Kern County, California, sheriff's detective told a suspect:

Interrogator: Your friends are the most important assets right now, always have been, cause you don't have a tremendous amount of them that you have been close to, so you'd do anything to protect losing those friends because if you didn't Billy would be alone, those friends would be taken away from you, you wouldn't have anything if you didn't have Joel, or you didn't have Scott.

Well you don't have Joel and you don't have Scott right now, they have turned on you. They have told us what's happened, they told us that, that it was your idea, they told us that you were the one who did it, um so without that friendship that you held so dearest in your life, that is no longer. Because if it was, they would still be true to you and not tell on you and you know that what I am saying is true.

And I'm not just in here making it up, because I know too much after, after our last interview. But they've told us exactly what's happened. Now do you consider that to be true friendship? This was not the pact that you guys had after the killing when you went to Mexico. That bond has been broken, they're standing out here for themselves, they really don't give a shit about Billy right now because they're out there for themselves and Billy's all alone in this room right now, and Billy needs to talk, and tell us what happened. So what happened in there Billy?¹²³

Similarly, a Vallejo, California, detective told an innocent defendant:

Interrogator: Okay, as Sgt. Becker said Eugene, we, we, have talked to a lot of people in this case. We've talked to you a couple of times, and every time we've talked to you, I think we were pretty, pretty honest with you. We were tellin you what we were hearing, and we asked you a

122. Interview of David Adams by Richard Ofshe. Broward County, Fla. 28-29 (Mar. 18, 1993).

123. Interrogation Transcript of Billy Wayne Smith, Kern County, Cal., Sheriff's Office, Tape 2, Side A, at 11-12 (Nov. 22, 1992).

couple times to uh tell us what you know about this case.

Now Mr. Young, uh as Sgt. Becker said, has uh given us a complete statement. He told us exactly what happened, what his role in the robbery was, and uh what everybody else's role in the robbery was. He implicated you also in the robbery. He's identified you as being a participant.

Now everybody who tells us things, at times may see things different, or may not be completely truthful. That's why we wanta come to you now and get your part of exactly what happened, and your participation in the robbery. In other words, we got a folder, about four or five folders thick of what the people are saying about Eugene Livingston. We have nothing on what Eugene Livingston had to say about this incident, and the best thing we can do now Eugene is be completely truthful, because it's over with . . . ¹²⁴

In the Phoenix Temple murder case,¹²⁵ Maricopa County, Arizona, detectives used a bold, false co-perpetrator ploy against an innocent man.

Interrog. 1: We can't find anybody who can tell us that you were in Tucson.

Interrog. 2: But we found four people that say you were in Phoenix at a church.

Suspect: I wasn't in a church.

Interrog. 1: And those people said that you were in a Blazer and that you went inside the church and that you know what happened inside there and that you came out and left there after (Unintelligible). Now Victor, ah Leo, you know that that's right. I mean you're shakin' your head trying to convince yourself, you know, but you cannot erase what happened. You cannot erase what happened. You were there.

Suspect: No I wasn't.

Interrog. 1: You went there (unintelligible).

Suspect: I was not there!

Interrog. 1: You know who you were with.

Suspect: No I don't.

Interrog. 1: You know who the people were that were there and you know what you know about what happened.

Suspect: I don't know anything.

Interrog. 1: Sooner or later, you know, you've got to say it.

124. Interrogation Transcript of Livingston, *supra* note 113, at 3-4.

125. See *supra* note 36 and accompanying text.

Suspect: I, I wasn't there, I was not there.

Interrog. 2: We have four witnesses. We've got absolutely no one in Tucson, no one in the world that can say you were in Tucson on that night. We've got physical evidence from the Bronco's, from the church, and you're tellin' us you weren't there.

Suspect: I wasn't there!

Interrog. 1: You want to go down for these killings, I mean, you know, and just take what everybody says that you're involvement was, I mean that's what we're talking about.

Interrog. 2: The fingers pointed at you right now, Leo. Not anyone else, but you.

Suspect: I, I don't know nothin' about that cause I was not here in Phoenix at that time.

Interrog. 2: Well you're gonna take the rap for it. All yourself, its gonna be all on your shoulders because everyone else is saying you, Leo, they're not saying themselves. Hell no, they're not saying themselves. Sure they're saying they were there. But you were the one. And that's the way it's gonna come down, plain and simple, plain and simple.

Interrog. 1: Leo, we're talkin about murder here.¹²⁶

The detectives returned to the confessing co-perpetrators several times before they elicited a false confession. In fact, the only supposed witness the police actually had was a psychiatric patient who could not correctly relate the major facts of the crime:

Interrogator: Leo, there were too many people there, you've got too many people (unintelligible) eight guys now. You can't expect 8 guys to keep a secret forever. No way. And, it has already been opened up, it's over. By the time we get done with this investigation, we'll have contacted a number of more people who these people have told, and all will give an account of what happened that night.

So (unintelligible) we are going to have a bunch of guys who confessed to the crime, who indicated you were there, picked your photo out of the photo-lineup. And then we're going to have all the people that they talked to giving out the same information and point their finger at you and say he was there also. You are going to be standing there alone, denying it, and it is only going to hurt you. Because, when you walk out this door, you are going to make a big mistake.¹²⁷

126. Interrogation Transcript of Bruce, *supra* note 54, Tape 2, at 34-35.

127. *Id.* Tape 3, at 12.

The same team of investigators told another innocent Temple murder suspect that others had named him:

Interrog. 1: Are all these people lying?

Suspect: I guess. Yes.

Interrog. 1: They're all saying the same lie.

Suspect: Yes, I don't know, I don't know what's going on.

Interrog. 1: What you're saying, what you're saying is that all these people got together, that they concocted their same story to cause you problems?

Suspect: I don't know why they picked me out. Why they did it, I don't know.

Interrog. 1: Did you piss someone off?

Suspect: No.

Interrog. 1: So why, why did they do it?

Suspect: I don't know.

Interrog. 1: Well, there's only one good answer to that. To verify it. That it did happen.

Suspect: Well maybe they are lying and I don't know why they did it.

Interrog. 1: But if they're lying Mark, what they're going to do is tell us a bunch of different little stories (unintelligible) not the same story.

Suspect: (Unintelligible) the same story. I, I can't remember what went on.

Interrog. 1: Well, no, you do remember. It's just that, that you don't want to remember.

Suspect: You think I do, I don't want to be here. I don't know why you don't believe me, that I don't want to be here.

Interrog. 1: Well, how can I believe you

Interrog. 2: The reason you don't want to be here is you're here because we know you what you did, but what you knew about it

Interrog. 1: How, how can we believe what you're saying if it's totally contradictory of what we're told by other people?

Interrog. 2: One more person, just one more person, hey Pat. We have (unintelligible). I mean this is, this is a (unintelligible) just, just one more person.

Suspect: I know, I'm, I'm stuck, I'm, I'm

Interrog. 2: This is going to be getting out of hand. You're going to be the last one and they're going to lay it all on you.¹²⁸

128. Interrogation Transcript of Nunez, *supra* note 54, Tape 4, at 18-19.

v. Technical and Scientific Evidence

(a) *Introduction*

Suspects can easily counter all types of witness observations that supposedly prove their guilt. They can counter demeanor evidence by rejecting the investigator's interpretation, eyewitness evidence by claiming it is in error, and co-perpetrators' evidence by asserting it is a lie. Evidence ploys that are based on well known technical or modern scientific procedures are likely to be more influential because the mere mention of a special technology—whether it is well-known or new—carries the prestige and incomprehensibility of modern science. Both the guilty and the innocent have a harder time explaining away evidence that is allegedly derived from scientific technologies.

In the investigation of infant deaths, false and erroneous reports of medical evidence can be so devastating that they can lead a grieving parent to misclassify a child's natural or an accidental death as a murder, and result in a false confession. If an investigator prematurely accuses a parent of a recently deceased infant by claiming supposedly conclusive medical evidence, the result can be disastrous.

Sometimes a false medical evidence tactic is directed at a grieving parent who has literally been taken directly from the emergency room where his or her child has been pronounced dead. By the time a careful evaluation of the medical evidence reveals that the death was not a crime, the parent may have already falsely confessed. "Shaken baby" cases are a particularly difficult and dangerous problem since even when the report of a significant head trauma is accurate. Dating the age of the injury is difficult and, therefore, the mere fact that the suspect was with the infant during the period immediately prior to the discovery of obvious symptoms of serious injury does not guarantee that he is the perpetrator. The infant son of the partner of a Los Angeles woman lost consciousness while she was the only adult in the apartment she shared with her associate. Medical evidence later revealed that the child's fatal head injury had happened due to a fall about a week earlier. Despite two visits to hospitals because of the child's listlessness in the intervening week, his skull fracture was not discovered until after his death. Although CAT scans done before his death showed the fracture, no one at the hospital had taken the trouble to examine the films, and so his condition was missed.

The suspect was brought in for a polygraph examination by a civilian technician. The polygraph examination, however, was nothing more than an excuse to put the suspect in a position to be interrogated by an investigator who used the machine as part of his act. During the primitive and heavy-handed interrogation, the technician repeatedly threatened and browbeat the woman. Initially she maintained that she never mistreated the child in any way. She also repeatedly expressed her fear of being sent to jail and losing custody of her three children.

The polygrapher was not subtle about coercing the woman. As soon as the polygraph examination was concluded he departed for a brief time, reappeared, announced that she had failed, and went to work:

Polygrapher: It's not a question anymore, I'm not asking you. I

know what happened, Okay. But what I'm trying to find out, is this something that happened that was premeditated, then a cold blooded thing or was it some accident.¹²⁹

Over the course of the interrogation the polygrapher pressed the woman to agree that she had done something to the child that caused his death and that whatever she had done it was an accident. He stressed the accident explanation forty times during an interrogation that took less than two hours. His repeated assurances that he was sure that the death was not what it might seem, a premeditated murder, set up two alternatives for the suspect: one leading to a high level charge and the other to a far less serious punishment.

The woman was adamant that she had not shaken, hit, or mistreated the infant. When she realized that she was going to jail, the polygrapher suggested that if she simply cooperated, she would receive the non-jail alternative that he set up early on:

Polygrapher: I'm here because Billy Jack needs your help because his doctors need your help, so they know what the correct treatment is. Maybe you need to go to parenting classes.¹³⁰

Although the polygrapher emphasized a non-jail alternative if the death was an accident, the woman continued to express her fear of jail and losing her children:

Suspect: So I'm going to jail for something I didn't do?
 Polygrapher: No, it doesn't (unclear) into that. (unclear) is one thing, how did this accident happen. . . . I'm asking you to learn from this so it doesn't happen again. . . . Now I'm here to accept the reason. I'm here, I don't mind talking to the detective, calling back downstairs, say hey look at this wasn't planned out, there was no plan here, this is how the accident happened.¹³¹

Later, the suspect again expressed her fear of jail and the polygrapher again eased her mind:

Suspect: I don't want to go to jail.
 Polygrapher: Nobody does, we're not talking about that, all I'm saying is if this was an accident, I need to know, if it's something simple like losing your patience.¹³²

Eventually the woman acquiesced and started making up stories that fit the polygrapher's suggestion of an accident. She was arrested. It was not until months later that the CAT scan was read and the correct cause of the child's

129. Interrogation Transcript of Sonja Stapleton, Los Angeles, Cal., Police Dep't 13 (Oct. 12, 1994).

130. *Id.* at 24.

131. *Id.* at 25.

132. *Id.* at 32.

death was determined.

In another southern California investigation, a father was pressured to admit that he had shaken his baby. San Diego, California, interrogators told him about the mistaken medical evidence:

Interrogator: There's medical evidence and what you're telling us does not match the medical evidence. The medical evidence only happens one way and one way only. You shook your baby whether you meant to or not very, very hard. Very hard. She can't get bloodshot eyes and hemorrhaging in her eyes from just doing what you just showed us. It's a violent shaking whether you lost control, lost your temper, whatever reason. And you just can't sit here and tell us that didn't happen.

These doctors are gonna testify it's a violent shaking. You know what retinas are in the eyes? They're quite possibly detached. That means pulled away. That means it's a violent shaking. And we don't think you did that on purpose. But we know you did it and you did it quite hard. So you need to tell us how you did it. Your baby is now dead. And this is very serious. What you told us today needs to be the truth. We don't think you meant to do it. Now you're doing real good Jason, but you got to tell us the truth. Okay? You got to tell us the truth.¹³³

(b) *Marks Made by Fingers, Mouths, and Shoes*

While an investigator will sometimes declare that he possesses scientific evidence, it is safer to suggest that he may have it and ask the suspect to respond to this possibility—a ploy that permits the investigator to save face should the suspect know that he could not possibly have left behind any evidence. For example, a Richmond, California, investigator claimed to possess a suspect's fingerprints but obviously erred and then attempted to recover in mid-ploy.

Interrogator: Okay. Now my concern is that her fingerprints are going to come up on your gun for some unknown reason, okay? Along the same lines, they fingerprinted the condoms you have, okay? They fingerprinted the condoms, you can fingerprint latex.

Suspect: We didn't have a condom, though.

Interrogator: Okay, now just listen. They fingerprinted those condoms, okay? What I want to know, number one, is are we going to find her fingerprints on your gun?¹³⁴

133. Interrogation Transcript of Albritton, *supra* note 99, at 76.

134. Interrogation Transcript of DePuy, *supra* note 108, at 28.

In San Diego, California, an investigator first made certain that a false fingerprint claim would be possible:

Interrogator: Did you ever have your fingerprints taken?

Suspect: Yeah. I got, I got arrested for a trespassing on (inaudible) and when they took me then I got fingerprinted.

Interrogator: What if I told you your fingerprints are all over that knife? And what if I told you that I think that you stabbed her too? Be up front with me Eric. You've been up front with me so far. Did you stab her too?¹³⁵

In some cases, an investigator may lie and claim that he has access to new, high-technology scientific instruments with which to extract fingerprints that will conclusively establish the suspect's guilt. For example, this ploy may be used when it might otherwise seem unlikely or impossible that police could have obtained fingerprints from the crime scene such as when a body has been dumped into the surf at a beach. A Pasco County, Florida, interrogator told a suspect:

Interrogator: Jeff, I want to explain somethin' to you, what we got down there. We found your wife, we got tire tracks. You ever heard of a laser. Know the kind that you shoot on Star Wars

Suspect: Yeah, I know.

Interrogator: A laser, law enforcement have had a laser, I guess for what, about three or four years, we've used it. We can actually get fingerprints off bodies. We actually can. It's, it's been proven. This is what's made this job a little easier. Uh, a lot of things go on partner, we're gonna be talkin' to your babysitter. We'll also be talkin' to your five year old. Listen to me. You're wife didn't leave with nobody last night. We're gonna find that out.¹³⁶

San Diego, California detectives told a suspect of a non-existent technology—the "Cobalt Blue" test—that lifted his fingerprints from a corpse.

Interrog. 1: There's only, the only thing we have left to do and we have done it because we send them off to a special lab, okay is, is, she was strangled. What we do is we put, what we do is we dust, we dust her neck with ah.

Interrog. 2: Cobalt blue.

Interrog. 1: Cobalt blue. Okay? And what we do is when we put that, when we go ahead and dust it, we have to photograph at the same time that we're dusting because when you apply pressure on somebody, on somebody, it will leave, it will leave an imprint. It will leave an imprint.

135. Interrogation Transcript of Jerrod, *supra* note 96, at 18.

136. Interrogation Transcript of Crouch, *supra* note 92, at 6.

Now, these, we took your prints.

Suspect: (Unintelligible).

Interrog. 1: Okay yeah we did take your prints at the time that the detectives were here. Apparently they did. It's my understanding because.

Suspect: A method I haven't seen before.

Interrog. 1: Yea well they do it, yeah they do it a little bit different here in Sacramento than we do. We do the basic, you know, just the basic ah fingerprints, palms. You know. We have sent the file and your prints over to the FBI lab okay? They're gonna go ahead and, and see what they get on it. There are prints on her. Okay I'm gonna tell you right now there are prints on there. For any reason, are your prints gonna be found on her neck?¹³⁷

A Solano County, California, sheriff's detective told a suspect about a Ninhydrin Gas Test that does exist and can under some circumstances lift fingerprints from clothing. The test's ability to retrieve the prints was taken as certain:

Interrogator: Okay, so let me ask you this. We sent his clothing off to the Department of Justice Criminalistics Laboratory. There's a new technique that they use, where, you might even have heard of it. It's called a Ninhydrin Gas and they can get fingerprints off of clothing and off anything now. Paper, currency, and they put it in the tank and they let the fumes go with it and everything shows up. Are your fingerprints from your hands, either one hand, gonna show up on his back as if you pushed him? Think close cause this is important. On his clothing. On his outer clothing that he was wearing.¹³⁸

Child sexual assault crimes that involve touching or even a small degree of penetration are unlikely to leave physical evidence. A creative investigator can easily maneuver around the problem. For example, an Anchorage, Alaska, interrogator told a suspect:

Interrogator: Well is there any, any reason why we'll find anything on her—on her clothes or . . .

Suspect: Oh no go ahead.

Interrogator: Hands or, or uh . . .

Suspect: Go ahead.

Interrogator: Uh, her face or.

Suspect: No.

137. Interrogation Transcript of James Nimblett, San Diego, Cal., Police Dep't 14 (July 30, 1990).

138. Interrogation Transcript of Michael Johnson, Solano County, Cal., Sheriff's Dep't 45 (Apr. 26-27, 1992).

Interrogator: In her hair.

Suspect: No go ahead. Go ahead.

Interrogator: Okay and if we do find that where, where does it come from, where did it come from?

Suspect: It wasn't well I'll tell you what you won't find any on her because it's — there's nothing there, you know just.

Interrogator: Ok. Robert have you heard about uh, DNA?

Suspect: DNA?

Interrogator: Um hum.

Suspect: I know uh. What do you mean?

Interrogator: Uh, DNA, it's a, it's a sys, it's a-a-a scientific method of uh, identifying people through body fluids such as . . .

Suspect: Um hum.

Interrogator: Blood and semen.

Suspect: Oh yeah, yeah, okay yeah.

Interrogator: And all of that uh, and it's, and it's very specific.

Suspect: Yeah.

Interrogator: It's, it's as specific as a . . .

Suspect: I know they can tell a person (inaudible) semen (inaudible) what it is you know and.

Interrogator: Uh huh, um hum, and, and it's as specific as a fingerprint.

Suspect: Yep.

Interrogator: Okay.

Suspect: I've heard about that yeah.

Interrogator: Have you, did, and let me ask you this have you ever uh, the skin cells, the skin cells right off your hand, have you ever changed like the, the sheets on a bed or anything like that. It looks like dust comes off of 'em uh, what those are is, it's not really dust it's skin cells even. And when we, we shu, shuffle this off as you know, whatever every where we are all day long.

Suspect: Um hum.

Interrogator: There's, we can use these in DNA also.

Suspect: Um hum.

Interrogator: Did you know that? Okay. Is there any reason why we're gonna find any of your skin cells inside of any of Chelsea's clothes?¹³⁹

Sometimes investigators select a suspect for interrogation because they are

139. Interrogation Transcript of Robert Lindell, Anchorage, Alaska, Police Dep't 11-12 (May 6, 1994).

mislead by erroneous forensic evidence. Flagstaff, Arizona, investigators relied on a doubly flawed forensic report when they told an innocent man that his dental impression matched what was erroneously believed to be a bite wound found on the murder victim:¹⁴⁰

Suspect: I've had that fear. But this is all really weird. I can't believe this is happening.

Interrogator: (Inaudible) and . . .

Suspect: Yeah, and I appreciate it.

Interrogator: You know . . .

Suspect: I.

Interrogator: . . . bite marks are just like fingerprints.

Suspect: Pardon?

Interrogator: Bite marks are just like fingerprints.¹⁴¹

Tucson, Arizona, police simply invented the existence of shoeprints that supposedly matched a pair of a suspect's shoes:

Interrogator: The, the reason I ask you, okay, is that comparing some of your shoeprints, with the shoeprints in the wash, when we went out there Sunday.

Suspect: Yeah.

Interrogator: They look like your shoeprints. Okay? And that's why I need you to, to remember. Okay? Because I've got this bad feeling that you go down there and you passed out in the wash and, and you don't know what's going on.¹⁴²

(c) *DNA Evidence*

DNA testing has in many respects transformed the process of criminal investigation in little more than a decade. So much attention has been given to the procedure that most people, even those who are generally poorly informed about scientific advances, have some awareness of its reputation.

Orange County, California, police told a suspect that DNA in saliva found in a bite wound on the victim's body irrevocably linked her to the crime:

Interrogator: How did your saliva get on her arm then? How did your mouth get on her arm?

Suspect: I, I had no idea.

Translator: I don't know.

Interrogator: This is your mouth okay? You explained to us how it got on her arm?

140. The supposed bite wound was actually a knife wound. The suspect was shocked by these test results. *See id.*

141. Interrogation Transcript of Abney, *supra* note 55, Interview 3, Video 2, at 45.

142. Interrogation Transcript of Jamie Givens, Tucson, Ariz., Police Dep't 12 (Nov. 16, 1995).

Translator: Then if it was not yours, you, you can explain that how did your saliva got on, got on, got on to that dead body's arm?

Suspect: I, I, I had no idea. I had no idea. Could it be some error made on your test?

Translator: No error was made. One hundred percent accurate.¹⁴³

Knowing that a suspect had once been treated at a local hospital, San Mateo County, California, sheriffs used an elaborate false evidence ploy:

Interrogator: When you're taken into an emergency room when you're a gunshot victim or you've got any trauma where it involves the cardiovascular system, in other words when you're bleeding, what they do is take blood samples, okay, and they use those blood samples for type and cross matching. They also keep a blood sample on hand in case the patient comes back in or needs any further blood transfusions. And what they do a test they call it an examination. They call it type and cross matching.

Okay? And what that is they, they can go through and tell what blood type you are, and then they break it down as far as clotting factors. Well there are a number of other tests that they can do to the blood, and that's why they preserve the sample in case anything goes wrong. They also take urine samples. When they give you that (unintelligible) bag, you know the bag with the, uh, urine to, which in this case they did do for you. And what they do is they go through and they check your urine. They check to see if there are any, uh, blood cells in your urine. They also check it for a bunch of other types of tests.

Uh, the reason I'm mentioning this is because the incident that we're talking about that occurred on or about the, uh, Valentine's Day in 1992. And when those fluids were examined, they positively matched the, uh, samples that were taken from Stanford Medical Center of you. Okay? So what I'd like to do, Stephen, is I think there's an explanation for everything. And, and we try to give everybody an opportunity to tell their side of the story. So do you or don't you remember something that occurred on or about Valentine's Day this year?¹⁴⁴

The ploy was developed further by introducing DNA:

Interrogator: Let's go back to what I first told you. Okay? You had

143. Interrogation Transcript of Peng, *supra* note 116, at 73.

144. Interrogation Transcript of Stephen Lamont Williams, San Mateo County, Cal., Sheriff's Detective Bureau Office 5-6 (July 6, 1992).

your surgery before, they took blood samples.

Suspect: Um-hum.

Interrogator: Stanford Medical Center.

Suspect: Um-Hum.

Interrogator: They retained one of the blood samples that they retained in the blood bank, and they also do what they call a printout, and where they print it out, the type and cross-matching of the blood to show what type of the blood you have. Subsequent to that, we've had some tests done on the sample of blood that they had. And those tests included testing for DNA. Do you know what DNA is? When they break your blood down.

Suspect: Drugs and Alcohol?

Interrogator: No, no, no. When they break, when they break your blood down to the cells, individual cell, each individual cell has a little code inside it. And for each individual, those codes are different. Okay? Now we had that examined and then we also had some fluids that were found at the scene of the crime examined. And so

Suspect: Hey, hold it. I was with somebody and they took a (unintelligible), and now I'm in trouble?

Interrogator: Well, let's, put it this way. I'm sure there's some logical explanation, but we just need some help here. What they're saying is that the examination of the blood that they had taken over at Stanford Medical Center from you in the examination of the fluids at the crime scene, they break it down to the genetic factor, the DNA, and they say it's you. No ifs, ands or buts.¹⁴⁵

False evidence ploys based on scientific procedures leave a suspect with little opportunity for a counter. Investigators represent positive results of fingerprint, hair, or DNA tests as error-free and therefore unimpeachable: "[T]he DNA doesn't lie. That's the only thing that doesn't lie,"¹⁴⁶ or "This thing is a scientific test. These things won't lie."¹⁴⁷

Investigators search for weaknesses in a suspect's denials, seek to exploit them and move the suspect towards confession. If the evidence ploy does not prompt a suspect to reverse his denials, the investigator may suggest that the evidence contradicts at least part of the suspect's previous account. If the suspect changes any part of his account, even if it is irrelevant to the issue of guilt, an interrogator will take this as evidence that the suspect is lying and as informal confirmation of his guilt.

Sometimes even innocent persons will change part of their account to

145. *Id.* at 22-23.

146. *Id.* at 53.

147. Interrogation Transcript of Robert Smith, Richmond, Cal., Police Dep't 17 (Mar. 26, 1991).

lessen the pressure they feel to comply. An innocent suspect who makes the mistake of complying and departing from his initial account on even one minor point makes a major mistake. Making the change will increase the investigator's confidence in his guess about the suspect's guilt; he will read the change as a sign that resistance is weakening and therefore is likely to become more determined to intensify his attack.¹⁴⁸

A San Diego, California, detective told a murder suspect that his laboratory confirmed a DNA match between the suspect and semen found in the victim's body. While the interrogator hoped that the tactic would yield a confession, he also suggested that the suspect might admit having had sex with the victim the evening before her death. If the suspect had agreed, the investigator would have interpreted this change as demonstrating the suspect's guilt.

Interrogator: Okay they took head hair from you, they took ah I don't know all the other physical evidence that ah that they did on Monday. Ah I did the ah, the autopsy on the young lady from Balboa Park. I went to the coroners and we took swabs from her. We took oral, we took vaginal swabs. We took ah, we combed her public ah area. Ah we took head hair. We, we did it all. We went ahead and sent you, sent your blood to our lab as soon as, as soon as detectives got there. And we matched them up with the semen that, that, from the young lady. They matched, so we do have a comparison here.

Suspect: Uh ha.

Interrogator: And I'm gonna be very up front with you on that. You did have sex with her whether or not it was the night before or that morning. Again, things aren't right and it may be this gentleman that's down in Stockton right now may be off but the bottom line is you did have sex with her. And that's what we're here basically to find out. Ah they do match.¹⁴⁹

(d) *Off-The-Shelf Technology*

One way to strengthen an investigator's argument that the suspect has been found out is to claim the existence of a new technology that links the guilty party to the crime. A clever investigator can invent a technology that can link any suspect to any crime and even to any specific act that the suspect declines to admit. Some investigators are so creative that they seem able to immediately invent whatever technology is necessary, as a Sacramento, California, investigator demonstrated:

Suspect: I can't (unintelligible) had no control over how she got, ah, what whatever, you know what I'm saying, she

148. Interview of Jerry Lee Louis by Toby Hockett in Arcadia, Fla. (July 31, 1992); *see also* Interview of Jessie Misskelley by Richard Ofshe in West Memphis, Ark. (Dec. 15, 1993).

149. Interrogation Transcript of Nimblett, *supra* note 137, at 7.

could have got bruised coming out of the window.

Interrogator: He didn't tell you about the reticulated demographic, ah subcutaneous photos. He didn't tell you about that?

Suspect: What is that?

Interrogator: Okay. When a blunt instrument impacts a soft body tissue. . . . There is a chemical, okay, that reacts physically to damaged enzymes and also subdural contacts with metal surfaces. . . . Okay, let's say you're wearing a T-Shirt and someone walks up to you and puts a knife up against you, with this chemical that we use we can take trace elements that are present in, in the metallurgy of a firearm. And it reacts and it almost looks like a tattoo. So that we can take that knife or we can take that gun and we can put it against that reaction, that chemical reaction and you see ah, trace the object that was against the person. Okay.¹⁵⁰

When inventing new technologies, an investigator is constrained only by the limits of his imagination and his ability to lie convincingly. For example, Richmond, California, investigators not only invented the "Neutron Proton Negligence Intelligence Test," but conducted it on young man and reported that it conclusively demonstrated that he had fired the gun that killed two people.

Interrogator: What this is, it's a chemical test Ok. It's good for about a week. It's the latest thing. It's high tech. What happens is that those two papers we put on your hands and the chemicals, it would react with the paper. Take it down to the lab guy, he runs some tests on it. It's a presumptive test. That's all it is.

Suspect: What's a presumptive?

Interrogator: Presumptive? That means it's just the first step OK. It tells me to take Test 2. Test 2, I stick your finger, your trigger finger is usually the best one cause that's usually the one people use, stick it in a little, it's like a plastic thing, close it up and there's little chemical things in there and they break 'em up. Ok. And the molecules on your fingers reacts to the neutrons and protons and all of the other good stuff which I don't really understand, I just know how to do it, a, I stick your finger in there and put it in there and I seal it up and then I pop these three little vials.¹⁵¹

Interrogator: This is the newest thing. The only way to get, if you handled the gun when it's shot. Just give me your trigger finger. Just stick in here as far as you can. Ok, for a

150. Interrogation Transcript of McCoy, *supra* note 89, at 114-15.

151. Interrogation Transcript of Smith, *supra* note 147, at 11-12.

second. Really get a good reading on it, so that there is no mistakes. Do you have a piece of white paper that we can stick in front of this Darryl? So he can, a note pad will do. These chemicals are so strong, I don't wanna, I'll bust it with these. Now what it should do if you haven't fired anything, there's not going to be any color. Ok. But if there are particles of neutron and proton and all that gunshot residue stuff, then it'll.

Suspect: Wait! Would them gloves, don't them plastic gloves I had on.

Interrogator: Were they latex or rubber?

Suspect: They are ah, I don't know. I want you to look at them and tell me because while I put them on.

Interrogator: You have some gloves? You have some gloves? Are they like surgical gloves?

Suspect: Yea, cause when I take them off, they got powder shit on my, hands.

Interrogator: That's a different kind of powder. However, if you use the latex gloves, latex aren't good. Ah, if you use.

Suspect: But I didn't.

Interrogator: When you are using those kind of gloves even for cooking your dope, you're taking a real serious health risk. Cause those gloves, everything goes right through 'em. That's why we don't don't even use them. Let's just, let's see. I mean maybe there's nothing here. But if it's clear, you're in the clear as far as shooting. If there are colors especially pink. If it shows blue first then pink that means you fired a gun.

Suspect: I didn't fire no gun.

Interrogator: Watch out when I smash it cause sometimes these break and the chemicals fly out. Huh. You didn't fire a gun but your hand did.

Suspect: My hand didn't fire no gun, officer.

Interrogator: Well, why is that pink man?

Suspect: Man, I didn't fire no gun. That's real.

Interrogator: And that's pink Robert.

Suspect: Man, I didn't fire no gun, man that's real.

Interrogator: You have a lab envelope so I can retain this as evidence.

Suspect: Do you have a regular crime lab one?

Interrogator: Yea, there we go.

Suspect: Man, I didn't fire that gun Sgt. Browne. I'm serious, man.

Interrogator: Well, so am I Robert. This thing is a scientific test.

These things won't lie. That's why we use them. And as I was saying before, I have a real hard time believing, ah, now I have a hard time believing that you didn't fire that gun out there at least once.

Suspect: Man, I didn't fire that gun, not even once. Man, I swear, man, I swear I didn't man. Oh no, I didn't shoot that gun man. If I shot that gun, I would have broke down and told you man. I didn't shoot that gun.

Interrogator: Robert listen. This is scientific.

Suspect: Man, ya'll. Ya'll. Ya'll. Ya'll framing me with this or something cause I ain't touched that gun. Man, I swear I didn't shoot. I touched it but I didn't shoot that gun.¹⁵²

Interrogator: You didn't fire that gun one time? Up in the air? Into a wall? Into the ground?

Suspect: Man, I swear I didn't shoot that gun. To my solid memory man, I didn't shoot that gun.

Interrogator: Well, take a second and research your memory because the Neutron Proton Negligence Intelligence Test tells me differently. You sure you didn't test fire it or something. You had to shoot it somehow.

Suspect: I might have shot it at my brother's house or something.

Interrogator: You might have?

Suspect: I'm telling you the truth.¹⁵³

Even so-called evidence as nonsensical as the Neutron-Proton Test can influence a naive suspect or someone easily intimidated. The target of the Neutron-Proton ploy described his reactions to the test results.

Suspect: I felt relieved. OK, well I said, now they fixing to know who, who really did it. Then when you talking about, he came and said it was positive, then I said, Jesus Christ! Then I said, man I know you didn't say positive. But then you tell me that test and everything. Well this test will show that I didn't do it and then when that test didn't, man I then, that's when I said fuck that, it's time to start coming with the truth. Man, look man, I know whatever I say can't hold up to that fucking thing man, cause that's ya'll thing. Ya'll invented that thing to catch killers and man, only thing I say is man, I don't know.¹⁵⁴

152. *Id.* at 15-17.

153. *Id.* at 32.

154. *Id.* at 41.

vi. Lie Detector Ploys

One of the most common and influential evidence ploys involves lie detecting machines—whether polygraph devices or voice stress testers. While the nominal purpose of a lie detection test is to diagnose the subject as truthful or deceptive, the primary function of any lie detector test administered during an interrogation is to induce confession.¹⁵⁵ By creating the impression that the procedure is infallible and by playing on a suspect's fear of arrest, the lie detection examination can be a powerful pseudoscientific tool of persuasion and manipulation. The passages below illustrate how investigators can use such examinations to lead a suspect to believe that his situation is hopeless.

A San Diego, California, investigator introduced the idea of taking a lie detector test by saying that he wanted to eliminate a suspect from the investigation. The investigator knew that he would be free to accuse the suspect regardless of the test results and could feed back a false test result if necessary.

Interrogator: Okay. Let me ask you another question. Would you be willing to take a polygraph test today?

Suspect: If it's part, if it has to be done I would.

Interrogator: Okay. Let me explain the reason I asked that. I really want to believe you. You know, I really do. I, I respect a man like yourself. But there's always that question and you know as well as I do, and you obviously are a responsible person, and you're proud of what you accomplished. And I think that's to be respected.

Suspect: Right.

Interrogator: Well, Dan and I are proud of what we do and we try and do the best job we can. And we try and cover all the bases. And with you in particular, we want to be real honest with you, we want to get your interview done and over with so we don't have to bother you again, so you can go about living your life and we can go about doing what we need to do. One of the things that would help us, and you, is if you would be willing to take a polygraph test.¹⁵⁶

An Anchorage, Alaska, investigator used a similar ploy:

Interrogator: Well you know like the polygraph, if you took that thing and passed it then you could tell everybody pointin' the finger at you that you passed it.¹⁵⁷

Earlier, the investigator had stressed the downside of not taking the examination:

155. See DAVID THORESON LYKKEN, *A TREMOR IN THE BLOOD: USES AND ABUSES OF THE LIE DETECTOR* (1981).

156. Interrogation Transcript of Nance, *supra* note 95, at 4-5.

157. Interrogation Transcript of Susan Johnson, Anchorage, Alaska, Police Dep't 13 (Sept. 30, 1993).

Interrogator: Charlie took and passed the polygraph. See he's not afraid to take the polygraph. You've been around long enough to know that there is no way you can go in there and pass that polygraph if you did this to Jim. And that's why you keep stallin', my, my lawyer don't want me to, my sister don't want me to, I need, I'm sleepy, I'm tired, I need to sober up, Susan I've heard all those excuses before from different people. Now I'm not even gonna ask you to take it.

Suspect: Whatever, whatever.

Interrogator: Any more because it's obvious you don't want to, OK? And I told you the only reason we wanted you to take it was to give you an opportunity to show us that you're telling the truth. But I didn't want you to go in there because I don't think you'd pass it. I know you wouldn't pass it.¹⁵⁸

If a suspect questions the validity of the lie detector, the investigator will claim that the device is highly reliable, if not infallible. He may suggest or infer that only a guilty suspect would question or refuse to take the examination and that taking the test will allow him to prove his innocence. A detective in Sacramento, California, put it this way:

Interrogator: Are you saying that you did not ever touch her in her breast area, vaginal area?

Suspect: Yes, I'm saying that.

Interrogator: Okay, would you be willing to take a lie detector test to prove that?

Suspect: A lie detector test?

Interrogator: Uh huh.

Suspect: Umm, I don't know, you know, what good are lie detectors?

Interrogator: It gives me an indication.

Suspect: They don't work.

Interrogator: Oh, that's not true. If they didn't work, they wouldn't use them.

Suspect: Why aren't they legal then?

Interrogator: They're legal, they're just not allowed to be brought into court.

Suspect: Well that's what I mean about legal. Why aren't they legal being in court?

Interrogator: Because there are a lot of questions there's.

158. Interrogation Transcript of Susan Johnson, Anchorage, Alaska, Police Dep't 4-5 (Sept. 28, 1993).

Suspect: That's what I'm saying you know, that's where I'm, my first thought was, I mean you know it doesn't prove nothing.

Interrogator: Yeah, it does prove something.

Suspect: Then why isn't it legal in court?

Interrogator: Because there can be misrepresentations on those parts.

Suspect: Right now, right now I'm getting this claustrophobic feeling right now because of the fact that I'm suppose to be innocent until proven guilty, yet I've got to prove my innocence?

Interrogator: Well, in this situation it's important, that's why I'm giving you the opportunity to show that.¹⁵⁹

Some investigators tell suspects that the polygraph never makes mistakes and that it can discern their inner thoughts or, as a Barrow, Alaska, investigator claimed, "The thing reads your mind."¹⁶⁰ With this sort of build up, the practice of falsifying test results and reporting to a suspect that he failed the test convinces some innocent persons that they have no hope of escaping arrest, while for others the tactic can undermine their confidence in their innocence. There is no way for a suspect to rule out the investigator's claim that his unconscious mind is revealing his guilt, even if he has no awareness of committing the crime.

An investigator who uses a false lie detector strategy may believe that the suspect who claims no knowledge of the crime is merely lying. However, for an innocent who credits the lie detector with the impressive power of plumbing the unconscious, the device reveals a "truth" that becomes increasingly difficult to deny. For example, Connecticut State Police used this approach with an innocent teenage male who had no awareness of having killed his mother. When the investigator later told him that he failed the test, he came to believe that he was the murderer.

Interrogator: All right. That's why I have this. That reads your brain for me.

Suspect: Does that actually read my brain?

Interrogator: Oh, definitely, definitely. And if you've told me the truth this is what your brain is going to tell me.

Suspect: Mm-hm.

Interrogator: If you.

Suspect: Will this stand up to protect me?

Interrogator: Right, right.

Suspect: Good. That's the reason I came up to take it, you know, for the protection of having.

Interrogator: Let me put it this way, Pete. If you didn't hurt your

159. Interrogation Transcript of Gonsalves, *supra* note 84, at 53-55.

160. Interrogation Transcript of Adams, *supra* note 86, at 17.

mother last night, I'll be only too happy to say so. All right? If you did, I'll have to say that. All right?

Suspect: Right.¹⁶¹

A Sacramento County, California, sheriff's detective worked hard to convince a suspect that he was caught because he supposedly failed his polygraph and this established his guilt without question:

Interrogator: I uh, I worked your charts. Why don't you turn around here so we can talk. Worked your charts. In fact, I did em' a couple of times.

Suspect: Uh-huh.

Interrogator: And um, 'member I, how I told ya about uh, how uh, reliable they are?

Suspect: Uh-huh.

Interrogator: Based on the type of stuff I do? They are very reliable.

Suspect: Yes, sir.

Interrogator: What uh, what I did was, I did three charts on ya, and let's say we have a zero.

Suspect: Uh-huh.

Interrogator: And we have a minus nine over here to show that that's where I would have to go to show that you were deceptive. Excuse me, minus thirteen I really have to show, and it's plus nine. So I don't have to go as far to show you're telling the truth as I have to go to show you're telling, telling a lie.

Suspect: Uh-huh.

Interrogator: Okay. And this is in regards to the shooting incident.

Suspect: Uh-huh.

Interrogator: Okay? Nothing else. I didn't uh, didn't uh, worry about anything else really.

Suspect: Yes, sir.

Interrogator: Where I ended up was over here at minus twenty-nine, which means absolutely. I mean I have, I have absolutely no uh, no qualms about it whatsoever as uh, you, you were being deceptive with me, and I can understand why. I really can. Uh, you know, as I said I have no uh, personal thing in this and I, you know, I, I, I really tend to think that you have been an alright guy and somethin' happened here that uh, on that particular day that, somethin's screwed up somewhere. And I went through the entire report and what you're saying doesn't jive because of the many witnesses that saw what was going on.¹⁶²

161. Interrogation Transcript of Reilly, *supra* note 75, at 37-38.

162. Interrogation Transcript of Wright, Sacramento, Cal., Sheriff's Dep't 1-2 (Aug. 20,

Detectives in Clearwater, Florida, relied on a similar ploy but had to order the polygraph operator to make a false report to the innocent suspect. When he did, he told the suspect that his test result was the worst the operator had seen in twenty-five years.

Interrog. 1: The test says you're a liar.

Interrog. 2: Did you tell him about the other part? I didn't tell him about the part why he's afraid to tell us, John. Do you know what it is? Do you know why, John?

Interrog. 1: I know why. He's embarrassed.

Interrog. 2: He's embarrassed to tell us that.

Interrog. 1: That test says you're a liar. No ifs, ands or buts. You're lying. The test even says you tried to hold your breath to readjust your breathing through the thing. But you know what blew it off the screen. He's going to show you. Your heart. Your heart pumped those needles right off the screen. He's never seen one that high. This guy's been doing that for as long as I'm here, I think.

Interrog. 2: Yea, the guy's an expert at it. He's got.

Interrog. 1: You know why your heart. Cause you were a caring guy. A guy thirteen months on the wagon. A guy who was trying not to kid himself. You're a fucking liar. You're lying to us and we're gonna prove you're wrong.¹⁶³

During the interrogation of a false confessor in an Arcadia, Florida, investigation, a Florida Department of Law Enforcement (FDLE) polygraph operator refused to make a false failure report to the suspect. The lead investigator, a FDLE interrogation specialist, took it upon himself to transmit the false polygraph report. He also confronted the suspect with false fingerprint and erroneous eyewitness evidence. Shortly after the interrogation started, an officer was dispatched to contact the alibi witnesses, who verified the suspect's alibi. Nevertheless, the interrogator coerced a false confession from the suspect.

At the suppression hearing, the interrogator claimed that during the more than ten hours that followed the verification of the alibi, no one ever told him that the suspect's alibi was solid and exonerated him. It took over four and one-half years for the confession to be suppressed and for the man to be released from jail.¹⁶⁴

A man who falsely confessed described the thinking that led him to comply with an investigator's demand that he take a voice stress test. Although he was proven innocent of the murder, he was told he failed the test:

Suspect: And at this time it was like I just, what's going through

1993).

163. Interrogation Transcript of Sawyer, *supra* note 74, at 167.

164. See Interview with Louis, *supra* note 148.

my mind is I knew that I was going to fail this and I don't know why, because on the way over I had doubts about doing this, I said "But," you know, "I don't want them to think that I'm hiding something so I have to go through with it."¹⁶⁵

The effect of negative lie detector results, in conjunction with other false evidence ploys, can be so devastating that it can actually shatter a person's belief in his innocence as well as convince him that he will be convicted. A few hours after an innocent man confessed in Oakland, California, he explained his reaction to being falsely told that he failed the polygraph:

Interrogator: Okay, and the other thing being that we told you we disbelieved the story you were telling us and the, the, that in fact that the polygraph, you were uncomfortable with the polygraph, did that come into this, us convincing you too, or.

Suspect: Um, well I, I mean, I'm, I was willing, I was so open to everything right then and I've been so, that's my problem right now. I do not have any barriers up and when, so this polygraph said I was lying and I went God, you know, maybe I lied. Maybe there is something I can't remember. I don't recall and then you guys were insistent on, "No, you're lying, you're lying, we know, you have, you know, fingerprints."¹⁶⁶

d. *Shifting the Innocent from Confident to Hopeless*

The strategy of relying on evidence ploys to lead a suspect to believe that he has been caught and that admitting guilt does no real harm will work with some guilty parties.¹⁶⁷ That this strategy can produce the decision to confess from someone who is guilty is illustrated by the comments of suspects in two northern California investigations. A Sacramento, California, investigator asked a suspect who had just confessed:

Interrogator: What made you to decide to admit something in here?
Why did you do it?

Suspect: Because I knew it was hopeless to lie to you.¹⁶⁸

A suspect in a San Francisco, California, murder investigation described how the perception that he had been caught altered his decision making:

Interrogator: You explained to us in great detail what happened in San Francisco and about the murder.

Suspect: The only reason why is because I'm gonna be found

165. Interview of Martin Salazar by Richard Ofshe 36 (May 16, 1996).

166. Interrogation Transcript of Page, *supra* note 76, Tape 4, at 25.

167. See Moston et al., *supra* note 5 (discussing strength of evidence on three factors that predict the decision to confess).

168. Interrogation Transcript of Schmitt, *supra* note 85, at 142.

guilty anyway.¹⁶⁹

The sanguine and resigned attitude expressed by these two guilty parties is a far cry from what an innocent is likely to say. Innocent persons and some guilty parties struggle to maintain their position of denial and express their shock by stating that a mistake has been made, offering reasons why the interrogator's reported evidence is in error, and offering to undergo whatever testing will establish their innocence. For example, a man erroneously accused in a Boynton Beach, Florida, investigation reacted to his interrogator's use of both flawed and false eyewitness claims as follows:

Interrog. 1: I can put you there at the house today. I know you were there today.

Suspect: I was not there.

Interrog. 2: The boy says you were there.

Suspect: I was not there. I was not there.

Interrog. 1: Why would the boy mistake you for somebody else, saying "Martin was here?"

Suspect: I have no idea.

Interrog. 2: I mean you're pretty distinct; you're kind of big like me, you know.

Suspect: I was not there. I mean I'll swear on a stack of bibles; I'll take a polygraph, anything. I was not there. I left my house.

Interrog. 1: Paul never came in one morning and busted you having sex with her.

Suspect: No, he did not. I've never had sex with that woman.

Interrog. 1: Why are all these people lying about you, then?

Suspect: I have no idea. I mean I don't even know what all this is about.¹⁷⁰

A few days after his arrest, a wrongfully accused defendant in an Arcadia, Florida, investigation described his emotional reaction to some of the false evidence ploys used during his interrogation:

Defendant: Yeah, and he tells me, he looks at me and he says, we got your fingerprint. No, the first thing he told me was, when he took out, he took out my picture, right, my pictures, he told me the people identified me.

Attorney: Well, tell me in, try to play him for a second and I'm you, and he comes in and sits down. You be him and tell me what he said.

Defendant: You've been identified by the witnesses. You've been pointed out.

Attorney: What did you say?

169. Interrogation Transcript of Anderson, *supra* note 114, at 34.

170. Interrogation Transcript of Salazar, *supra* note 119, at 27.

Defendant: I say, how am I going to be pointed out when I wasn't there? Are you sure they ain't talking about a Mexican, because I always get mistaken as a Mexican, right?¹⁷¹

Determined to prove his innocence, this man had had a heated argument with his interrogator, insisting that the evidence could not be true and that the tests should be re-done.

Defendant: He said they are my fingerprints.

Attorney: Okay.

Defendant: All right, and I sit there and told him, how can my fingerprints match up to someone else's fingerprints? And the only thing I knew of history of fingerprints, don't no man's fingerprints even match the next man's fingerprints.

Attorney: Okay.

Defendant: All right, but yet he said, told me again, they's your fingerprints. Now, I know you was at the store, now.

Attorney: All right. What did you say?

Suspect: Now, I'm getting mad again.

Attorney: And what did you do then?

Suspect: So then I just kept telling him, I don't know how my fingerprints match up to somebody's, y'all better redo them fingerprints. Because my fingerprints don't match up to nothin in that store, because I ain't been in that store.¹⁷²

Once the accusatory phase of interrogation begins, an investigator does not attempt to discriminate between denials or alibi claims that are truthful protestations by an innocent suspect or the flimsy lies of a guilty party. It no longer matters that the interrogator cannot distinguish truth from lies because he has been trained, above all else, to express unwavering confidence in the suspect's guilt. To maintain the facade of well-founded certainty, an interrogator must clearly establish that no amount of denial will shake his belief in the suspect's guilt.

For an innocent suspect, the experience of suddenly being embroiled with a person in authority who levels serious accusations of guilt but is unwilling to acknowledge the possibility that they may be false must be akin to awakening and discovering that you have changed into a cockroach and that no amount of breast beating will alter the situation.¹⁷³ A Maricopa County sheriff's office investigator told an innocent suspect in the Temple murder case:

Interrogator: Well, uh, we have a problem. And, uh, the problem is that, you know, your name has come up in this deal.

171. Interview of Louis, *supra* note 148.

172. *Id.* at 49.

173. See FRANZ KAFKA, *THE METAMORPHOSIS, IN THE PENAL COLONY, AND OTHER STORIES* (Willa Muir & Edwin Muir trans., Schocken Books 1995) (1919).

Okay? And, uh, for your name to come up, I mean, we just didn't wake up and open the newspaper one day and, uh, you know, pick your name out or throw a dart at a dart board and say come down and pick you up, alright?

And, uh, there has been some, uh, you know, statements and information given and that has checked out. You know, uh, almost one hundred percent okay? Leo, your time has come, man. Okay, your time is now. And you got a big, heavy, giant weight on your shoulders. I can tell by looking at you.¹⁷⁴

For an innocent suspect, the steadily growing list of inculpatory facts makes it increasingly difficult to classify the interrogation as a simple mistake. Wrongly accused suspects frequently come to see themselves as either being set up or railroaded. A man who had falsely confessed described the experience in an interview:

Suspect: What made me most scared is at one point I thought I was being, you know, framed or set up by somebody, because once again, I don't remember which one of the interrogations it was, but they drew a picture of the cord for me when they were asking me, "Don't you think your fingerprints are going to be on this cord?" and this and that, "Because the end of the cord is pretty flat so, you know, you can get a pretty good fingerprint on there." And I believe it was Shelke who asked Griswald to draw a picture of it for me.¹⁷⁵

Regardless of the theory that the innocent suspect entertains, he cannot fail to understand that the case against him is airtight, that his arrest is inevitable and that his fate is determined.

Interrogator: I'll tell you what we know about you. You were involved with the incident at the Temple. Plain and simple. And you're gonna go down hard. You're gonna go down hard because everyone else is gonna put the shit on you. Like they already have.¹⁷⁶

Each time the suspect objects, the interrogator has an opportunity to repeat the list of facts that irrefutably confirm his guilt. As the false confessor in Arcadia, Florida, described the experience:

Defendant: All right, then he gave me the impression I ain't going nowhere, see what I'm saying, and then they told me my fingerprints matched, which I kept continuously telling them, well, how can my fingerprints match something when I wasn't there. They told me they had, I

174. Interrogation Transcript of Bruce, *supra* note 54, Tape 1, at 11-12.

175. Interview of Salazar, *supra* note 165, at 90-91.

176. Interrogation Transcript of Bruce, *supra* note 54, Tape 2, at 40.

failed the polygraph test, now, see, now I done got to the point where I know I didn't do nothing, but they telling me that I done something and ain't no way for me to get out of it, see what I'm saying? So the only way out for me, for me to get out, was to tell them what they told me.

Attorney: Why did you feel that was going to do anything for you?

Defendant: Because, I knew it wasn't going to do nothing good for me, I'm just saying. I knew it wasn't going to do nothing good for me, I just knew either way it went, I wasn't going nowhere, see what I'm saying? That was the impression I was getting. They say, we have your fingerprints, your fingerprints matched, you failed the polygraph test, all right, witnesses, pointed you out, all right.¹⁷⁷

During an interrogation in the Phoenix Temple murder case, a Maricopa County, Arizona, sheriff's detective made it clear that the suspect's statements during the interrogation would determine his fate. Eventually this man confessed falsely to executing nine people. Under pressure to provide a post admission narrative of the crime, he used the information with which he had been deliberately contaminated during the interrogation and invented a description of how it happened. Although much of what he invented was wrong, because he had been told how the killings were done he was able to correctly describe how the death wounds were made. He explained that he placed the barrel of the rifle at the base of each victim's skull and fired. If this man's innocence had not been independently established and the interrogation demonstrating his contamination had not been recorded, his ability to contribute this sort of precise information would almost certainly have led to his conviction and incarceration.

The interrogator reversed the suspect's denial and elicited a false confession by convincing him that his situation was hopeless:

Interrogator: OK. Alright, the bottom line is, ok, we got you in the Blazer and the Bronco goin to the church that night, ok. You're one of 8 people in the Bronco and Blazer at the church that night Leo. And it's all over with, it is all over with. The game's up, alright.

Now let me tell you something, man, this is the biggest moment of your life right here. You gotta make a decision.¹⁷⁸

Another innocent Temple murder suspect expressed his mounting confusion and fear:

Interrog. 1: So these other people that are telling these facts?

177. Interview of Louis, *supra* note 145, at 16-17.

178. Interrogation Transcript of Bruce, *supra* note 54, at 29.

They're the same. How could they be lying? So it had to be you cause you tell us something totally different. I don't know what you're talking about. Mark it don't make sense. You understand common sense.

Suspect: Yes, I understand.

Interrog. 1: You think a judge uh prosecutor is gonna believe that Mark doesn't know what he's talking about, Mark has no knowledge about what's going on?

Suspect: I don't believe this is happening.

Interrog. 1: Mark, you have to believe this is happening because it happened about a month ago.

Interrog. 2: It's not gonna go away either.¹⁷⁹

Later, he expressed more about how he was reacting to the interrogation:

Suspect: I'm scared, I don't know where to go, I don't know what to do, what to say. And you're telling me I know something I don't know. And I don't, I don't, how is that supposed to feel? Tell me that what someone going to feel your gut busted out and stuff like this. You, your held for two hours and not knowing what's going on and someplace out of town and blamed for something that you, you weren't there, or didn't do.¹⁸⁰

In Sacramento, California, a detective graphically drove home the nature of the situation of a young man who had witnessed a murder but had initially claimed that he had not been at the crime scene:

Interrogator: Well I hear you failed the polygraph.

Suspect: I just can't get that picture out of my head, Sir. I know, I know in my heart and soul I, I did not shoot that man, Sir. I saw everything that happened. I saw every, I saw when he got hit. I saw him jump. I heard the girls screaming', but I didn't shoot the man, Sir. I'd never shoot the man. I did not touch the gun. I did not know the gun was in the car, Sir. I was, maybe I could have stopped it. I know I probably could have stopped it, but its, it seemed like it happened too fast and I don't know, I was just stuck in one spot. When you showed me those pictures of the men, I know those men. And I know that you knew, that I knew those men, and I apologize for lying to you. Uh, uh.

Interrogator: Well at this point Cheval, I'm, I'm not here trying to help myself. Frankly I've got you by the balls.

Suspect: Yes, sir.¹⁸¹

Vallejo, California, police investigators conveyed the message that there

179. Interrogation Transcript of Nunez, *supra* note 54, Tape 3, at 10.

180. *Id.* Tape 4, at 8.

181. Interrogation Transcript of Wright, *supra* note 162, at 33.

was no way out for a man they wanted to use as a witness against members of a group that robbed a Loomis Armored Car facility and killed three men. The threat of a death penalty eventually motivated him to confess falsely, but his attempt to save himself fell apart because he could not supply the information the investigator's demanded.¹⁸²

Interrog. 1: We've got you, and we've got Mr. Young. You may not realize it yet, that we have you.

Interrog. 2: You should realize it, but you don't.

Interrog. 1: That man is gonna come into court and testify to that and more. You know why the jury's gonna believe him, beyond the fact that he knows so much about the crime, one of the uh, uh arrangements that we have with this man is that if we prove he's lyin', deal's off, but we can still use the tape against him. We can play the tape against him in court, where he just admitted killing two people, and we can go all the way.

This is a special circumstance crime. You know what that potentially means. If that man is lying, the, the one count of first degree murder is out the door, and he can be tried for everything that he was involved in. There's no way that man's not gonna be found guilty. I got him on video tape, admitting to killing two people. You think he's gonna jeopardize his life to lie about you.¹⁸³

Later, this man expressed his comprehension of his circumstances:

Interrog. 1: Eu, Eugene, everybody that tells us these things, the, the only response you can have is that they're not being truthful. Is it possible Eugene that you're not being truthful with us?

Suspect: I'm being very truthful. I'm just in awe basically at this nightmare, and these people that you went and be on the front line at war with me. I'm dead.

Interrog. 2: Well Eugene it's not a nightmare, cause you wake up from a nightmare, but tomorrow when you wake up, this'll still be there.¹⁸⁴

He perceived the interrogation to be his worst nightmare because he understood the interrogators' message perfectly: the (false and erroneous) evidence the police were confronting him with was going to lead a jury to sentence him to death:

182. This man stood trial for the triple murder because of his coerced confession, only to be acquitted by a jury who watched his interrogation and confession on videotape. The jury considered the videotape in light of the fact that the state had no evidence except that he admitted participation in a crime he could not describe, with others whose identities he was unable to supply, even when complying with the interrogator's demands would save his life. See *infra* text accompanying notes 263-65.

183. Interrogation Transcript of Livingston, *supra* note 113, at 48.

184. *Id.* at 126.

Interrogator: Let, let's get right down to it the chase here, what are you worried about? What are you worried about? If, if you was to tell us the truth of what's happened out there, what's your main concern, because it's obvious to me that you're worried about something, because looking at you right now, all, everything you're doing here you're tellin me you do wanta be straight up with us, something is worrying ya. What's worrying ya?

Suspect: Well I'm worried this right here, that uh what I'm telling you, and you guys seem to have patched enough things to present to the court room and make me look guilty. Uh, so that means I gotta go to the gas chamber for something I didn't do, that's what worries me.¹⁸⁵

Flagstaff, Arizona interrogators threatened a woman with losing her children and spending twenty-five years in prison if she did not comply with their demands:

Suspect: Please don't do this to me. (Sobbing). You guys let me take my kid to my parents.

Interrogator: No.

Suspect: And talk to my parents.

Interrogator: No, we'll let your

Suspect: You guys can drive with me! Please!

Interrogator: We're gonna call them and have them come in and pick them up. Let them know.

Suspect: How can you call my parents?

Interrogator: We're gonna go out there. We're gonna send an officer out there, okay. And

Suspect: Gil, you can't take me to jail, I didn't do anything. I'm begging you, please, I didn't do anything. (Crying).

Interrogator: Get up, Trena.

Suspect: I didn't do anything (sobbing), I swear I didn't do anything! I didn't do anything, honestly, I swear to God I didn't! (Crying)

Interrogator: Trena. Trena. Get up off your knees.¹⁸⁶

In a post-interrogation interview, a young man in Oakland, California, recounted his reaction to the fabricated evidence the investigators introduced and to the stress of the interrogation:

Interrogator: [I]f I can reiterate, we had, we've put evidence having you in the area earlier, you were told that we had an eyewitness putting you in the area further down than

185. *Id.* at 70.

186. Interrogation Transcript of Trena Richardson, Flagstaff, Ariz., Police Dep't 77 (Apr. 20, 1994).

you're admitting to being, that it was our belief that your story was, you were telling us a lie and that the fourth thing you said was that the polygraph had scared you. I guess the physical surrounding of the machine and the fact that you always had to be in control while answering the questions in a cooperative manner.

Suspect: Um, (pause) the eyewitness I'm not sure about. Somehow that, I mean that because I was scared and that you believed that I had been further down in whatever evidence you had for that and somehow you picked up my two fingers and said that those were somewhere down there. Um, and the polygraph scared me, my arm was blue, and uh, I had to be in control 'cause I was trying to cooperate and all these an, questions (pause) and trying to (pause) picture her and stuff is just.

Interrogator: Okay. But, the sum total of those four items, those four items, is what made you tell us incorrect information, is that correct?

Suspect: Um, (pause), yeah, yeah. And the, the polygraph.

Interrogator: And those.

Suspect: Yeah, all that.

Interrogator: All that. Is, is that the total.

Suspect: I was shocked. I was distraught, shocked past the belief that yes . . . there is a possibility.

Interrogator: Is that the sum total of the, of the things that played on you that . . .

Suspect: That's what convinced me, that's what convinced me that there was a possibility that I might have killed her.¹⁸⁷

An Arcadia, Florida, defendant who falsely confessed described how the detectives' tactics during the first phase of questioning induced feelings of hopelessness:

Defendant: I done gave up hope on everything nor, all right, because I ain't never see, I ain't never see, I ain't never been put in no position like that, see what I'm saying? I hadn't been put in no position like that, to be answering the same questions over and over when you sit there and try to purely tell the person what you had done, and you ain't done this and that, and they say you have, see what I'm saying, saying you done this and that. I done got to the point where I just gave up hope on everything now. All right, I didn't care about myself no more, right. I

187. Interrogation Transcript of Page, *supra* note 76, Tape 4, at 4-5.

didn't care about anything.¹⁸⁸

If an investigator offers to accept a self-defense version of a crime and helps the person understand that this is his way out, the person will from then on be aware that he can escape the punishment of the interrogation by accepting the deal. A young false confessor who had witnessed a murder and was subsequently accused as the killer in a Fort Lauderdale, Florida, investigation described his experience:

Suspect: I remember just wanting to get it over with, telling him whatever he wanted. I wanted to tell him whatever he wanted to hear just so I could get the whole thing over with, so I could get out of there and just, if I was an old man, I would probably have had a heart attack. I mean that's how I felt. I just wanted to get it over with. It hurt so much, I just wanted to get it over with, no matter what it, I just wanted to get it over with and told him what he wanted to hear.¹⁸⁹

A man who confessed falsely during a Clearwater, Florida, investigation described the cumulative effect of the stress of the sixteen-hour-long interrogation, the shock of finding himself accused, the despair that the several false evidence ploys created, the loss of confidence he experienced when told that he failed the polygraph, the confusion when he was told that he didn't remember the killing because he had a blackout, and the fear he felt when he was threatened with the death penalty if he did not agree with and confess to everything the interrogators demanded he say:

Suspect: The truth is and this is gonna piss you off.

Interrogator: Tom!

Suspect: The truth is, the only reason I'm telling this stuff is because you got evidence to get me. I don't believe I did it. That's why I want to talk to somebody. I'm going fuckin bananas.¹⁹⁰

188. Interview of Louis, *supra* note 148, at 26.

189. Interview of Adams, *supra* note 122, at 52.

190. Interrogation Transcript of Sawyer, *supra* note 74, at 291.

2. Step Two: Eliciting the Admission¹⁹¹

a. Introduction

Once the investigator has introduced all of the evidence he intends to use or invent, he shifts his attention to eliciting the admission "I did it." Most often guilty suspects have to be motivated to admit guilt, but some become so convinced that resistance is futile that they end the cat-and-mouse game by confessing at this point. For an adolescent in San Diego, California, the piece of evidence that finally broke his resistance was that his girlfriend and co-perpetrator had confessed and described his role in the crime:

Interrogator: Why are you blaming it on Ryan?

Suspect: (Crying). I'm not! I didn't do it!

Interrogator: Why wouldn't Danielle say that Jarod didn't have anything to do with it, it was all Ryan?

Suspect: (Crying).

Interrogator: Why wouldn't she tell me that? You guys are boyfriend/girlfriend.

Suspect: You guys are good. It was me and Danielle. You guys are good.

Interrogator: No, we're not good. I just, like I was saying, Jarod, I don't think.

Suspect: Me and Danielle did it.¹⁹²

From the point at which the investigator re-focuses on eliciting the admission, the central issue of the interrogation becomes why the suspect should agree to tell the truth. This demand has entirely different meanings for guilty and innocent suspects. The investigator's meaning for the phrase "tell the truth" is that the suspect should comply, admit guilt, and make an accurate confession that confirms what the investigator believes happened. A guilty suspect easily and correctly understands what the investigator wants at the conclusion of step one, just as clearly as he did at the start of the interrogation. Given that the investigator has accomplished his goal and has succeeded in leading the suspect to reach a new appraisal of his circumstances, he will have come practically full circle from his position at the start of the interrogation. In the beginning, when he forcefully rejected the investigator's accusation and demand for an admission, he viewed the cost of confessing as high. Wanting to avoid arrest, he had everything to lose by admitting guilt and nothing to

191. In the illustrations below, the interrogators' evidence ploys are entirely fabricated in examples taken from cases in which the suspect is innocent, and may or may not be fabricated in cases in which the suspect committed the crime. The likely guilt or innocence of suspects has not been identified in all of the case illustrations. It should therefore be kept in mind that the interrogator's repeated assertions that the suspect's position is hopeless does not mean that his statements about the case evidence are accurate. In the illustrations below, this is rarely the case. A presumption that what the interrogator says is true and that the suspect is guilty will cause the reader to misperceive the situation of the person who receives the interrogator's intended persuasive communication.

192. Interrogation Transcript of Jarod, *supra* note 109, at 54.

gain. By the conclusion of step one of the interrogation process, his appraisal of his situation has almost reversed itself—now he has almost nothing to lose by admitting what has become obvious but has not yet been shown what he has to gain.

An innocent suspect at the same point in the interrogation process hears a different message. For him, the truth is what he has been saying all along and the investigator's absolute rejection of it has taught him that the investigator's "truth" is something different. He understands that the demand for the investigator's "truth" is a request for a false confession. While certainly not having come nearly full circle, his situation, too, is different from what it was a few hours earlier. His calm about speaking with the police has been replaced by distress, a fear that his life has changed, and a realization that he is about to go to jail. He has discovered that being innocent means little. The nightmare of the interrogation, however, remains as incomprehensible as it was when he was first accused.

Fundamentally, an innocent person's appraisal of his circumstances and options is similar to that of a guilty party's, except that the innocent knows that what is happening is unjust and this knowledge affects his willingness to confess. Because he knows he is innocent, both his will to resist making a confession and his distress at the prospect of being arrested are likely to be greater than what a guilty party feels. A guilty suspect will have been aware from the start of the adversarial nature of his relationship with the interrogator and of his jeopardy. Unlike the innocent who hopes that he can change the interrogator's position and avoid arrest, the guilty party is likely to realize that this will not happen. His knowledge that he committed the crime and that the evidence simply will not go away forces this realization. If the stress of interrogation becomes too intense, he knows he can terminate it.

The innocent suspect is likely to cling to the hope of bringing the situation back to normal, is likely to be adamant that he won't admit to something he did not do and may be experiencing considerable stress. Although his *Miranda* rights are known to him, invoking them does him no good since his goal is to reverse the process that is bringing him to arrest. The investigator has made him realize that once the interrogation ends he will be arrested. To alter the process, he must not only continue to resist confessing but must convince the investigator of his innocence. If he stops protesting his innocence, even if he does not confess, he will have accepted the fate the investigator has told him is certain—arrest, prosecution, and conviction.

What the innocent does not know at this point is that during the next phase of the interrogation his situation will be made to seem far worse than he has as yet imagined. The investigator will confront him with a more detailed analysis of his future—one full of reasons why he must not only confess but must do so immediately if he wants to minimize the damage he is about to sustain.

In a typical interrogation of a guilty suspect, the interrogator's task is straightforward. In order to bring a guilty suspect full circle and change denial into admission, the interrogator must now show the suspect that he has some-

thing to gain by making an admission.¹⁹³ Since the guilty suspect now perceives himself as having been caught, offering even a small benefit may lead him to reason that admitting the obvious changes the situation little, if at all, and making the admission results in some small improvement in his situation. If the suspect can be led to consider only the possible futures that the interrogator wishes him to evaluate, he is likely to conclude that confession leaves him better off than remaining silent.

Investigators have at their disposal a range of increasingly valuable incentives that can be introduced to precipitate a decision to confess. Whether they realize it or not, investigators are engaged in a rather straightforward negotiation in which they seek to *buy* the admission as cheaply as possible. The interrogators' incentives range from non-coercive, legally permissible psychological benefits to the strongest sorts of threats and offers of leniency (which presumably the investigator realizes are illegitimate). Although some interrogators are quite willing to make blatant threats and promises,¹⁹⁴ they usually resort to indirect methods for issuing threats and promises.

Investigators behave as if they are engaged in a negotiation. They are aware both that incentives vary in strength and that offers of a material benefit and threats of harsher punishment are prohibited and must be communicated subtly. This is illustrated in the excerpt from a San Mateo, California, child sexual abuse investigation detailed below. This interrogation was being conducted following a policy of avoiding advisement of *Miranda* by telling the suspect that he was free to leave prior to the start of the interrogation. The suspect had been picked up at his home and taken to the station to answer some questions about the sexual molestation of his niece. The investigator confronted the suspect with some false and some true evidence indicating that the offense of sexual abuse of a child could be substantiated. The evidence convinced the suspect of his imminent arrest: "What, what can I say? I'm getting charged here?"¹⁹⁵

Rather than responding to the suspect's comment with the straightforward answer that he would be arrested, as the leading training manual advises interrogators to do,¹⁹⁶ this interrogator manipulated the situation by immediately bringing up the child's need for treatment. In using this maneuver, he avoided honestly answering the suspect's query and not only avoided informing him of the inevitability of his arrest, but also introduced the idea that the repair of the child and the family was the primary consideration. Consistent with avoiding the *Miranda* advisement, this investigator's strategy was designed to mislead the suspect about his criminal jeopardy and focus his attention on suggested non-jail resolutions. The interrogator's apparent strategic purpose was to lead the suspect to conclude that he could avoid arrest if he cooperated and made an admission. Hence, as first step, the interrogator

193. A recent observational study found that 88% of suspects are exposed to some sort of appeals to self interest. See Leo, *Inside the Interrogation Room*, *supra* note 4, at 267.

194. See *infra* text accompanying notes 96-130.

195. Interrogation Transcript of Domingo Villaneuva, Redwood City, Cal., Police Dep't 15 (Nov. 11, 1996).

196. See INBAU ET AL., *supra* note 20, at 196-97.

stressed treatment for the child and repair of the family as the primary issue:

Interrogator: Well, I'm hoping for the truth because what I've got is, I've got a family who has a five year old daughter that has been, had sex with. I mean she's okay. But the longer we drag this out, going back and forth, whether you did it or you didn't do it.

Suspect: I didn't do.

Interrogator: That's not going to help her out any. Um, best thing for the families, I've done a lot of these cases, and if there's a hope of getting the family to get reunited, you know through therapy or through, you know.¹⁹⁷

In his next attempt to motivate an admission, the investigator sweetened the offer. He played down the seriousness of the crime and emphasized that no physical harm had been done to the child—her injury was easily repaired. The investigator expanded his offer of “therapy” and suggested it as a non-jail alternative for the suspect:

Interrogator: Like I said, she's okay. She's not you know, beaten up, she's not, you know, doesn't need to be hospitalized. She just maybe needs to talk to a therapist or something. And, and, uh, in time she's gonna be okay. And now what I'm looking at is whether you're gonna be okay. And you're telling me that this didn't happen when I've got everything that says it did happen. And that you're the one that was there when it, um, what, what are we gonna do here? I want to make sure that . . .

Suspect: I wasn't there, though.

Interrogator: . . . that you get help if you need it or if you want it.

In his third attempt to motivate an admission, the interrogator again reviewed the false evidence to remind the suspect of his situation and then focused his thinking on the harm associated with remaining silent at this point. The suspect asked another question about his future. This time the question allowed the investigator to answer with information that did not change the subject. But his answer differentiated between the alternatives of silence and admission. The interrogator associated silence with the prospect of the suspect appearing before a judge while the admission alternative was associated with treatment, “just being done with it,” and being able to “put this stuff behind you,” which did not necessarily include time in jail.

Interrogator: Well, here's some things that, that they have done at the hospital. They collected specimens from her and whether or not you did this, they're gonna be able to compare body fluids from her, they collected off of her with you.

Suspect: Uh-huh.

Interviewer: Okay. And that will be a real definitive way, you know,

197. Interrogation Transcript of Villanueva, *supra* note 195, at 15.

whether you actually did or not, regardless of whether you said you didn't do it and, um, I'm hoping that if, you'd be honest with me in the beginning and then we get a confirmation through medical science that this did happen. And that's why I got you here today, so you can tell me everything that happened. Like I said, you're not a bad person if this did happen. But if you're looking at not telling the truth from the beginning, its just gonna be all the worse later on down the road so.

Suspect: What do you mean the worse?

Interrogator: Well, what's gonna happen is we're gonna sit down in front of a judge and we're gonna have a bullshit story that you're telling me right up front, when we know different, when the evidence suggests different. That's what I'm asking you, just be honest. I mean, you got a lot inside of you that I'm sure you want to just get out and just be done with it. And the only way that you're going to be able to put this stuff behind you is by telling the truth right now. So how did this happen?¹⁹⁸

As the record of the interrogation substantiates, the suspect concluded that if he confessed to some bad acts but not to the act that had been associated with jail time (i.e., sexual intercourse), he was better off since he would receive treatment instead of punishment. He admitted to sexual contact with the child weeks earlier, but maintained that he had not even touched the child earlier that day and so could not be the donor of the semen the investigator alleged was found in her vagina. In fact no semen was found in the child's vagina, and so the suspect was undoubtedly telling the truth on this point.

The investigator worked to support the delusion his tactic had created—that admitting to other acts of sexual abuse would result only in treatment, not punishment. After the suspect began making admissions to acts of sexual abuse short of intercourse, the investigator reinforced the conclusion that this could be handled privately:

Suspect: You can't go, tell my family all this shit.

Interrogator: You know, look you're nineteen years old.

Suspect: Yeah, Yeah, I gotta grow up.¹⁹⁹

Still later, the suspect again expressed his concern that everything be kept private. The suspect's concern about keeping this confidential is consistent only with the expectation that he would not be charged and tried. Again, the investigator supported the suspect's deluded conclusion:

Suspect: I don't want this shit going out to (unclear) you know.

Interrogator: To, to what?

Suspect: To my friends or my family members.

198. *Id.* at 17.

199. *Id.* at 21.

Interrogator: Well, I'm not here to bad mouth you to your friends or anybody else. But you, you think that her parents have a right to know what happened. Right, they're her parents. They have a right to know what happened in order that she can get better. And in order for you to get better, you're going to have to face them sooner or later. Okay. Its not something that you're gonna be able to hide forever, 'cause that's not something that's gonna make you get better, just by putting your head in the sand and saying this never happened.²⁰⁰

As illustrated above, a suspect who knows he is guilty and is convinced that he has been caught is likely to search for ways to better his situation and is in the market for the incentives the investigator offers. A suspect who is innocent is likely to focus on correcting the error that is happening all around him and will likely see confessing falsely as having a great cost. A guilty suspect in the same factual situation but trying to decide whether to confess truthfully will likely focus rapidly on minimizing his punishment.

If an investigator is committed to obtaining a confession but is interrogating an innocent suspect, he is likely to discover that eliciting an admission of guilt is far more difficult than what he is accustomed to having to contend with.²⁰¹ In order to get an innocent to confess falsely, an investigator will have to introduce strong threats for remaining silent and strong promises of substantial benefit for giving the false confession.

b. *Low End Incentives: Moral and Self-Image Benefits*²⁰²

Tactics that communicate incentives at the low end of the continuum involve reminding the suspect of the emotional benefits of truth telling versus the continuing emotional distress associated with denying guilt. For example, an investigator may emphasize the moral or self-image benefits the suspect will experience if he tells the truth, as happened to an innocent suspect in Flagstaff, Arizona:

Interrog. 1: George, you're the type of person that you're going to have to tell this to somebody. You cannot live with yourself unless you get it out and say I did not mean to do this. It's a mistake. I want to try to make right what I did wrong. And that's the type of person that you are. You have to be commended for that.

Interrog. 2: You don't want to carry this with you any longer. We

200. *Id.* at 16.

201. The most recent observational study of interrogation found that 23% of suspects interrogated made incriminating statements and an additional 42% confessed in run-of-the-mill interrogations. Leo, *Inside the Interrogation Room*, *supra* note 4, at 280.

202. A recent study of interrogation in the United States observed that in 37% of cases, interrogators appealed to the importance of cooperating as part of their strategy for eliciting an admission. Interrogators appealed to the suspect's conscience 23% of the time, and used praise or flattery in 30% of the cases. *Id.* at 267.

know that. That's what you came here for. You came here to leave something here, and that's what you need to do is to leave it here, and you'll leave it.²⁰³

A Richmond, California, investigator emphasized the purity of truth telling:

Interrogator: Okay, just tell me this, Newell, real quick, just to let you know what we need, what we need here is we need a hundred percent truth, okay? Now I'm not saying you're giving us a hundred percent truth but what we need is a hundred percent truth. It's just like the AIDS virus. You wouldn't want just a little bit of AIDS virus, you don't want none of the AIDS virus because it taints the whole body. A little untruth taints your whole damn story, okay? So what we need here is a hundred percent truth, okay.²⁰⁴

Investigators sometimes trade on the commonplace normative prescription against lying and invoke it to motivate a suspect to tell the truth. For example, a Solano County, California, interrogator told a suspect:

Interrogator: You can't, you can't come in here and lie to me. I don't even want to talk to you if you're gonna lie to me. Okay? You gotta understand something. This is, this, the gravity of the situation is much too serious, and the only thing that, the only thing you got going for you is to tell the truth. Okay? The truth will prevail. You ever hear the term "honesty is the best policy."²⁰⁵

An investigator can capitalize on the suspect's anxiety, fear, and emotional turmoil by calling it remorse and by urging him to respond to his emotions and express his remorse by confessing. The investigator may tell the suspect that he will experience emotional relief, if not psychological health, by admitting guilt and getting it off his chest. For example, a Connecticut State Police investigator told an innocent teenage boy:

Interrogator: All right. This isn't the end of the world. I've talked to a lot of people who have been involved in a lot of serious things and they're normal individuals today. Once they got it straightened out upstairs. See?

Suspect: Mm-hm.

Interrogator: As long as you don't get it straightened out in your mind you'll never have a day of peace.²⁰⁶

Similarly, Costa Mesa, California, investigators implored a 14-year-old suspect to tell the truth:

203. Interrogation Transcript of Abney, *supra* note 55, Interview 3, Video 3, at 18.

204. Interrogation Transcript of DePuy, *supra* note 108, at 27.

205. Interrogation Transcript of Andrew Childs, *supra* note 117, at 6.

206. Interrogation Transcript of Peter Reilly, *supra* note 75, at 99.

Interrog. 1: You say, why tell the truth, because you're going to get in the same amount of trouble, well, if that's the way you feel, why not tell the truth? For you, the same amount of trouble, why not tell the truth? Why not get it off your heart?

Suspect: Because there's nothing on there.

Interrog. 1: Yeah, there is. You killed somebody.

Interrog. 2: A guy with a family. Apparently, he's got a daughter, a wife. He's been married for like thirty-four years (inaudible) a long time.

Interrog. 1: I've killed somebody before and it haunts you and I was justified in doing mine. I mean it haunts you for a long time.

The most important reason for you to come clean, because if you come clean, your body comes clean and your soul comes clean and you don't have to live, you've gotten this off of you. Otherwise, you're walking around with this, on top of you and it's going to screw up your whole life, the rest of your life.

And believe it or not, you're only fourteen years old, okay? Fourteen is a long time, from the end of your life. You have, you have a long life to go, Okay? Things will get better. They're shit, right now, I agree. You couldn't be in much more shit than you are, right now, okay? You've got to go up from here. It doesn't get any worse than that.

My personal feeling is that, you cannot proceed down the path, the correct path, if you leave all this stuff with you, you know, so when you get it off your chest, and you get it off your shoulders and put it on ours now, you know, you don't have to deal with it anymore, other than, you know, talking about it or, or, ah, I mean, it's off your soul type of thing. I don't know if you believe that or not, but you have to, you have to like get rid of it, to get rid of it, if you know what I mean. To get rid of the pain, you have to, you have to, you know, tell us about it.²⁰⁷

San Diego, California, police emphasized how good telling the truth would make a suspect feel:

Interrogator: Right now you have to tell us. Cause believe me you'll feel better by telling us. You need to get this off your chest. . . . And this is your opportunity right now to feel

207. Interrogation Transcript of John Doe, Costa Mesa, Cal., Police Dep't 23-54 (Sept. 1, 1995). The defendant's actual name is concealed because of his age. *Id.* at 54.

really good and say what happened. You need to take responsibility. You need to feel a lot better feeling about yourself. You have to Jason.²⁰⁸

Anchorage, Alaska, interrogators reminded a suspect that confession brings harmony:

Interrogator: You know as well as I do that, uh, by denyin' the truth you're never gonna have peace with yourself.²⁰⁹

Investigators sometimes base appeals on a belief in God, imploring the suspect to confess out of religious duty or for absolution. Vancouver, Washington, sheriff's detectives brought God in on their side of the table:

Interrog. 1: What are you gonna tell God, JT? How are you gonna explain it? How are you gonna ask him to forgive you?

Interrog. 2: There's gonna come that time, JT.

Interrog. 1: How are you gonna explain it?²¹⁰

A Boynton Beach, Florida, interrogator urged confession because whether someone is punished on earth hardly matters:

Interrog. 1: Let me tell you something. I'm a deacon in the First Baptist Church in Lake Worth, and the bottom line is this: If you're sorry and you ask the man himself for forgiveness, then you're off the fucking hook because this place here don't mean shit.

What this means is when you stand in front of the man, ask him for forgiveness, you're fine. This ain't nothing but a thing. This is a start up place for us; this ain't eternity. The only thing we can do here is do the best that we can to be the best people we possibly can. And we all make mistakes. And the thing is if you try to rectify mistakes while you're here so you don't live in eternity or fucking hell or whatever you believe in.²¹¹

An investigator can emphasize that he wants to help the suspect and still operate at the low and uncontroversial end of the incentive continuum. Help in this context is left vague and at most implies an undefined, better emotional state than the suspect is presently experiencing. The suspect need only confess to receive help from the investigator in attaining this better state, as implied by one investigator:

Interrogator: What you really gotta do, is you gotta help yourself now. You really have to help yourself. You really have to help yourself. You gotta get outta this thing where

208. Interrogation Transcript of Albritton, *supra* note 99, at 76-77.

209. Interrogation Transcript of Susan Johnson, Anchorage, Alaska, Police Dep't 32 (Nov. 29, 1993).

210. Interrogation Transcript of James Thomas, Clark County, Wash., Sheriff's Office 61 (Dec. 20, 1993).

211. Interrogation Transcript of Martin Salazar, Boynton Beach, Fla., Police Dep't 49-50 (Feb. 23, 1996).

you're, you're denying even to yourself, cause it doesn't work and you know it. Now what we gotta do is get something goin' for you.²¹²

Or, expressed another way:

Interrog. 1: You're putting out a request, you're putting out a cry for help, and we're here to answer it for you.

Interrog. 2: George, I think it's important for you to know that the way we look at this because, true, we have a different aspect of it, perspective than most people do, and what we're saying here basically is that a mistake was made, we want to try to make that right as much as we possibly can and that in no way, shape, or form are we judging you as a person because we don't have the right to do that. We can't do that because we've made too many mistakes ourselves. You and what goes on between you and God are two different things.²¹³

While low-end incentives are unlikely to motivate a guilty suspect who still believes he can avoid punishment, they are sometimes sufficient to tip the scale when directed at someone who recognizes that his desire to avoid punishment is unrealistic. If an investigator has succeeded in framing a suspect's perception as an interaction between two cordial persons rather than as between hunter and prey, the suspect is more likely to allow himself to feel some respect for the values embodied in the appeals, and to desire to appear as someone who shares these cultural prescriptions.

c. *Systemic Benefits: Indirect Threats and Promises*

The psychological benefits of reducing guilt, doing the right thing, showing empathy for the victim's family, straightening things out with God, and appearing honorable in the eyes of the investigator or the community are not likely to elicit a decision to confess from an innocent person for a variety of reasons. One reason is that telling a lie—confessing falsely—violates all of the cultural prescriptions activated by the investigator. Low-end incentives are actually negative incentives to confess for an innocent suspect.

An investigator who is unable to motivate an admission from a suspect by offering low-end incentives has only two choices: terminate the interrogation or introduce stronger incentives. If the investigator focuses a suspect's attention on more concrete incentives, he will likely suggest that there are both systemic benefits for confessing and opposing systemic punishments for holding to denial or remaining silent. The more clearly the investigator points out the supposedly inevitable consequences of admitting responsibility versus continuing denial, the closer he moves toward introducing legally coercive threats and offers of leniency. The investigator's tactic is to paint a picture of

212. Interrogation Transcript of Wright, *supra* note 162, at 10.

213. Interrogation Transcript of Abney, *supra* note 55, Interview 3, at 14.

how the system operates that is deliberately incomplete and not necessarily accurate. It is a picture designed to communicate information that will affect the suspect's decision making in a predictable way. If the suspect were to rely exclusively on the information fed to him by the investigator, a decision to confess would be almost certain.

The investigator's strategy over the course of the interrogation is to press the suspect to rely on the investigator's analysis of reality and the future. Time is on the investigator's side. The cumulative effects of fatigue, stress, fear, confusion, and endless confrontation are likely to increase the investigator's persuasive effect. The logic of the investigator's position is unimpeachable; his task is only to get the suspect to accept his axioms.

Looking at what the investigator chooses to include and leave out of the picture, it is obvious that he is manufacturing an advertising poster for confession. For example, when an investigator describes a courtroom scene and encourages a suspect to imagine how a juror will react to his failure to *tell his side of the story now*, the interrogator leaves out the alternative scene in which a defense attorney tells the jury that the state has absolutely no physical or eyewitness evidence linking the defendant to the crime, that the investigator lied to the defendant about these matters during the interrogation, that the defendant always maintained his innocence and never confessed, and that the state has the burden of proving the defendant's guilt.

Once an investigator starts to clearly identify the benefits of confessing and makes them appear substantial, it becomes difficult to pretend that these follow in some vague, natural manner. While the investigator might begin by telling the suspect that showing remorse generally confers a benefit, he may then promise that he will write in his report that the suspect was remorseful; he may next suggest that showing remorse will influence how the district attorney charges the case; his next suggestion might be that showing remorse will allow the interrogator to be able to say valuable things to the judge and jury; and he might become so bold as to argue that showing remorse will influence the jury's decision about his guilt or innocence and the judge's decision about the amount of punishment the suspect will receive.

The importance of "speaking now" can be emphasized without necessarily linking it to a specific benefit, but it is not likely to function very well as a motivator. In this excerpt from a Salt Lake City, Utah interrogation a suspect is given the opportunity to confess but no systemic benefit was stressed:

Interrogator: The investigation is ending with your arrest because, uh, of, uh, what you did do. We know how it happened, when it happened. We have the physical evidence, uh, from the scene. And, uh, what we'd like to do right now is give you the opportunity just to explain why it happened. Uh, that's, that's the big question in our minds right now.²¹⁴

A San Diego, California, investigator stressed the importance of pleasing

214. Interrogation Transcript of Adams, *supra* note 100, at 1.

the authority figure. Confessing was more clearly associated with a benefit—appreciation from the investigator because it was personally important for him to understand what happened. But the inducement of approval from the investigator was interpersonal and slight. The investigator made no link to anything that was a significant benefit for the suspect:

Interrogator: Now just, just listen to me okay? Now I've talked to an awful lot of murderer's, okay? And sometimes I can understand where they're comin' from. But people have to be truthful with me before I can even, even begin to understand it. And you know, we're, we're gettin' a little truth out of you, but we aren't gettin' the whole truth. Now, just listen to me. I can understand you bein' scared, nervous, whatever. I can understand that. That's a natural phenomenon.

But like I keep tellin' ya, the truth, the truth, and what you're tellin' us isn't jivin'. We know things! We are giving you an opportunity to tell us the truth. Ya know? Instead of bullshittin' or lyin'. Ya know. We know about you, Mr. Nance. We could write a book about you. We know almost everything there is to know about you, with the exception of Nancy White.

Suspect: Well I did not kill her.

Interrogator: Tell me about it.²¹⁵

If merely asking for information doesn't work, then an investigator may try to delude a suspect into reasoning that confessing at this point is necessary because it is to his advantage. This progression often starts with announcing that this will be the suspect's *only* or *last* opportunity to tell his side of the story. In the following Sacramento, California, interrogation, the investigator pressured the suspect to decide whether to admit guilt by suggesting that time was running out:

Interrogator: This is a time for you to tell the whole truth, okay? Don't come part way, and don't tell me a story that I can't believe and other people won't believe. Like I told you, I can only go so far. I won't sit here and listen to you lie again and again to me and my patience will run out. And when I go out that door, you won't have anybody else to tell this story to, and who's gonna believe you? Right now I'm listening to you, I'm trying to do the thing that's right here and the thing that's right is to tell the truth and you know it.

Suspect: I only

Interrogator: Not part of the truth, not a piece of the truth, not a little bit here and a little bit there and then you change your

215. Interrogation Transcript of Nance, *supra* note 95, Tape 2, at 4-5.

mind. Like I said, it only goes so far, I can only tell you again and again and again tell the truth, tell the truth, tell the truth. And each time you lie to me, it takes a little bit of my patience away. A little bit, and little bit, and a little bit. And I'll step out of here and I'll think about it and I'll come back in here and talk to you. But I'm not gonna be here and you're gonna have to live with what you said. Because I won't ask you anymore. She was going away from you wasn't she?²¹⁶

This attempt to pressure an admission alluded obliquely to the advantages of acting immediately—"you won't have anybody else to tell this story to, and whose gonna believe you?"—with no reference to the advantages of being believed. In contrast, a detective in Flagstaff, Arizona, not only emphasized the time pressure on the suspect, but also unambiguously spelled out the end-of-line benefit of immediate compliance:

Interrogator: You're in a lot of trouble, you know that.

Suspect: Yes I do.

Interrogator: Uh, this sit down today, right now, okay.

Suspect: Uh-hum.

Interrogator: Will probably be the last time you're gonna talk to both of us. You know why?

Suspect: Why?

Interrogator: Because you're gonna go to a judge today, right, for your initial appearance. The state of Arizona is gonna provide you an attorney. They're not, he's not gonna let you come and talk to us.

This is gonna be your last chance for any type of, uh, oh when, uh, Rick talked to you yesterday, when I walked out of the room, where we could negotiate time and charges, this right now is the last chance, because if, ok I told you, I don't quite believe your story, and the investigation doesn't stop today, it starts.²¹⁷

Few investigators are as open about the strategy of offering systemic benefits as was this detective. But the strategy is nothing more than a shell within which to conduct a negotiation and bargain about outcomes for the suspect. It must be conducted obliquely because of the legal constraints on what is permissible to use as a motivator, but it must also communicate the offer and the obligation; otherwise a bargain will never be reached. If, as in these interrogations, a recording is being made, a difficult communication problem is created. The Flagstaff investigator just ignored the recording and spoke forthrightly. The confession he obtained was suppressed.

Although investigators are presumably aware of the prohibition against

216. Interrogation Transcript of Schmitt, *supra* note 85, at 132.

217. Interrogation Transcript of Richardson, *supra* note 186, at 124.

making promises and threats, they do not always respect it. As psychological interrogation has developed over the last fifty years, so have more subtle tactics that accomplish the prohibited goal by less obvious means.

In the interrogation of an adolescent in Solano County, California, a detective laid out a subtle version of how the system supposedly worked. Before giving this speech, the detective had coerced a witness statement from another young man who had also been arrested, and then was offered a way out by changing the story of what he had seen. The young man agreed that he had witnessed his friend deliberately push another boy into a passing train, something he initially said had not happened. The coerced witness statement had already been reported to the principal suspect as the main piece of evidence that would seal his fate:

Interrogator: The way the system works is I am, you know, contact you, talk to you. I talked to everybody. Then I send the whole thing off to the um, District Attorney and the courts and they evaluate it, okay? When we're talkin' here tonight, you know, I've yet to go back to the District Attorney and tell him one of two things, alright? And that's it. I can tell him, "You know, I talked to um, to Mike tonight after having talked to ninety percent of the people you know, that were out there, including two people that were standing within ten feet of him when um, when Mr. Mockus got hit by the train and everybody tells the same story, right down to the wire.

But when I talked to Mike, you know, he told me something that was totally vague, you know, and ends didn't meet ends and there was just, you know, for whatever reason, he's, he's not being honest and you know, there must be something, you know, some deep reason why he doesn't want to be honest, you know.

In other words, he's just sayin', you know, 'screw you guys' I can go to them and I can go, "Look, you know, Mike has been in very minimal trouble. He um, came forward to me. What he told me is the truth. He understands that he made a mistake, but you know, he's ready to deal with the problem that he's created and he's been honest about it. And here's the reason why this happened and he told me what was going through his mind. Why this thing happened. You've got to understand the gravity of the situation, warrants your honesty. It warrants complete total honesty and nothing else. Because you're going to have eight other people that are going, that are going to go up and say exactly what happened and then your story, this is the only chance that I'm gonna talk to you. I'm not gonna keep coming back and talking to you. I don't need to and if this is your initial, our initial contact, first time I met

you in my life and it looks a lot better for you if you're honest on our initial contact and I can go to the DA's office and say, "You know, he just got himself in a little deep. But he's honest about it and here's the reason this thing's happened and he explained it and it makes sense to me."²¹⁸

In the following exchange, an Oakland, California, suspect explained how the investigator's emphasis on psychological benefits and sentence reduction was effectively communicated to him and had caused him to falsely confess a few hours earlier:

Interrogator: Could you tell us why you were telling us that—why you don't remember if you must have killed her.

Suspect: Cause you were saying that I had to search (pause) to relieve my conscience and that I would never be able to live. I'd sit in jail and rot away from the inside if I could not remember. And if, and not even remember 'cause you felt that I could—but I could not remember what had (pause) happened.

Interrogator: Did we tell, you would rot in jail for that?

Suspect: Yeah. From the inside I would, I would. Eat away from the inside.

Interrog. 1: I think the term was that we told you that something like that would gnaw at you and eat at you from the inside.

Interrog. 2: Okay, that, that is different from—rotting in jail. We are talking about it would gnaw at your insides. Is that right, or it would play on your conscience?

Suspect: But it is also, I mean, prison or jail was mentioned and (pause) the idea that there was a way out and that was by (pause) cooperating and I was cooperating. But not to what you, not the answers that you wanted. And every time I told the truth.²¹⁹

As with every tactic that communicates an offer of a material benefit for making an admission, emphasizing the systemic consequences of admission can be done directly or indirectly. Over the course of a lengthy interrogation an investigator who is trying to get this offer across is likely to revisit the subject. With each return to the subject the investigator is likely to clarify the meaning of his suggestion that a benefit will follow admission. The following excerpts from a Sacramento, California, interrogation involve a man who had already been arrested for child sexual abuse:

Interrogator: You know, Robert, while you were in here talking to your wife, I'm talking to some of those other officers

218. Interrogation Transcript of Johnson, *supra* note 138, at 24.

219. Interrogation Transcript of Page, *supra* note 76, Tape 4, at 3-4.

that were talking to the kids. You know, their stories are pretty believable, and, you know, you're going to need some counseling. You really are, you know, and the way to start out is you got to be strong. Okay? You got to admit what you've done, and, and you got to start on your way to recovery. That's the only thing that's going to get you any shorter time periods or anything like that. You have to recover. You can't continue to do this. You know what I'm saying?²²⁰

The suspect continued to deny guilt. The interrogator responded by stressing that evidence from several children was conclusive and then emphasized again the benefits of making an admission:

Interrogator: [D]eny all this all you want. That's not going to do you any good. I mean cause those kids aren't lying. And the only thing that's going to help you

Interrogator: The thing is to talk it out. Get it out of your body now, you know, get it out, get a counselor, get your life back on track.²²¹

After a few more minutes, the interrogator spoke more openly about the beneficial consequences of confessing. The suspect expressed his concern about outcomes:

Interrogator: If you want that family, you're going to have to pull yourself together. You're going to have to be strong. Okay? You can start today or else you can go sit in jail and think about it. I don't care.

Suspect: Where . . . where do I go?

Interrogator: It doesn't matter to me because it's your—you go right here. You start talking right here. You start on your way to recovery. The District Attorney knows that you're on your way to recovery. You're not putting these kids on (unclear). You're not just thinking about yourself. Okay? All right. That's how you start. And then no matter what comes of it. You know, the main thing is that you recovered. Okay? That you get that counseling. All right? All right? Okay? So you can become a productive person.²²²

The defendant apparently began to consider the value of the offer and tested whether the investigator could deliver his end of the deal. After again demanding an admission, the investigator said:

Interrogator: All right, Robert. Well . . .

Suspect: Well what am I going to say? You say you can get me

220. Interrogation Transcript of Robert Fitzsimmons, Sacramento, Cal., Police Dep't 29 (July 10, 1996).

221. *Id.* at 31.

222. *Id.* at 36.

into recovery and counseling, I guess?

Interrogator: Yeah.²²³

The interrogator clarified the advantage of the admission/counseling deal in the following exchange:

Suspect: Still have to go to court, right?

Interrogator: That's up to you.

Suspect: (Unclear) If I don't go to court there's got to be a set time.

Interrogator: A set time for what?

Suspect: For jail time.

Interrogator: For jail time? Yeah.

Suspect: Prison or wherever the hell I go.

Interrogator: That doesn't mean that you have to go to court. Of course a judge would have to send you, yeah. Or . . . put you in a program for . . . you know . . . to make sure you get your treatment that you need. All these things will be taken into consideration.²²⁴

During the ride to the police station, the arresting officer told the suspect that child molesters are likely to be killed in jail and that he was unlikely to survive. Not surprisingly, the suspect became leery about going to the county jail. The investigator used every mention of leaving or being with family to persuade the suspect to take the deal:

Suspect: There's no way I can leave.

Interrogator: Yeah that's true. There's only one way you can leave. One way you can only leave. One way. And that's to get yourself together. Get your life started back, get this thing behind you. That's the only way you're ever going to walk out of here. Is that true?²²⁵

The investigator repeatedly emphasized that the system valued rehabilitation above punishment and that rehabilitation was available once the suspect confessed:

Interrogator: Well what we're trying to do is we're trying to fix things. What happened in the past has already happened.

Suspect: Right.

Interrogator: You know. That's like in, in baseball. I mean you throw the ball, there's nothing you can do to pull that ball back. You just got to accept what happens and make the best of it. And that's what we're here to do today is make the best of this situation and try to fix it so it doesn't ever happen again. Because when you leave

223. *Id.* at 37.

224. *Id.* at 42.

225. *Id.* at 52.

here, you want to have a clean slate. You want to start fresh.²²⁶

Eventually, the investigator succeeded in getting the defendant to accept the deal—his best choice was to admit to sexual contact with the children at this point and thereby get counseling and less time in jail. In a phone conversation from the interrogation room, the suspect explained to his wife what would happen if he confessed or remained silent:

Suspect: Then they, well they'll put me on the counseling thing. . . . I just go to the jail I guess. I don't know for how long.²²⁷

An investigator may focus the suspect's attention on how a prosecutor, judge, or jury will review the case and determine his punishment, how they will react to the suspect's litany of denials, and how they are likely to be affected by a demonstration of remorse and/or confession. For example, a San Francisco, California, detective told a suspect:

Interrogator: Here's the situation, I'm just here to be your conduit, to let you tell me why it happened.

Suspect: Well you ain't gonna be the prosecutor.

Interrogator: Well, we're gonna be the ones that talk to the prosecutor, all right, and really it's just a matter was it manslaughter, voluntary, involuntary, second degree, first degree.²²⁸

While working on an innocent young man who had already been persuaded of his guilt, a Connecticut State Police investigator focussed his attention on the importance of creating the right impression:

Suspect: Do you think when this comes to the court it will be considered temporary insanity?

Interrogator: Oh, Pete, don't worry about courts. All right? Don't worry about things like that.

Suspect: That's all I can think of.

Interrogator: The thing ah, to help yourself right now. In other words they got to present all this stuff before the judge, you know?

Suspect: Mm-hm.

Interrogator: If they present what they have right now, before a judge, your—there's no doubt in my mind that the judge is going to think he's got a cold blooded killer. All right.

Suspect: Mm-hm.

Interrogator: Instead of somebody who went off the deep end for a

226. *Id.*

227. *Id.* at 73.

228. Interrogation Transcript of Anderson, *supra* note 114, at 3.

few minutes. Okay?

Suspect: Right.²²⁹

The investigator's goal is to motivate a suspect to offer an account that simultaneously admits his involvement but places him in the best possible light. By doing so, the investigator encourages the suspect to reason that he will receive prosecutorial, judicial, and/or juror leniency. Investigators studiously avoid educating suspects about the realities of the justice system. An investigator in Flagstaff, Arizona, fashioned a view of the future in which a female suspect would not be able to convince a jury to believe her story even though she became involved only after the killing and as a result of her husband's threats:

Interrogator: Trena, put yourself in a juror's shoes. I'm explaining your story to them. Are they gonna believe you? This happened at the burn scene and you were forced, you felt you were threatened that you were gonna end up in the trunk, everything is done like you explained, then you go back and have sex. That's gonna be a big, big point. That's gonna be a big point. Put yourself in the juror's shoes. Why should they believe you? I don't believe you.²³⁰

A San Diego, California, investigator flipped this argument 180 degrees and told the suspect that if his story was sad and compelling enough it would help. The investigator communicated the idea by referring to a case that supposedly resulted in jury nullification:

Interrogator: You better believe it counts. It does count. If you've got twelve men or twelve, yeah six women and six men in that jury box and they're listening to that what, what, what's being said. I'm gonna tell you what. It does weigh a lot. It does weigh a lot in terms of, in terms of what, of what you know, of what goes down and what they're thinking. It does weigh a lot, man. Again that's what, I, you know, that is just from past experiences of being in court and everything. I mean I've sat in court and I'm going, "God damn it, how in the hell could they not convict this guy of fucken' first degree murder." Well what happened was they ended up feeling more for the guy or the girl or whatever because of the certain factors that led up to the incident.²³¹

A San Mateo, California, investigator explained that since the suspect would not be testifying at his trial, now was the time to get his account on the record. The interrogator invited the man to give any self-serving story that he wanted to tell:

229. Interrogation Transcript of Reilly, *supra* note 75, at 283.

230. Interrogation Transcript of Richardson, *supra* note 186, at 126.

231. Interrogation Transcript of Nimblett, *supra* note 137, at 32.

Interrogator: I got a question to ask you. A few months from now when you're sitting in front of a jury, the man that saw you in the morning and the night before comes up and tells the truth of what he saw. You're sitting there, now, that's what happened, but he didn't, he's not telling the reason why. You think a jury is going to listen to that.

Now, is your time to bring up that reason. Now is your time to tell your side of the story, so that everybody's gonna know that you're not gonna be talking, you know, just from what this guy has to say, this witness. Get it on the books now, so that, you know, they're gonna know. "Hey, wait a minute, okay. I made a mistake, but this is the reason for the mistake. I'm willing to tell the truth to as exactly what took place and why. Yeah, I shot him." It might have been defensive, it might have been an accident. Do you think that a jury's gonna listen to an excuse six months from now?²³²

In a Jackson Hole, Wyoming, investigation, an interrogator told a defendant who had just been arrested for child molesting the following:

Interrogator: You recall you had a problem. You knew you had a problem, when you were at the Triangle X. That's why you are no longer at the Triangle X. What it boils down to is we want to get to the root of the problem, exactly what happened as far as what you did with those, those three or four girls, or whatever.

The details need to be brought out. And if you're not going to bring out the details, what I have to go do is go back and tell the judge, tell the prosecutor that he doesn't—he knows he had a problem there. You want to—you're starting to get some help. I mean, tell me, tell Bret, tell the judge that you are telling the truth. Tell the prosecutor that you're telling the truth and we don't have to deal with it anymore . . . ²³³

The investigator went on to suggest that the results of an admission at this point would be beneficial:

Interrogator: Tell us a little bit about, about the number of times, the number of kids that were involved here, so that I've got some way to go back to the, to tell the people that I'm dealing with, that, you know, the prosecutors and the judges, so that I can say; yeah, this is it, there's no more, there's not going to be any more surprises, and I

232. Interrogation Transcript of Bernard Knight, East Palo Alto, Cal., District Attorneys' Investigators 26-27 (Sept. 24, 1992) (Case No. E92-11302).

233. Interrogation Transcript of Russell Stone, Salt Lake City, Utah, Police Dep't 46 (Dec. 5, 1995).

believe that Russ is telling us the truth. And I want to be able to go to them and tell them that they're telling us the truth, that you're telling us the truth. That will, that will clear the whole issue for them, and we're not going to — you know, as far as what's going to happen with you, you've got to figure in your, in your own mind.

If you've got a guy on one hand that's being truthful, and another guy that you think's holding something back, how are you going to deal with this person? If you got, if you've got somebody that's truthful and somebody that's deceitful, how are you going to deal with people coming from different angles, different directions? And that's, that's one way you're going to have to consider for yourself as to how you're going to deal with the case. Do you understand.²³⁴

It would be difficult to defend any implication from these remarks other than that a contrite, remorseful defendant admitting guilt and asking for mercy and help from the prosecutor and judge will receive it. Although the investigator did not guarantee the result, his tactic was likely to lead the defendant to conclude that a benefit would almost certainly follow.

An investigator might attempt to effect a suspect's decision making by leading him to believe that the jury is going to be harsher on him if he continues lying. For example, Vallejo, California, investigators told a suspect:

Interrog. 1: It's over, we gotcha, but what ya gotta understand is the way the system works. We're doing the investigation. I wanta be able to set forth the complete investigation now in front of the District Attorney, and say these are the people involved, these are what their involvement was, and make your decisions on what you file, and we'll go to court.

But like it is now, they're saying Eugene's doing this, this and that, but Eugene's sitting back saying no I didn't do nothin, and it makes themselves, it makes them sound like they're being truthful, and to be quite honest with ya, there's more there than they're telling us, and you can tell us what's really there.

Interrog. 2: Eugene, Eugene, don't you know, I mean I know you're smart enough to realize that if you lied to us, we can prove you're lying. That's just as bad if not worse than standing up like a man and admitting what you did.

Interrog. 1: Absolutely.

Interrog. 2: Because people are gonna sit in judgement of you one

234. *Id.* at 50.

day on this crime, and they're gonna look at the fact that you lied, and what are they gonna say about why Eugene lied. There's no reason he would lie if he wasn't covering up for something, and unfortunately those people are not gonna know for sure what you're covering up, only you know that, cause it's in your mind. They don't know if you're covering up just your participation in the robbery. They don't know if you're covering up the fact that you ordered the hit. They don't know how much you're covering up. They just know that you're lying and you're covering up, and then it's just as damning if not more damning than the fact that you sat right there and tell us exactly what happened.²³⁵

A Maricopa County, Arizona, sheriff's detective told an innocent Temple murder suspect to consider how the judge would treat an admission and expression of remorse. The investigator's strategy was apparently designed to lead the suspect to believe that some self-serving account of what was an execution-style mass murder and robbery would garner leniency:

Interrogator: Remember what I told you judges are pretty reasonable people ya know they weigh facts and they examine things and they try to be unbiased and they weigh all the evidence . . . What do you think their decision would be in a situation like that as opposed to ya know hey what happened here? I messed up I was some place I shouldn't been ya know something happened I didn't know it was gonna happen I'm sorry for what happened and I didn't have any control over it. What do you think the outcome in a situation like that's gonna be then opposed to the other where the guy just don't care? . . . You know the key factor in all this is hey, I'm sorry, I'm sorry.²³⁶

d. *More or Less Explicit Threats and Promises*

If thinly veiled suggestions about how to manipulate the system do not work, an investigator may decide to more openly communicate that certain harms follow from continued denial and that there are benefits available for confessing. The investigator may suggest that he has the power to deliver the outcome implied in his comments or that it will certainly be delivered down the line by other criminal justice officials. Either way, the suspect is expected to conclude that he is certain to receive one or the other of the two alternatives that the investigator associates with the decision to confess or to remain silent. If an investigator decides to shift to these more direct methods of com-

235. Interrogation Transcript of Livingston, *supra* note 113, at 79-80.

236. Interrogation Transcript of Nunez, *supra* note 54, Tape 3, at 12-13.

municating threats and promises, his tactics will appear straightforwardly coercive.

For example, Vallejo, California, interrogators made the consequences of admission versus denial clear:

Interrog. 1: Again we're right back into a first degree murder situation, where you just walked in, premeditated, I'm gonna get that son-of-a-bitch, what you told Vance, and then it looks like to us that you just went back there the next day, opened up, walked in and got a man, he was probably sleepin on the couch, cause he's on the couch, lying on the couch, and started bangin his head in.

Interrog. 2: From the outside, from our side looking in, it just looks like cold blooded murder, and it doesn't have to be that way.²³⁷

San Diego, California, interrogators told a adolescent female who was suspected of murder that failing to confess would leave her in big trouble:

Interrogator: You're, you're in trouble. Okay?

Suspect: I know.

Interrogator: And you're in big trouble and, and the—You're in such big trouble that this is the only time you can help yourself. Cause if you don't tell me, you know, what this situation is or what happened over there, you're in big trouble.

Suspect: (Sigh).

Interrogator: And, you know, you're, you're, it's only your bacon you're saving right now. It's nobody else's.²³⁸

Sometimes interrogators suggest that the crime was obviously committed by someone in need of psychiatric care rather than imprisonment. They lead the suspect to understand that if he admits guilt, he will receive hospitalization and care but that if he continues to deny guilt he will receive prison and punishment. For example, a Connecticut State Police investigator told a teenager who had no memory of murdering his mother:

Interrogator: Don't be afraid to say, "I did it." (garbled).

Suspect: Ya, but I'm incriminating myself by saying I did.

Interrogator: We have, right now, without any word out of your mouth, proof positive.

Suspect: That I did it?

Interrogator: That you did it.

Suspect: So, okay, then I may as well say I did it.

Interrogator: Yes.

237. Interrogation Transcript of Vince Yarborough, Vallejo, Cal., Police Dep't 20 (1994) (Case No. 94-02881).

238. Interrogation Transcript of Danielle Barchers, San Diego, Cal., Police Dep't 493 (Sept. 24, 1995).

Suspect: Okay.

Interrogator: And by so doing, we take the first step towards getting you the kind of help you need. That's all.²³⁹

Later, the investigator made clear that the offer of help meant keeping the young man out of prison:

Interrogator: Now, let's get the problem solved. Let's, I mean, let's take some positive action to get you some help. I'm telling you I don't want to see you hurt. I don't want to see you in Somers. I don't want to see you in prison. That's not what I get paid for. I don't get paid by the number of people I put in jail. Neither does he. And, neither does Sgt. Kelly or Sgt. Schneider. Or anybody on our whole State Police Department. That's not our (garbled). If we can help you or any other citizen or any kid, that's what we're paid for and that's what we're trying to do. Now somebody is dead. You are responsible, we know. We can prove it with extrinsic evidence. Now, we're telling you that we are offering you our hand, take it. Does that make sense to you?²⁴⁰

Flagstaff, Arizona, interrogators told an innocent suspect that because he was abused as a child, he was more likely to grow up to be criminal and thus needed help, not punishment:

Interrogator: That's basically one of the things that we always try to tell people who are involved in molestation, as well as children, they must talk about it, they must get counseling, they must get it out because if they don't, what happens is what happened to you. You didn't get the help you needed on that. And I truly believe that you are telling me that. And I know this for a fact because I have seen statistics that people who are molested as children have a higher percentage rate of becoming involved in a negative way with law enforcement later down the road. In other words, they commit crimes. Because they have got all this great, great, great, great mental turmoil inside of them.²⁴¹

Shortly after this exchange, the investigator reported the following:

Interrogator: My superiors did not agree with the way that I wanted to handle this thing. You can believe.

Suspect: They want you to book me and charge me.

Interrogator: That was discussed. And I told them no, I was not going to arrest you, and I haven't arrested you, that I wanted

239. Interrogation Transcript of Reilly, *supra* note 75, at 191.

240. *Id.* at 250-51.

241. Interrogation Transcript of Abney, *supra* note 55, Interview 3, at 16.

to give you the opportunity at this point to tell me things like you have already told me. You know, who could sit on a jury and say that, yeah, this man committed a crime, but look at what he was a victim of. Look what happened to him when he was a child, and look at all the times he's cried out for help you know.²⁴²

A Palmer, Alaska, police investigator offered psychiatric help to a woman whose infant son had just died for not yet determined reasons. But first she had to agree to the investigator's demand to confess that she killed her infant son.

Interrogator: I want to see if I can get you whatever help I can get you and this is the lady right there that might be able to help you. But you got to tell me the truth now. Okay?²⁴³

Investigators control and limit the *reasonable* alternatives the suspect will likely consider by defining the problem as a simple two-choice situation. An investigator may ask a suspect whether he is a cold-blooded murderer or just a person who made a mistake and accidentally caused the underlying event. This technique depends on ordinary human information processing and reasoning capabilities.²⁴⁴ By framing a suspect's alternatives as admitting to either a premeditated crime or an accident, an intellectually normal individual would infer that two different levels of sentencing will follow.

Even when it makes no difference whether the killing was planned or unintended, as in felony murder cases, interrogators lead suspects to believe that accidental homicides are a lower level of offense and therefore less severely punished. For example, Vallejo, California, police told the following to a suspect in the investigation of a robbery in which three guards were executed:

Interrog. 1: Eugene, as we were saying before, now this, this person here is, is going to testify to what he told us, and what he told is, is something that we went and looked into. In other words we're not gonna sit there and just take his word for it. We're gonna look into this, and we're gonna see if we can prove through other means what he is telling us is true. We've done that Eugene. We've done that through other people's statements. We've done that through some physical evidence at the crime scene, okay. As you saw when we first started this interview out with him, uh Mr. Highsmith and uh Mr. Young and his attorney sat down and went over some legalities. Uh, Young realized that he's going to come straight up

242. *Id.* at 19.

243. Interrogation Transcript of Beverly Huckstep, Palmer, Alaska, Police Dep't 5 (Dec. 21, 1992).

244. See Kassir & McNall, *Police Interrogations*, *supra* note 6; Nisbett & Wilson, *supra* note 39; Harris & Monaco, *supra* note 39.

truthful with us.

We believe he's being truthful until we can prove differently. We proved a lot of the things that he said is true, and as we told you from the beginning, Eugene we did search warrants at a lot of houses. We did a search warrant at your house. We did search warrants to your van. Your phone number is in his roladex. He has your phone number. We can show that association. We, we will talk to James. James knows you. James has your phone number. James is willing to testify to that. We have that on uh video tape as we're talkin to you. We've talked, we've talked to Victor.

What we're trying to tell you here Eugene is whatever happened that night, whatever involvement you were in that night, whatever intentions you had, we don't know, but sitting here and talking to you in the last two years, and the interviews we've did with you, I don't believe that you necessarily knew that this was gonna happen, or end up the way it ended up. I don't think that was the last thing on the minds. And unfortunately it did, but now we're at a situation where the only way we can get this settled once and for all, and get this off your mind, off your chest, off your shoulders, and everybody else's, cause as you can see we're not grasping for straws, like we did when we first interviewed you. We've corroborated a lot of things Mr. Young said.

This is your opportunity now to tell us exactly your side of what happened. What was the plan? Why did it go bad? And as you can see, he's puttin everything off. You're the mastermind, you planned it, you did this, you did that.

Interrog. 2: Not only that, but the big thing Eugene here is that he's saying that you ordered the killing, at least the first guards, you said it may be necessary to kill that first guard in order to cover up how you got in, okay.

Now we are not so naive. We been doing this job a lot of years. We're not so naive to think that when we talk to someone that there's not a good chance that he may slant what he says a little bit to make himself look a little bit better. Now there's no doubt this man was in there and did the crime. He's gonna plead guilty to first degree murder. He knows a lot about the inside layout. He knows about the doors. He knows a lot of other stuff that I cut out of that tape. There's gonna be absolutely no doubt to the jury or to the judge that this man participated in the crime, and he's telling the truth about

that.

The real issue here that we're hoping to get from you, and the only thing that you can tell us in your own welfare here, is there's not gonna be any doubt that you set up this robbery. The question is, did you intend for those guards to get killed, or did you intend it to be a straight out robbery? You're the man that has to tell us that on your behalf, cause you've seen what this man said.

Defendant: Exactly.

Interrog. 2: And if you don't tell us, nobody else is going to speak up for you Eugene, and this is your opportunity to, to do that. Now it's one thing in today's day and age to set up a robbery. We know that you were having financial problems, okay, a lot of money there, a lot of temptation, a lot of people get themselves into a position in life to where they feel desperate enough to do something as far as stealing. Not a lot of people get so desperate that they're willing to kill people for it. There's thieves and there's murderers. Thieves are not good people. They're a hell of a lot better people than murderers.

Now you need to tell us were you gonna be a thief that day, or did you intend to be a murderer? Did you intend for those guards to get killed Eugene, or did you just want it to be a robbery?²⁴⁵

e. *High End Threats and Promises*

If a suspect fails to understand or act on the choice before him, an investigator may use even heavier-handed tactics to communicate an expectation of significant differential punishment outcomes for silence and confession. Some boldly assert that the suspect will be charged with the most serious offense possible if he does not confess, but if he admits guilt he will receive a lesser punishment. Presenting these alternatives to a suspect who already believes that there is sufficient evidence to arrest and convict him will coerce confessions from the guilty and false confessions from the innocent.²⁴⁶ It makes no difference if the evidence exists or is fabricated, as long as the suspect believes that the police have it. It makes very little difference whether the suspect knows he is guilty or knows he is innocent. If the tactics of the interrogation have their expected effects, his attention will be focused on the choices the investigator has placed before him, and he is likely to confess if he would rather avoid the death penalty and receive less, rather than more, punishment.

With this degree of clarity and at this level of threat and/or promise, the

245. Interrogation Transcript of Livingston, *supra* note 113, at 36-38.

246. Leo & Ofshe, *Consequences*, *supra* note 1.

coercive nature of the interrogation is fully revealed. No one knows how often threats of this sort are delivered in unrecorded interrogations because there is typically no way to absolutely resolve the swearing contests that arise between suspects and investigators. Sometimes, however, it is possible to establish that a death threat and/or offer of leniency was made during the unrecorded portion of an interrogation because the suspect makes a reference to it in the recorded portion. When this happens, an embarrassed investigator is likely not to challenge the remark, realizing that to do so while the tape is running only makes matters worse.

For example, in a largely unrecorded Pompano Beach, Florida, investigation, two detectives threatened a suspect with the electric chair if he did not accept the deal they offered. Only the final portion of the interrogation (i.e., the confession statement) was recorded. The recording captured the suspect making two separate remarks that confirmed the deal and the death threat. Both interrogators ignored his comments when he brought up these subjects. Early in the recorded portion of the interrogation, the suspect made reference to the offer that the investigators had made off-tape:

Interrogator: Okay and you're freely talking to us today.

Suspect: Yes.

Interrogator: Okay. Uh, okay. We're talking about a robbery that turned into a homicide that happened at the, uh, at the foodmart.

Suspect: Yeah.

Interrogator: Okay.

Suspect: I think I'll plea bargain, right? I'll plea bargain.

Interrogator: Well, you tell us the truth. That's all we're interested in right now and what occurred here.²⁴⁷

At the conclusion of the interrogation, one of the detectives made the mistake of asking the suspect why he confessed:

Interrogator: Why you giving this statement? Is it the truth?

Suspect: It's the truth.

Interrogator: OK.

Suspect: This man had me frightened of the electric chair.

Interrogator: Excuse me.

Suspect: Frightened of the electric chair and all of that.²⁴⁸

Due to the significance of the Phoenix Temple murder investigation, Maricopa County, Arizona, sheriff's detectives decided to record their interrogations. The interrogating detectives nevertheless relied on death threats despite the recording:

Interrog. 1: You've been sentenced before . . . you've been sen-

247. Interrogation Transcript of Shandy Huggins, Pompano Beach, Fla., Police Dep't 3 (Feb. 10, 1995).

248. *Id.* at 14.

tenced before for little things and you know that if that judge gets pissed off at you it's a lot different than if he's not. And you right now you can make a decision to make a difference about how the judge feels about you and you need to take it.

Interrog. 2: What if he might send you to the gas chamber, and I don't say that to scare you, Dante, but in this situation that's a real possibility and I'm not gonna sit here, Wayne's not gonna sit here and lie to you about these things cause that's not gonna serve us any purpose.

Interrog. 1: So you're sitting here thinking it's us against you, that's not the case. We're here to help you out.

Interrog. 1: You need to think ahead to that sentencing time and have you walk before that judge, that's something to think about. Because you've been there before, think about how it was, think about how it's gonna be.²⁴⁹

The detectives followed immediately with the suggestion that the nine murders could be characterized as an accident, which would supposedly benefit the suspect. Eventually he falsely confessed to all nine murders.

Interrog. 1: You've heard about premeditated murder?

Suspect: No.

Interrog. 2: Have you heard about that?

Suspect: No. What's that?

Interrog. 2: You know first degree murder, second degree murder?

Suspect: Yeah.

Interrog. 1: Premeditated murder is the worst kind, I planned it, I went in and killed 'em. You're the only one that can say that's not how it happened. You're the only one that can help yourself out and say no hey wait a minute, yeah I was there but hey it wasn't planned and that is (inaudible) truth from me was it planned or not, alright? You understand the difference, I know you do. Cause you're a smart person (inaudible).

But we don't think it went down the way you planned it, that's the key for you. I don't want to see you, because you know, you probably don't trust police, you know, you grew up on the streets, you've been in prison you probably don't trust us, okay, that's natural for you. But you've got to believe me when I'm tellin' ya, the difference between premeditation, go in there to do this and go in there and it happens, are bigger then, I'm sure you understood. If you understood that you'd come clean you really would (inaudible) and you're

249. Interrogation Transcript of Parker, *supra* note 54, Tape 2, at 13-14.

gonna feel better once you do.

Suspect: Oh I understand but there's nothing to come clean with.

Interrog. 1: No doubt in my mind, no doubt in his mind and we have the exact same facts that the jury's gonna have. Okay? Exact same facts. They're gonna get everything we've got. And they're gonna know the answers just like we do. The only thing that they're not gonna know is did he plan it, did he plan to kill 'em or did it just happen. And . . . and we've been in enough juries to know they think the worst unless somebody says no that's not how it happened.²⁵⁰

Sometimes guilty suspects can be coerced into confessing in order to save an uninvolved relative. In the investigation of a high profile gang-related freeway shooting in Los Angeles, California, a young man had been identified as the shooter by another gang member. During his interrogation, he refused to admit to the crime when confronted with both true and false co-perpetrator eyewitness evidence. The investigator's response was to threaten the suspect with arresting his brother if he did not admit responsibility for the murder. The suspect's brother was not a gang member and had not been in the van at the time of the shooting.

Interrogator: [T]hey've implicated your brother. They've implicated you. You telling your mom for a fact Avan didn't do anything. That only leaves one other person and that is you.

Suspect: Then book me.

Interrogator: Oh, I am. What I'm trying to avoid is having to book your brother too.

Suspect: Why do you have to book him? Just book me.

Interrogator: I can't, I have a guy who says he was there, says your brother was there.

Suspect: What if I tell you he wasn't there?²⁵¹

The interrogator continued:

Suspect: No. You even said yourself all the people in the van are in the same boat or whatever.

Interrogator: Yeah.

Suspect: Whatever.

Interrogator: Yeah. You guys are, but the thing is, is that so is your brother, you know. And he might not have to be—

Suspect: How?

Interrogator: —Is what I'm saying.²⁵²

250. *Id.* Tape 3, at 3.

251. Interrogation Transcript of Leo Burgos, Compton, Cal., Police Dep't 45 (Apr. 4, 1996).

252. *Id.* at 46.

The interrogation kept returning to the subject of the younger brother's fate:

Interrogator: It's like I tell you. You were there. I know you were sitting in the van. I know you shot. I know where you got the gun. I got some of those guys in jail. If I didn't have all that, Leo, I wouldn't be here with you. You wouldn't be in here with me. You know what I mean? And you're holding out for the wrong reason, because these guys didn't hold out. No, they told the truth.

Suspect: You sure my brother will go home tonight?

Interrogator: Okay. If the truth is that your brother has nothing to do with it, yes, your brother will go home, okay. Because, first of all, I want to believe your brother, and to be honest with you I want to believe you.

No, no. See? I'm telling you if you tell me the truth and it makes sense to me I will believe it.²⁵³

The suspect wanted to be absolutely certain the deal was in place—that if he admitted responsibility his uninvolved brother would indeed go home.

Interrogator: So, um, like I tell you, you know. It's just the truth I'm after. I'm not asking you to roll anybody out. I'm not asking you to say, "Hey man you know it was so and so's gun. I got it from —," because I know that already. I just want to know what you did. I want to hear it from you. I want to hear.

Suspect: Just want to know if my brother's gonna go home.²⁵⁴

The interrogator followed up:

Interrogator: What happened that night, Leo? You guys are coming down the freeway on the one hundred, right? By Manchester? Right? Kid is driving? Huh? Like I tell you make that other guy a liar, and if he's a liar and your brother goes home and if you're responsible for something.

Suspect: Man to man, my brother will go home tonight.

Interrogator: Man to man, if you

Suspect: Right now?²⁵⁵

The suspect then went on to admit being in the car and shooting at someone he believed to be a rival gang member. His target turned out to be a ten year old child who was leaving Dodger Stadium with his family.

One of the innocent Temple murder suspects resisted confessing despite the threat of the death penalty and constant pressure for hours. What finally

253. *Id.* at 48.

254. *Id.* at 50.

255. *Id.* at 51.

caused him to comply were threats against a friend and a family member. It is unlikely that promising to humiliate and harm others by harassing and interrogating them would normally cause an innocent person to confess to mass murder. Taken alone, out of the context of the entire interrogation, almost no single psychological threat or promise would likely have this effect. But interrogation is a time-sequenced and cumulative process in which each new element, like the proverbial straw that broke the camel's back, adds to the weight of what is already in place.

Interrog. 1: Dante, if T.C.'s not involved in this man, give it up.

Interrog. 2: Make some right out of it, Dante.

Interrog. 1: We need to get that stopped.

Interrog. 2: Everybody's here Dante, the game's up. All I need to know is Dante.

Suspect: Leave T.C. out of it. T.C. don't have anything to do with this.

Interrog. 2: Peter either.

Suspect: Peter either.

Interrog. 2: He's being brought in. What happened Dante, did you pull the trigger?

Suspect: I didn't pull no trigger.

Interrog. 1: We're gonna . . .

Interrog. 2: Right?

Interrog. 1: We're gonna be in Tucson, Dante.

Interrog. 2: This is not a game my man, this is your one chance. I mean that, like Larry told you I just want to know if you're a killer Dante.

Interrog. 1: They're gonna hit that house big time. T.C.'s gonna go down right in front of his kids.²⁵⁶

Once this man broke and started to make admissions, seven investigators worked on him for hours and pressed him for information about the crime. When he was unable to supply them with the information they wanted, they repeated the same threats and promises that provoked his first decision to confess.

An adolescent in a Fort Lauderdale, Florida, murder investigation described the coercive threats used in the unrecorded portion of his interrogation. The investigators sought to induce him to agree to the story of the crime that would lessen his punishment:

Suspect: He's telling me that I'm lying that who knows what happened, that if I keep lying, I'm going to be in prison for the rest of my life. He said that they'll like me in prison with my pretty eyes and stuff. He said I'm going to be in prison for the rest of my life. I'm going to get

256. Interrogation Transcript of Parker, *supra* note 54, Tape 7, at 9-10.

the electric chair if I keep lying about this—if I keep lying to him because he knows what happened. . . . He's telling me that he knows what the story is, he knows what happened.

And that I'm over here lying, and if, he knows, he's saying, "I know you're lying and you keep, if you keep lying, "and he's standing up now, put his finger in my face, "if you keep lying, you're going to be in prison for the rest of your damned life." I'm telling you what really happened. I know what the fuck happened. "You're going to go to prison for the rest of your life. They're going to like you with your pretty eyes. And if you don't go to prison, you're going to get the electric chair. . . ." So I was, I didn't know what to do, so I told him, I just decided to tell him what he wanted to hear. I said, "all right."²⁵⁷

Another young male defendant in South Carolina described a portion of his interrogation as follows:

Suspect: And that's when David told me about his feelings he couldn't put in the report and everything. And he told me I could spend the rest of my life in jail. And um, so at that point, I said "You mean I'm going to die in jail. And um, David, he was the smart one, you know, and he made, you know, the smart comment "if you don't fry." You know, and when he said that I said "What do you mean, the electric chair?" And he said this could be an electric chair case. And um, so um, they talked about, you know, they told me that and then um, you know, after he told me about his feelings and stuff he told me that and um, but he said we can avoid all of that if you'll just help us out, tell us something.

Interviewer: That can avoid all of that?

Suspect: Uh hum.

Interviewer: Exactly what did he say about that?

Suspect: He said, um, that you know again about talking with the judge, you know, he said that he could talk with the judge, you know, to get me out of it. And he just had to have something for his report.

Interviewer: Did that make any sense to you at the time?

Suspect: Well at the time I was real scared, and I thought, hey if I do what he wants me to do, you know, the man's told me I'll be leaving.²⁵⁸

257. Interview of Adams, *supra* note 122, at 35-38.

258. Interview of Register, *supra* note 105, at 29-30.

While innocent and guilty suspects comprehend and react differently to an interrogator's accusations of guilt and claims about incriminating evidence, both experience growing certainty of arrest and conviction. As one suspect told the following to a prosecutor who interviewed him hours after he falsely confessed to Oakland, California, police:

Suspect: Am I, am I going to get myself hung for this? I mean because I, the part they said finally that I was going to go to jail as a murderer, and that the only way that I would have a chance and that I could continue my life to do those things that I find worthwhile, is if I could recall the section before when I saw BiBi and the time that I would actually have struck her, and I mean, there's none of that. Everything they said is just because they leaned on me until, I mean they scared me to death. They said I was going to spend the rest of my life . . .

Prosecutor: Okay.

Suspect: . . . in jail, in prison.

They said that I must have, that I was lying and they put a lot of pressure on me and I said that if it's not lying, it's what I believe that I did not drive down there. They said they have witnesses and they saw my car there and had all the proof and I felt like, well, I'm already found guilty for that and now, what's next, you know. And they said I'd spend the rest of my life in prison for that, so yes, that's my comment to my cognitive, my cognition is that no, I never did, I tried to make that clear on the tape, that this is all, just that I want to close my eyes and dream and think of, whatever, and then they's mention something like over there in the bushes and all of a sudden I can, bushes are imagined, and then I was trying to save myself because they had found me guilty, they had found me guilty. And they said they were my friends and if I couldn't, and if they were here to help me and if I couldn't get them to not, to. . . .²⁵⁹

Sometimes interrogators are so explicit in their offer that they engage in open plea bargaining: offering a suspect a specific promise of prosecutorial and judicial leniency in exchange for an admission. For example, Flagstaff, Arizona, investigators offered a woman less punishment in exchange for telling them the location of the body of a victim they believed her deceased husband had killed:

Interrogator: When we walk out of here today, there's no more deals. Period. And we already know, Gil and I already know

259. Interrogation Transcript of Page, *supra* note 76, Tape 3, at 3, 5.

what you just said that we can get the whole truth. And maybe, maybe, we can drop something, but until we find out what everything is, we're not gonna tell you that we can do it. Okay. So you tell us every bit of the truth right now.

Suspect: (Crying). Is it gonna help me or make it worse.

Interrogator: Oh yeah. It's gonna help you a lot. Alright.

Suspect: I'm sorry. I'm just so scared (crying).²⁶⁰

Interrogator: We get Jason's body. Twenty-five years. We don't get a body, it's life.

Suspect: I didn't kill nobody. I didn't do anything wrong, Rick.

Interrogator: Didn't say you did.

Suspect: So why am I being arrested? I didn't do anything.

Interrogator: Twenty-five years, we get a body. Life if we don't get a body. You decide which one you want.

Suspect: I didn't do nothing.

Interrogator: We're out here today to find the body.

Suspect: The only.

Interrogator: You provide it and, and, you provide it and we'll go from there.

Suspect: I don't know.

Interrogator: Plain, plain and simple. Okay? . . . We're not here, we're not, we don't want to hear I don't know, I don't know, I don't know. We want to hear it's here. And we're gonna out and find it and then we're gonna go on with life. But we're not going on with life until we find it. So, you want on hold again, that's fine.²⁶¹

Suspect: What do you guys want from me?

Interrogator: I want Jason and I want him today.

Suspect: I don't know where he is.

Interrogator: I want to know where he is today. If you tell me where he is and I go find him, we'll deal. But I want Jason. I want to cut this crap out and I want to have another person, because I'm tired of this, Gil's tired of this, our families are tired of this, the Sheriff is tired of this, we want.

Suspect: I'm tired of this.

Interrogator: Jason. Or whoever the hell he is. Dead or alive, we want him. That's the only way you're gonna get something out of this.

Suspect: What do you mean?

260. Interrogation Transcript of Richardson, *supra* note 186, at 24.

261. *Id.* at 78-79.

Interrogator: I guarantee you. Do you wanna be in prison for life?

Suspect: No. I don't want to even go to prison for one day.²⁶²

This woman eventually fabricated a story to satisfy the interrogator's immediate demand. Since she had no idea whether the person they sought was alive or dead, her confabulated statements were subsequently proven wrong.

While interrogating a recently arrested man who had been maintaining his innocence, Vallejo, California, police, in conjunction with a prosecutor and an FBI agent, explicitly offered a promise of prosecutorial leniency in exchange for a confession. Prior to formally presenting their deal, the interrogator had informally threatened the suspect with the death penalty if he did not confess. When he became desperate, the prosecutor formally offered the suspect a deal so he could avoid the informally-threatened death penalty:

Interrogator: I'm gonna have Jim Highsmith talk to you from the Solano County DA's Office.

Prosecutor: Okay Mr. Livingston, uhm the uh prosecution, I'm, I represent the District Attorney in Solano County. My name is Jim Highsmith. I've been sitting here uh during this interview today and listening to your uh responses to the questions to the detectives. We are prepared to uh offer you one thing in exchange for your truthful testimony, and that is that we will not seek the death penalty, and I want to recite to you what the agreement is, and I want you to listen very carefully to what this agreement will be. Okay, you ready?

Suspect: Yes sir.

Prosecutor: You will agree truthfully, completely, and fully reveal to the prosecution agents, that is to these detectives, uh by this interview all that you know concerning the Loomis robbery of November the 13th, 1991, uh in which three people were murdered. You will agree to provide all of the information that you know about these crimes, including but not limited to information concerning the part that you claim, and all people who were involved in the planning and the execution of the, of the robbery and the murders.

Uh, and uh in exchange for this truthful testimony, the prosecution, that is the Solano County DA's Office will not seek the death penalty against you in connection with the charges which we have brought against you. Uh in the event, however, that you, you do not give us a truthful statement, uh we will file a complaint, that is, strike that, we will seek the death penalty. In other words, you have to give a truthful statement as to all as-

262. *Id.* at 91-92.

pects of the case. Do you understand that?

Suspect: Yeah.

Prosecutor: Okay, uhm you understand that uh you will receive no immunity for perjury, if we find later on uh that you perjured yourself. Another thing, okay, have we coerced you in any other way? Uh has, has, is this, will this be your free and voluntary statement?

Suspect: Yes.

Prosecutor: Okay, and uh no other promises have, have been made to you. You understand that?

Suspect: Yeah.

Prosecutor: The only thing that we've agreed to is that we will not seek the death penalty. You understand that?

Suspect: Yeah.

Prosecutor: Do you agree to tell us truthfully everything that you know about the Loomis homicide?

Suspect: Yes, uh I got a question.

Prosecutor: Yes.

Suspect: If you're not seeking the death penalty, what you be seeking, life?

Prosecutor: We will, we will seek all, all other, everything up to and including uh life, yes, and it could be life without parole. Uh I'm not saying that's what it'll be, but that's, I'm not making any other promises. All this is, is that we will not seek the death penalty. Do you agree to that?

Suspect: Life without parole.

Prosecutor: That could be a possibility, because we have charged special circumstances in this case. But, but that's all we're willing to do at this point. Do you understand that?

Suspect: Where's the light at?²⁶³

Prosecutor: Well let me, I, I don't want any wavering on your part. You have to understand that we are giving up a considerable thing. There are three people that died, and that that's all we're willing to give up. We will not seek the death penalty in exchange.

Suspect: But I didn't kill these people.

Prosecutor: That's true, but I'm, I, again telling you that we will not seek the death penalty. That's all we're willing to give up, and that you will, you will give a truthful statement.

263. This is a reference to an earlier conversation in which the interrogators told the suspect that cooperating was his "light at the end of the tunnel." Interrogation Transcript of Livingston, *supra* note 113.

Do you agree to that? If not, say so, because we'd be wasting our time. Do you, uh, agree to these conditions?

Suspect: Yeah, but is, is it possible it might change?

Prosecutor: Anything's possible, but I'm not gonna promise you that. All I'm saying is we will not seek the death penalty. That's all I can tell you. Any other questions.

Suspect: No.

Prosecutor: Okay, do you, do you agree to give us an honest statement?

Suspect: To the best of my knowledge.²⁶⁴

After agreeing to the deal, the suspect attempted to make up a confession based on what he knew about the crime, that is, what the interrogators had told him and what was common knowledge. When pressed for specific information, he broke down and admitted he was making up the answers to avoid a death sentence. At this point the video recorder was turned off; when it was turned back on, the suspect attempted again to satisfy the interrogators. His second attempt also failed because he still could not answer their specific questions correctly. He then reasserted his position prior to being offered the deal—that he was not involved in the robbery/murders. The interrogators revoked his “deal,” the prosecutor charged him with capital murder, and the confession he had given was used at trial.²⁶⁵

f. *The Accident Scenario Technique*²⁶⁶

i. Introduction

Interrogators use the accident scenario technique or the maximization/minimization strategy to deliver threats and promises in a way that is more sophisticated than simply placing the alternatives before the suspect.²⁶⁷ When directed at innocent persons or at guilty parties who realize that they are negotiating a reduction in their punishment in exchange for confessing, the tactic is usually made progressively more transparent. If the suspect is not motivated to comply or does not realize what is required of him, the investigator can become more explicit both as to the consequences of accepting or rejecting the deal and what the suspect needs to do to carry out his end of the bargain.

The investigator implements the accident scenario technique in its most subtle form by suggesting that some sort of accident, outburst, struggle, or unintentional turn of events caused a criminal event or changed the ending of

264. *Id.*

265. Even though his so-called confession was obviously both involuntary and unreliable, it was nevertheless allowed into evidence at trial. The jury acquitted him of the triple murder charges.

266. In most of the illustrations below, the interrogators' references to incriminating evidence are erroneous and/or false.

267. A recent observational study found that investigators attempted to minimize the seriousness of the crime in 22% of their interrogations. See Leo, *Inside the Interrogation Room*, *supra* note 4, at 267.

a crime. Done this way, the investigator leaves it up to the suspect to invent the story of how the crime happened. A suspect must be aware, or have been made aware, that certain stories take away premeditation or reduce the seriousness of the crime.

If a suspect doesn't understand that explaining what happened as an accident leads to a lesser punishment or doesn't want to admit even to being involved in an accident, the investigator can clarify what the story needs to involve by formatting it and/or making the benefit clear. An investigator can even explicitly lay out the elements of the accident for a suspect and require only a series of one word answers to signal agreement.

Under the circumstance of either an unformatted or a formatted accident scenario, a suspect shifts from denial to agreement because he understands that he will either avoid a harm and/or realize a benefit by making the change. When a person makes this shift, he is doing nothing more complicated than maximizing his expected utility. While he may be operating on information that has been deliberately distorted, and in a situation in which every effort has been made to limit the alternatives he considers, he is nevertheless making a choice among the alternatives he perceives and so can be expected to act rationally under these constraints.

Investigators will use this tactic in the formatted form even when the crime scene facts clearly indicate a premeditated murder and directly contradict any possibility that an accident or a self-defense event occurred. When used in this fashion, the tactic is intended to first elicit a false confession by offering a benefit for adopting the story. As the tactic is supposed to play out, the investigator next attacks the statement because it does not fit the crime facts, and finally obtains an accurate account of the crime. The three fundamental problems with this approach are that: 1) it relies on coercion—promises of leniency and/or threats of harm—to elicit the initial agreement to the false confession; 2) while it may be possible to lead a guilty suspect to produce an accurate description of the crime, innocent suspects will never be able to do this unless they are informed of the crime's facts, e.g. contaminated; and 3) since guilty suspects know how the crime happened, some will realize that the interrogator's suggestion of an impossible accident version of the crime facts is a trap.

Because guilty suspects can often see through the tactic, it may generally be more effective when directed at the innocent. In order for a guilty suspect to go for this ploy, he must either ignore the fit of the scenario and the crime facts or believe that the detective is so corrupt that he is willing to undercharge the crime in order to close the file. The innocent suspect is more likely to be taken in by the tactics because he doesn't know how the crime really occurred.

ii. The Unformatted Accident Scenario

The interrogator can progressively expose both the motivational components and the story requirements of the accident scenario technique. The interrogator can offer the suspect the opportunity to tell a self-serving story with

little fanfare and without explicitly mentioning the benefit of choosing this option. Reno, Nevada, investigators suggested to a fourteen year-old that the robbery and killing he had done might have been caused by the victim:

Interrogator: It's our job to find out, exactly what happened, and in this particular situation, one of the people was dead and you're the only one that knows exactly, exactly what happened (inaudible). A body was found. You're responsible for that guy laying out there. We don't really know, exactly, what happened. I mean, it could be a whole bunch of things. Maybe the guy was some kind of weirdo and he tried to pick up on you. Maybe, who knows. It's just a lot of possibilities that we don't have the answers to.²⁶⁸

In a partially recorded Pasco County, Florida, interrogation, the adult suspect immediately comprehended the meaning of an interrogator's offer of help:

Interrogator: Listen to me, a lot of crazy things go on in this world. The only thing right now you've got is you, that's all, listen to me, things happen my man that we don't have no, no control over. I've been with my wife before when I'm tellin' ya, and I know, alright. Jeff, help me, help you. You hear me?

Suspect: Mean it.

Interrogator: I mean it man. I'm not shittin' ya. You hear me? Jeff, don't carry this thing around with you. God damn, don't do it. You hear me, huh, look at me, hear me man? I've been around too long. He has too. We told so many people, their loved ones are dead and there's always a reason. People down the street may not understand it. May have been an accident and it just may have been an accident.

Suspect: Wasn't blaming themselves.

Interrogator: You hear me?

Suspect: Well maybe an accident? Yeah.

Interrogator: What I mean is an accident. I don't think you meant to kill your wife. I really don't, I mean it, I'm tellin' ya, you wouldn't do it, you've been married to her too long.²⁶⁹

In the following example, a San Diego, California, investigator laid out two alternatives before the suspect: having the jury regard him as a premeditated murderer or as something less serious. The investigator then suggested how the suspect can realize his preference, openly stressing the central element of the story he wanted the suspect to invent:

268. Interrogation Transcript of Doe, *supra* note 207, at 32.

269. Interrogation Transcript of Crouch, *supra* note 92, at 27-28.

Interrogator: Would you rather, and hear me out Elmer okay, would you rather, let's give you a situation. For you to be charged with this, with this murder, would you rather be looked upon on the eyes of the jury, and hear me out please, as a cold-blooded killer. Or, or as a person that did something that just got out of hand and did not intend, did not intend. Which, if you were in that situation, which would you prefer? And I'm asking you Elmer? I'm asking you which would you prefer to be looked upon as. As somebody that was just cold-blooded, just flat out went ahead and killed a young girl or somebody that was in a situation that just went haywire and did not intend. And that's the magic word. Did not intend.²⁷⁰

A Sacramento, California, investigator made clear to an adolescent that he would be charged either with murder or a less serious offense. He suggested an accident in the following:

Interrogator: We don't know exactly what happened. We don't know if somebody intentionally killed her or if this, this was an accident. If somebody did something that they didn't mean to do. Something that happened and things got out of hand. I don't know. I don't know. I think you're involved in her death.

Suspect: I don't know how.

Interrogator: And I think you need to take this opportunity now, Shane, to explain to us so that we don't think it's a murder. Because if it's a murder, you're gonna wanna cover it up and hide it. Now, if something happened then you need to explain it to us. Now is this the time to do it. . . . If it was an accident, people will understand. If something happened, things got out of hand, if she fell, I don't know, but you need to explain that. Because we can't explain it for you. If people had an opportunity to explain that for you when you could've done it yourself, they're gonna explain it as a murder. And it wasn't, was it?²⁷¹

A detective in Solano County, California, manipulated another adolescent using a false witness evidence ploy coupled with an accident scenario invitation:

Interrogator: Both Andy and Josh told me not more than two or three hours ago, that when you're all running up at the train, they both said that you pushed him into the train.

270. Interrogation Transcript of Nance, *supra* note 95, Tape 3, at 3.

271. Interrogation Transcript of Schmitt, *supra* note 85, at 37.

Straight up. Now my question to you, when you pushed him into the train, was it an accident or was it intentional?

That is very important. Because they're gonna tell their story and it don't make you look good unless you've got an explanation and I can't say it for you, "Hey it was, you know, an accident or it was intentional or whatever." Not reached up to grab him or pull him away. Shoved him. And he fell into the train. Straight up. That's what they told me. I'm just tellin you what I know. Alright. Was it an accident?²⁷²

San Francisco, California, police educated a suspect as follows:

Interrog. 1: Hey Robert, we know you killed the guy, the only question is why, and if you don't want to tell us that that's fine, but I mean that's to your advantage, I mean, right now we're thinking you went to the guys house, and you planned on killing him, and that's how you did it, you planned it from the beginning, and that's first degree murder. The only question is why you did kill him, was there some reason? Was there a fight, what happened, did, uh, is there some kind of circumstances that lead up to it that'll help explain it, and modify it, that's the only issue, that's the only question.

Interrog. 2: The only question is, in this situation is why? Did he threaten you? You told me no, he didn't threaten you, that no homosexual ever threatened you. Did he make you angry, did he throw you out, uh, did, you know, what was the reason, and that's all we need to hear, uh, you know, the rest of this stuff you're just fixating on things that aren't important and the question really is why, uh, it's not a matter of whether you.²⁷³

San Mateo, California, detectives made clear that an appropriate story would result in a benefit:

Interrogator: Sometimes things happen, you know, it could be an argument, it could be a fight, he could have come at you. You know, instead of a murder, this might be an accident. It could be a manslaughter situation in the heat of passion. But he's not gonna know until you tell him the truth. You were there.

Suspect: I was not there.

Interrogator: Well, we're, we're a little bit past that, Bernard. Bernard, we're a little bit past that. Okay. Right now you're

272. Interrogation Transcript of Johnson, *supra* note 157, at 68.

273. Interrogation Transcript of Anderson, *supra* note 114, at 21.

in the driver seat. You can help yourself. And, uh, if it's the truth that's, you know, can help you, if there's, if it was an accident or something like that, or it was a fight, who knows?²⁷⁴

When the investigator presents the suspect with a beneficial option, he may tell the suspect only about the advantage of admission and how the suspect might frame it, as in a Sacramento, California, interrogation:

Interrogator: I know that you're the one that pulled the trigger. Now there's no need if you're gonna continue to deny it, you and I have nothin' else to say but now, if you wanna tell me the truth, if you wanna tell me that the gun went off accidentally, the gun was a malfunctioning weapon, whatever, but I don't want to hear no more lies about that you didn't pull the trigger because that's just not the case. . . . All I want out of you is the truth.

I want to help, I can help you, you can help me, you can help your dad, you can set the whole thing straight, but you're not gonna do it with these lies, because nobody, nobody's gonna believe you because you are a liar. You shot him, the witnesses say you shot him, the polygraph says you shot him. There's nothin at all to tell me that you didn't do it. Nothing. Absolutely nothing.

The only thing you might convince me of is that the gun malfunctioned or it went off, whatever. Maybe you didn't intentionally shoot him but you had the gun in your hand when it went off. That's the only thing you're gonna convince me of. Cause none of the rest of it's the truth. Do we have anything to talk about?²⁷⁵

One strategy for offering a suspect leniency is to run him through the various degrees of a crime and their respective consequences and then invite him to choose the crime level at which he prefers to be charged, as in the following Boynton Beach, Florida, interrogation of an innocent man:

Interrogator: Do you know the difference between first-degree murder and second-degree murder?

Suspect: Uh-huh.

Interrogator: Okay, first-degree murder entails life in prison without parole or the electric chair. Okay. Second-degree murder, first-degree murder is like a premeditated murder; second degree murder is a, a passion crime, you know, somebody gets mad. It's a lesser, it's lesser than first-degree, okay? What you need to think to yourself is, okay, if you were there tonight, okay, you need to tell

274. Interrogation Transcript of Knight, *supra* note 232, at 18.

275. Interrogation Transcript of Wright, *supra* note 162, at 35.

us, because we'll know if you were there or not.

Suspect: I was not there.

Interrogator: If you killed her, just help yourself out, because this will be your one and only shot.²⁷⁶

To insure that a suspect "gets it," police may give him a short course in the finer points of criminal law and sentencing guidelines, as in the following San Diego, California, interrogation:

Interrog. 1: Do you know the difference between first and second degree? First degree murder in comparison to manslaughter? What is that ah, you know a little bit better than I do in terms of years? You know, in terms of years.

Interrog. 2: First degree murder's ah life. Second degree murder you can get twenty-five years. Manslaughter you can get probation. Involuntary manslaughter, it just depends on the circumstances. We got to know the story.²⁷⁷

Interrog. 1: What is the worst possible scenario if this gets adjudicated in court and what is the worst possible? Okay, you end up getting, getting convicted of first degree with special circumstances. You know, you're looking at, you're looking at um, you're looking at life with no possibility for parole. That's what you're looking at man. I mean I'm just letting you know. I'm just putting the cards out on the table here. If she consented, then it's not rape. If she went crazy on you, I mean you put her out. Granted you put her out but your intent was not to kill this lady. I mean you're not stupid man. You wouldn't come back to a God damn campsite if you thought you'd killed somebody.²⁷⁸

The point is I'm interested in why it happened okay. I'm interested in why it happened and I don't feel in my mind that it was premeditated, that you intended to. I just don't. I knew your condition. I knew her condition at the time and you ended up coming back. That's the point. The point is, is do you eventually want to end up getting tried for first degree murder? You know what I'm saying? I mean that's all, that's the only point is where I'm, where I'm coming from. And I'm just giving you these, these options here because this is not a cold, malicious, cold blooded, you know, 'I'm gonna, I'm gonna kill you' type of thing.²⁷⁹

During an unrecorded interrogation in New Brunswick, New Jersey, an

276. Interrogation Transcript of Salazar, *supra* note 119, at 50-51.

277. Interrogation Transcript of Nimblett, *supra* note 137, at 36.

278. *Id.*

279. *Id.* at 46.

investigator went so far as to pull a statute book off the shelf and read the penalty associated with each level of homicide.²⁸⁰ The suspect described this part of the interrogation as follows:

Suspect: I remember the one guy talking to me telling me about this is the detective in there, he was telling me you know, well you know, how he had the book, so he was telling me the different types of murder charges and stuff.

Interviewer: He was reading from the book?

Suspect: Yes, he was reading from the book all right and telling me you know, how it could be murder one and stuff you know, he was going for the whole nine yards, you know. I remember him saying that, you know, they could charge me all right, they were going to charge me with capital murder. He says do you understand what capital murder is? I said no not really. He says well, he says a capital murder he says you know, they can give you lethal injection, you know.

Then I believe it was somewhere around that point that he picked up the book and he says look, this is what capital murder is. You know and then he turns around and says, well you know, if you two were just in the car and you were arguing because of Randy you know, and you know, things got out of hand you know and ah, you know you accidentally hit her or she went to hit you and you know you might have grabbed the knife and killed her or something. He said that would be like an involuntary manslaughter or a provocation passion you know.

Then he started reading what they carry. You know but ah, I remember him explaining, I mean he went through the book and explained all of them to me all right and what time each one carried. It might have been about five minutes or so after that, he turned around and says to me, says well why don't you just talk to Kerwin you know and see what Kerwin has to say you know maybe we can get these charges dropped down to something lesser you know.

Kerwin came in all right and him and Kerwin were saying something you know and then Kerwin comes over and said well you know if you tell us that you know you two were arguing and that you know Tree was, you know, got mad and stuff and told me about Randy and this, that and the other thing you know, you

280. The police confirmed their discussion of sentencing options with the suspect during this unrecorded interrogation.

could help yourself, you can get your sister out of all this.

Interviewer: Now let me see if I got this straight. The first detective sitting at the desk starts telling you about the different penalties starting with death penalty and running down to overtime parking?

Suspect: Right.²⁸¹

iii. The Formatted Accident Scenario

By the time an innocent person undergoing interrogation has reached the point at which he realizes that cooperating with the police is his only hope, he will appreciate the special meaning the investigator has attached to the word "truth." For the innocent suspect, the investigator's demand for truth has always been a request for a lie. When the formatted accident scenario is put into play, the interrogator and the suspect finally arrive at equivalent working definitions of "truth." Presuming the subject's guilt, the interrogator understands that what he wants from the suspect is a lie and so does the suspect, but each pretends that the truth is finally being spoken.

After the conclusion of an interrogation in Oakland, California, a young man told the truth to the detectives who had elicited his false confession a few hours earlier:

Interrogator: Have we asked you to tell us anything but the truth?

Suspect: You wanted me to (pause) tell you what I had done to cause that was an accident.²⁸²

Inbau, Reid, and Buckley's training manual for police interrogators²⁸³ promotes the practice of formatting an account of the crime that turns the event into an accident, a reasonably provoked response, or an act of self-defense. This tactic communicates that there is a way out of the suspect's predicament with little or no punishment. In the following passage, the manual demonstrates how to transform a first degree murder into an act of self-defense. The implication is that once the interrogator classifies the crime in this way other criminal justice officials will accept his conclusion that this is how the crime happened, and thus the suspect will be charged accordingly.

"Joe, you probably didn't go out looking for this fellow with the purpose of doing this. My guess is, however, that you expected something from him and that's why you carried a gun—for your own protection. You knew him for what he was—no good. Then when you met him, he probably started using foul, abusive language, and he gave some indication that he was about to pull a gun on you. Then you had to act to save your own life. That's about it, isn't it, Joe?"²⁸⁴

281. Interview with John Chew, Toms River, N.J. 24, 27-29 (Aug. 9, 1994).

282. Interrogation Transcript of Page, *supra* note 76, Tape 4, at 27.

283. See INBAU ET AL., *supra* note 20.

284. *Id.* at 104.

After the investigator has elicited this false confession to the less serious crime, the manual advises that he obtain an accurate account of what happened, thereby transforming the false confession into a true confession and returning the crime to its factually proper description as a premeditated murder. The coerciveness of this technique is simply ignored by the manual authors.²⁸⁵ In an appendix to the text, they attempt to rationalize this approach by arguing that the manipulation of a suspect's perceptions about how much punishment he will receive is permissible because no real threats or promises were issued.²⁸⁶

During a legal interrogation, reality can not be changed. A confession will be inadmissible as evidence if the interrogator takes away the consequences of the confession (promises), or physically adds anxiety (threats, abuse) during the interrogation. However, the interrogator can legally change the suspect's *perception* of the consequences of confessing or the suspect's *perception* of the anxiety associated with deception through influencing the suspect's beliefs.²⁸⁷

This rationalization makes about as much sense as saying that a person who brandishes a weapon and asks for money is not committing armed robbery if there are no bullets in the gun.

San Mateo, California, police suggested a false confession to self-defense that appears to be modeled after the Inbau, Reid, and Buckley text example.

Interrog. 1: You're doing nothing, absolutely nothing to help yourself. You know, if it's, if it's an accident or there was something, there was some type of provocation to make you believe, you know, you might have been afraid of this guy. Maybe he had a gun. Maybe he pulled it, I don't know. Did he? Right now is the time and opportunity to go for this. You only get one time. That's the way I work. I don't know how Tom works it. I got to a guy and if he don't want to help himself, the heck with him.²⁸⁸

Interrog. 2: I can see the two of you to on Clarke [Street]. Jerry trying to get big, flex his muscles, do whatever. Either he pulled a gun on you or whatever, and somehow you got the gun away from him or you had your own gun and you were trying to defend yourself and then you shot him.²⁸⁹

A Connecticut State Police investigator suggested to an innocent young man that he killed his mother in self-defense:

285. See Kassin & McNall, *Police Interrogations*, *supra* note 6.

286. See INBAU ET AL., *supra* note 20, at 327-47.

287. *Id.* at 333.

288. Interrogation Transcript of Knight, *supra* note 232, at 24-25.

289. *Id.* at 25.

Interrogator: Is this what happened last night, Pete, that you came home and because, as you said, you're tied to your mother's apron strings, she flew off the handle and went at you or something and you had to protect yourself? Is this how it came down?

Suspect: It's still not coming out. It's still not coming through. I still can't remember and I want to.

Interrogator: I mean, this could be the whole thing here.

Suspect: Ya.

Interrogator: She could have went at you. And, this is strictly a self-defense thing where you had to protect yourself against her.²⁹⁰

During an investigation in Orange County, California, a police officer passing as an interpreter tried to convince the suspect that if she claimed that she acted in self-defense, the killing was not a crime, and therefore she would not be punished:

Officer: My feeling was that this Miss Chi right? This is my own opinion. This, this, this I am sure of it you know? This was not indicated by that police officer you know? My feeling was that whoever had that knife first, was that, my feeling was that it was Miss Chi. I think you were trying to defend yourself. So you bit to get her to drop the knife you know? So you did it out of the sudden urge then accidentally stabbed her a few times. The result was this was how she die. Do you agree with what I had said?

Officer: If-if-if you knew that you were connected to Miss Chi's murder then you better surrender?

Officer: If you killed Miss Chi out of self defense—Chi, Jen-Bing—by law you will get some leniency you know? It would be found not guilty. But if you planned the killing then you could be facing the death penalty. Otherwise you could be facing severe penalty or, Mrs. Peng, are you connected to Chi, Jen-Bing's murder? Then earlier, if you didn't understand I will explain the law to you again right? For self-defense, not guilty. To planned to kill someone, guilty. In court they would not give any leniency to people who killed someone out of sudden urge you know?²⁹¹

Vallejo, California, police used the technique in an attempt to lead a suspect to reason that a self-defense killing in the course of committing a burglary was to his advantage. To prepare him to see it this way, the investigators first informed him about the consequences of remaining silent:

Interrogator: Since I don't know how to explain it to you any better,

290. Interrogation Transcript of Reilly, *supra* note 75, at 121-22.

291. Interrogation Transcript of Peng, *supra* note 116, at 81-82.

uhm right now we're prepared to, to book you for first degree murder, uh murder during the commission of a burglary, first degree. Uh, cause we don't know of any right way to do it, because we're not hearing from you what happened in there.

If the woman came at you with a skillet, there were some bolt cutters on the ground, if the woman came at you with the bolt cutters because you got in an argument or something, it could explain what happened in there, but right now we're led to believe that you went in there and banged on a woman for no reason at all, and then took her property, and we don't we're not, can't believe that that's the case, cause I've know ya, and you're just not the type of person I would think to go in there and bang the woman, take her stuff, somethin' happened inside the house. She called you names, she called you a thief, she did somethin' to you that, she was fightin with ya or somethin'. Somethin' happened, ya know, and that's what we're, we're tryin to find out, to get a story from you about what happened in there so we don't have to look at it as you're just a guy that went in there and bashed her on the head and took her TV.²⁹²

A detective in Sacramento, California, not only formatted the story and pointed out the suspect's jeopardy, but also offered to deliver the message to the jury for him. The investigator said that the suspect's best opportunity to save himself would be gone when the interrogation ended. If the suspect did not confess to the accident story, the interrogator would not be able to help him at his murder trial:

Interrogator: Now, I guarantee you that as long as you continue to lie to me, just like myself, the twelve men and women on that jury, they're gonna put me on the stand, "Detective Reed tell us about Cheval Wright? Did you interview him here, did you interview him, did you interview him here. When did he finally start telling the truth?" and I'm gonna say, "Eight twenty of ninety-three at 13:35 hours, after confronting him for the final time that he's still lying to me, he told me the truth."²⁹³

The only thing that you can do from this point forward is do something for your self, which is to tell the whole truth so that people can believe that when the gun was handed to you it was cocked and it went off accidentally. Nobody's gonna buy into this about you handing it to him then he, so okay, even if they buy into

292. Interrogation Transcript of Yarborough, *supra* note 237, at 9.

293. Interrogation Transcript of Wright, *supra* note 162, at 41.

it, it still makes you the murderer, so you're better off to go with the truth and to convince the jury through me, because your attorney probably will never let you take the stand. I'm gonna be you settin' up there. I'm the only one that's gonna be tellin' that twelve men and twelve women on that jury what really happened.

It's gonna be me and them other dirt bags. Them other dirtbags are gonna get up, they're gonna make you look as bad as they can. "Oh ya, he wanted us to stop, he wanted us to rob these people, and he's just an asshole, he wants to shoot people, that's the way Cheval Wright has always been."

Well you and I know that's not true. I know that, you know that, and I think your dad knows that from the way he acted yesterday cause we was truly sincere. Now I'm your mouth piece, Cheval, I'm the one that's gonna be up in front of the jury tellin' em what you said.²⁹⁴

We're still down to that point where we get on the stand and me, as a professional witness, the question from the prosecutor's gonna be after I get done testifyin' about this story you just give me, did I believe you're tellin' me the truth? And I'm gonna say no. And then those other guys are gonna get up on the stand and they're all gonna say the same thing. And then say "Ya, he was over here acting bad, talkin (inaudible)" or whatever was said like that and it's gonna go on and on, and they're just gonna bury you.²⁹⁵

After this session, the investigator administered a questionnaire about the interrogation. The suspect's answers confirmed that he decided to confess after realizing the extent of his jeopardy and directly in response to the investigator's offer to deliver the fraudulent accident scenario to the jury.²⁹⁶

Interrogator: Could the interviewer have said or done anything different that would have made it easier for you to tell the truth?

Suspect: Yes.

Interrogator: What?

Suspect: You know, told me something like um, you know, told me maybe, give me some idea what was going to happen to me.

Interrogator: Gee, that's something that all interviewers have trouble

294. *Id.* at 42-43.

295. *Id.* at 44.

296. The suspect said that he had seen the gun in the hand of one of his acquaintances and had physically tried to stop the robbery shortly before the other man shot the victim. The suspect's account was confirmed by the statement of a surviving victim of the crime.

with because you never really know.

Was anything said or done during the interview that prompted you to hold back the truth for a while?

Suspect: Yes. Like when you told me that, the rest of my life was going to be spent in jail.

Interrogator: What was the most significant thing the interviewer said or did that led you to tell the truth?

Suspect: You would tell the jury something that they wouldn't believe from me.²⁹⁷

During the investigation of a premeditated murder, in which the perpetrator viciously beat, strangled, robbed, and probably raped the victim, a Boyton Beach, Florida, interrogation specialist recast the death using the accident scenario technique. He suggested that the accident happened because the victim requested "rough sex." Using the threats and promises inherent in this technique, the interrogation specialist elicited the suspect's agreement to this grossly inaccurate account. Subsequently, two other detectives took over and tried to obtain a confession by confronting the suspect with facts that negated the accident scenario. The innocent suspect²⁹⁸ broke down and admitted that he lied about his involvement, and that he had only agreed to the accident scenario because he feared receiving the death penalty:

Suspect: The guy acted like if I said it was an accident, everything would be fine. Just forget about all this shit. I don't want to put my parents through this shit.

Interrog. 1: Well.

Suspect: I ain't got no choice. I mean everything's pointing towards me, I just didn't fucking do it, but.

Interrog. 2: Marty, let me ask you this.

Suspect: I did it just to try to get off. You know, just, I don't want to get a first degree murder charge.

Interrog. 2: Okay.

Suspect: I have no choice. I mean if that's what you have to do, you have to do.²⁹⁹

I mean like I said, you know, you guys telling me about, you know, we're going to book you on first-degree murder, and if I just come out and say it was an accident, you know, everything will be just fine, you know, just.

297. Interrogation Transcript of Wright, *supra* note 162, at 76.

298. Martin Salazar's innocence was established shortly before trial. A fingerprint in the victim's blood had been discovered on the socket end of the extension cord used to strangle her. The print was neither the victim's nor Martin Salazar's. After the defense discovered that the prosecution had hidden this exculpatory evidence, the prosecution dropped all charges against Salazar. After charges were dismissed, the detective who elicited the coerced confession refused to accept the state attorney's dismissal. He located a forensic expert who would report that Salazar's fingerprints could not be excluded. The state re-indicted Salazar. At this time, Salazar is awaiting trial.

299. Interrogation Transcript of Salazar, *supra* note 211, at 41-42.

Interrog. 1: Who said that?

Suspect: An officer I was talking to.

Interrog. 1: Said that everything would be fine if you.

Suspect: Well, my future would be (inaudible) I'd have a future. But if I got booked for first-degree murder I might as well just forget about everything.

Interrog. 2: Were you ever told tonight you were under arrest for first-degree murder?

Suspect: I was told I was going to be. As soon as he walked out of here.

Interrog. 2: Okay.

Suspect: And that I would never see the fucking sun again. And I just got scared and I told him, you know—god damn. I lied to you guys and said I did it just to try to get a lesser charge so I could get a, just.

Interrog. 1: I don't understand that at all.

Suspect: I mean it's just, he scared the shit out of me.³⁰⁰

When interviewed prior to trial, this man described how the interrogator implemented the accident scenario technique during the unrecorded portion of the interrogation:³⁰¹

Suspect: He said "Them assholes out there want to charge you with second degree, or first degree murder." He goes, "Their intentions are just to hang you." He goes, "But I told them to give me a chance to talk to you and see what we can come up with." I believe this is when he starts, he was like, "If it was an accident, just," you know, "if it was an accident, like say you all were having rough sex or something and you just happened to," you know, "get into bondage and stuff and you accidentally strangled her," you know, "not meaning to, then it's all right." You know, "It's," you know, "it's happened before," you know . . .

He goes, "Do you want them guys to come in here and charge you with first degree murder?" And he goes, "And then they'll have to tell your mom that you're a killer, a cold-blooded killer. How would your mom feel about that? How would you feel putting your mom through this?" He goes, "If they come in here and charge you with first-degree murder, it's going to be a

300. *Id.* at 43-44.

301. Although the detective denied explicitly threatening the suspect with the death penalty, he described how he formatted a crime scenario that could not possibly have been true, educated the suspect to the various levels of homicide and their components, explained the penalties for each, and pointed out that the suspect was the only person who was in the room and therefore the only one who could really say what happened. The detective had been trained to use the Inbau, Reid, and Buckley method.

long time before you see the fucking sun again." He said, "But if you say it was an accident, your future's looking so much brighter already." He goes, "What you need to start thinking right now is just accident. Accident. Just think accident."³⁰²

Even though this man told the two detectives that he confessed falsely in response to the threat of a death penalty charge, the detectives continued the interrogation, calmed him and then coerced the same false confession a second time:³⁰³

Suspect: What's going to happen to me?

Interrog. 1: Depends on what you tell me. If you tell me that you planned on going over there and killing her and you did all this planning and all that good stuff, well, then that is first-degree murder. But I don't think you're that kind of guy.

Interrog. 2: I don't think you're that. I don't think you're that cold-blooded murderer, that premeditative murderer, the kind of guy that's stalking these people and going out and killing on purpose. Like Ray said, it was an accident. We think it was an accident, but we need to hear you tell us it was an accident. But we need to know in your words what happened.³⁰⁴

It is not uncommon for a suspect—even in murder cases—to report that an interrogator said he could go home once he confessed. This seems so bizarre and improbable that it is difficult not to think that the suspect is lying. If, however, the investigator used the maximization/minimization technique, the suspect might quite reasonably come to believe that once he agrees to the investigator's suggested story, he will be able to leave the police station. Because the maximization/minimization technique works to transform the actual offense into a low level crime or a non-criminal act of self-defense, the interrogator can plausibly intimate that the suspect will be released if he confesses. The false confessor in the Boyton Beach, Florida, investigation recounted the following:

Suspect: He goes, "If you'd just say it was an accident," he said "you all were having rough sex," you know, "and just got carried away and you accidentally killed her, they won't charge you with first degree. They will charge you with second-degree murder and then," you know, "your future looks so much brighter," you know, he goes," because you're a clean-cut, respectable man from what I see. Your bosses think highly of you, and so do

302. Interrogation Transcript of Salazar, *supra* note 211, at 68-70.

303. The detectives had to have known that the death threat reports were true since they watched the specialist do his work via hidden video recording and monitoring systems. The tape of the specialist's session with the suspect has never been given to the defense.

304. Interrogation Transcript of Salazar, *supra* note 211, at 50-51.

all the people I've talked to." He goes, "Now why would you throw your life away for some drunken coke whore who is nothing but a piece of white trash," you know. And he goes, "Well, if you say it was an accident I think I can possibly talk to these guys into letting you go home. That's up to them, but," you know, "I can probably get them to let you go."³⁰⁵

The above-mentioned false confessor in Arcadia, Florida, reported that the interrogator led him to believe that by agreeing to the minimized version of the crime he'd be able to go home:

Suspect: All right. And I said, okay, I said, now, if I sit here and lie in yall's face, yall going to think I'm telling you the truth. But if I sit here and tell yall the truth, yall think I'm lying, right? He didn't say nothing. I say, you know what, man, I'm tired of you people, now, I'm fixing to go and tell yall what yall want to hear, right? So, because I got to the point where I was mad, frustrated, I know I didn't do nothing, right? But they can't accept no for an answer, right?

So now I got to the point where I felt, if I just tell them I did it, you know what I'm saying, maybe they'd leave me alone. That's all I want them to do, is just to leave me alone. I was fixing to go crazy, right? I ain't never been put under pressure before. I been put under pressure, but I always found when I get in front of a person, I keep telling them, saying things, I always get found true to what I'm saying, right? But them, they didn't want to go, they kept saying I did it, I did it, I did it, I did it, you did it, you did it, you did it, you did it, that's all I been hearing, you did it, right?³⁰⁶

So I figured, well, I'm mad now, either way it went—this the way I started thinking, either way it went, I tell them the truth, I can't go nowhere, if I tell them what they want to hear, maybe I can go somewhere. Maybe I can go home, right? He told me I can go home, if I tell them what they wanted to hear.³⁰⁷

During the unrecorded interrogation of a mentally handicapped suspect, Seattle, Washington, police threatened life imprisonment if the suspect did not confess but suggested that they could help him out once he confessed. When interviewed, he described this experience:

Interviewer: Did, at any time when you were talking to the police, did they tell you about how serious or not serious the

305. Interview of Salazar, *supra* note 165, at 70-74.

306. Interview of Louis, *supra* note 171, at 84.

307. *Id.* at 95.

punishment might be for whatever happened in connection with Miriam?

Suspect: They told me that this is a small matter, um, we can't help you until you admit it. And then they stated.

Interviewer: How were they going to help you?

Suspect: I don't know. They just said that. And then ah, they stated it would get a lot worse if I didn't admit it. They stated ah, I could get.

Interviewer: How was it going to get worse?

Suspect: I could get in a lot of trouble if I didn't admit it, where I could go to prison and on and on.

Interviewer: So if you didn't do it, you were going to go to prison and what else?

Suspect: And they mentioned that I could get, basically, they just mentioned mainly that I could go to prison for life if I didn't admit it, and it would be a harsher punishment. And if I admitted it, they could help me.

Interviewer: If you admitted it, was there any particular way you were supposed to admit it that would allow them to help you?

Suspect: No, they just stated that we think you're lying. You really need to tell the truth. This would help us.³⁰⁸

A young man in South Carolina similarly described his interrogation experience:

Interviewer: OK. What was it, if you remember, that finally got you to the point where you said OK. What was your thinking?

Suspect: It was, after being there so long that day, I was literally thought, cause they been telling me, I mean if you tell us something we'll help you. So I literally thought if I tell them something they were gonna help me. You know, hey, I figured if I go and tell them something now, you know, today, that I would be home, you know, shortly.

Interviewer: Did it occur to you that, that all of their offers to help presumed that you had actually done the killing?

Suspect: No, I just, the only thing I was thinking about is, you know, telling them what they want to hear when I could get home.

Interviewer: So the, what did you think the consequences were going to be?

Suspect: I thought I was going to get out of it. Thought they,

308. Interview of Kris Howe by Richard Ofshe in Seattle, Wash. 23 (Oct. 28, 1994).

they told me when, you know, they'd go talk to the judge. You know it wasn't like you were saying, you know, I thought once I told them what they wanted to hear, then it would be over.³⁰⁹

The false confessor in Arcadia, Florida, spent nearly four and one-half years in pre-trial detention before his coerced and demonstrably false confession was suppressed. He described his interrogation experience as follows:

Defendant: This is what I told him, though. I told him I did tell yall everything, because I don't know nothing about it, right? He said, no, that ain't good enough. So like I said, now, I been in this place all day long, all right, I'm tired, I'm sleepy, I'm hungry, right? I'm getting sick to my stomach, right? Now, the thing about it was, in my mind I know I didn't do it, right? But I been there all day and they was telling me what happened and all this kind of stuff, right?

Interviewer: Wait a minute, when was that? You mean, during the day?

Defendant: Yeah, all day long they was telling me what happened and you did this and you did that, and by the, it was like a video camera coming in my mind that was putting all these pieces together, right. Everything they tell me, I was putting together, okay? Now I'm starting to, in my head, they was running on me so much, I'm starting to think, you did it which I know I didn't do it, right? And I kept telling myself I didn't do it, and my mind knew I didn't do it, but it's the way they kept saying you did this, you did this, you know, I was under pressure. I was being, other words, I felt I was being pressured. All right, and I couldn't get out of it, so that's, that's when I started thinking, I, ain't no other way, this what I started thinking, ain't no other way I can get out of this. I can keep telling them I didn't do it, tell them the truth, right, I didn't do it. Then I told them, and I said it just like this, I asked them, okay, am I under arrest? No.

Interviewer: He said that then.

Defendant: Yeah. And then I asked him, if I tell yall what yall want to hear, can I go home? And he said yes.³¹⁰

309. Interview of Register, *supra* note 105, at 45.

310. Interview of Louis, *supra* note 171, at 81-82.

3. Persuaded False Confessions

a. Introduction

The tactics that yield coerced-compliant false confessions were illustrated above. Because these confessions are elicited by threats of harm and offers of leniency, they are simple to comprehend. Persuaded false confessions are more complicated, but no more difficult to understand. Their cause is not the illegitimate use of interrogation methods relying on threat and promise, but rather the inappropriate and uninformed use of powerful influence techniques. If applied in a certain manner, psychological interrogation procedures are capable of confusing an innocent person about his culpability, leading him to become temporarily convinced of his guilt and yielding a false confession even though the person has no actual knowledge of committing the crime. Persuaded false confessions occur because the person has formed the opinion that it is *more likely than not* that he is guilty.

Persuaded and compliant false confessors have similar interrogation experiences up to the point at which the suspect concludes that his situation is hopeless. The turn of events that leads to a persuaded false confession is a small matter. Confronted with supposedly conclusive evidence of his guilt and told that his alibi is contradicted by other facts, an individual may realize that his only basis for claiming innocence is that he has no memory of having committed the crime. Since virtually everyone assumes that he would remember committing a complicated crime, or for that matter even a simple murder, an innocent person may verbalize the defense "I know I'm innocent because I don't remember doing it." If he says this, he draws the investigator into an attack on this denial—just as surely as the investigator was drawn to attack every previous denial. This time the attack focuses on the reliability of the suspect's memory.

Claiming no memory of committing the crime is not a response exclusively available to the innocent. Indeed, guilty parties make the equivalent claim often enough that it is unlikely to surprise an experienced interrogator.³¹¹ Investigators counter this claim by proposing a seemingly plausible explanation for the suspect's ignorance, typically that the suspect suffers from some sort of amnesia. An investigator can usually brush aside the disingenuous lie of a guilty suspect since his claim of no memory is at best a weak defense and is likely to be made late in the game. However, this tactic may lead a genuinely confused innocent to adopt an amnesia explanation for his lack of memory of having committed the crime. The task is especially easy if a suspect has had alcoholic blackouts, amnesia caused by a head injury, or believes in the existence of repression or multiple personality disorder.

Once an investigator shatters a suspect's confidence in the belief that he would remember committing the crime if he did it, the suspect will likely reason that the only way he can know his own conduct is by relying on objective evidence.³¹² Working with this logic, he can only rely on the false evi-

311. See INBAU ET AL., *supra* note 20, at 47, 143.

312. See Darryl J. Bem, *Self-Perception Theory*, 6 *ADVANCES IN EXPERIMENTAL SOCIAL PSY-*

dence that the investigator has created and will therefore conclude, as would most similarly situated persons looking at the damning evidence, that he probably committed the crime. As one innocent suspect in a Connecticut investigation put it:

Suspect: I would say that you're right, but I don't remember doing the things that happened. That's just it. I believe I did it now.³¹³

Relying on the false evidence, the person will conclude, in effect, that it is more likely than not that he committed the crime. An individual who infers his conduct from the alleged evidence rather than by relying on his memory will express neither certainty of his guilt nor certainty of his innocence. The person does not simply conclude that "I did it," as a matter of fact, but makes an admission in tentative language that reflects and expresses his genuine uncertainty. An innocent man who was led to believe that he had a "dry blackout"³¹⁴ and confessed falsely to Clearwater, Florida, interrogators put it this way: "I still can't believe I did it. I guess all the proof's in."³¹⁵ He explained additionally: "The only reason I believe I did it is if my hairs were in her car and on her body and in her apartment."³¹⁶ Another individual wrote in the second of three statements he signed during an interrogation by Manchester, Connecticut, police: "If the evidence shows I was there and that I killed her, then I killed her, but I don't remember being there."³¹⁷

During the post-admission narrative phase of interrogation, an investigator will be unable to elicit the kind of straightforward admission that can be obtained from a guilty party. Despite proposing the amnesia ploy, the investigator probably assumes that the suspect is fully knowledgeable of his involvement and uses amnesia to overcome what he sees as the suspect's ignorance ploy. Therefore, when the investigator begins collecting the post-admission narrative of the crime he is unprepared for what follows. Although the suspect has willingly admitted guilt, he is still unable to corroborate his actual knowledge of the crime. As a result, an investigator may retreat from an open-ended questioning style and start making suggestions. The investigator may prompt the suspect to guess about how and why he committed the crime. For example, Clearwater, Florida, interrogators prompted a suspect to conjure up mental images of how he could have accomplished a "dry blackout":

Interrog. 1: What do you see?

Suspect: I don't, but I still say to myself, "No, you didn't do it."

Interrog. 2: That's alright, but you got a picture, so you must have done it, right?

CHOLOGY 1 (1972).

313. Interrogation Transcript of Reilly, *supra* note 75, at 129.

314. The investigator told him that someone who had once been an alcoholic might be subject to "dry blackouts"—equivalents to a blackout caused by alcohol but supposedly affecting a person who has no alcohol in his system.

315. Interrogation Transcript of Sawyer, *supra* note 74, at 204.

316. *Id.* at 217.

317. Second signed statement of Richard Lapointe, Hartford, Conn., Police Dep't. (Mar. 8, 1987); *see also* Ofshe, *supra* note 36.

- Interrog. 1: Is that what you're looking at when you describe it? Are you looking at a picture and describe what you see?
- Suspect: Yea, but I see it in my house.
- Interrog. 1: Could it have happened in your house?
- Suspect: I don't know how I'd get her over to her place?
- Interrog. 1: Right out the door and into her place.
- Interrog. 2: It's right there. It's the same cement slab. One door to one door. It's only a couple feet.
- Suspect: I don't remember anything what's inside her house.
- Interrog. 1: Were the lights on?
- Interrog. 1: Maybe that's why. Maybe the fuckin' lights were off and you couldn't see nothing inside her house. Did you ever think of that?
- Suspect: No.
- Interrog. 1: How did it start in your house? From the couch?
- Suspect: That's the picture I get.
- Interrog. 2: On the couch? Describe the picture.
- Suspect: See I don't know if I'm making this up or not.

....

- Interrog. 2: We want you to tell us.
- Interrog. 1: Alright, you want to make this story up. Let the pictures roll and let's hear the story. Let's hear the story. Let's hear the story and then we'll ask at the end is this something that you remember.
- Interrog. 2: One, two, three, go. Let's go, Tom.
- Interrog. 1: Make up a story. Let's hear the story. You're at the front door?³¹⁸

Unlike voluntary or compliant false confessors, persuaded false confessors couch their admissions of guilt in an inflated use of grammar that expresses their uncertainty. Their expressions of guilt are tentative, speculative, and hypothetical, such as "I would have done," "I probably did," "I could have done," "I must have done," "Most likely I did," and "I guess I did."³¹⁹ For example, Oakland, California, investigators obtained the following post-admission narrative from a university student who had falsely confessed:

- Interrogator: As she came out, uh, did you see her?
- Suspect: I guess I must of . . .
- Interrogator: Did you actually see her or did you drive down and see her, could you see her from the road there.
- Suspect: I think I saw her from the road . . .

318. Interrogation Transcript of Sawyer, *supra* note 74, at 206-07, 211.

319. See OFSHE & LEO, *SOCIAL PSYCHOLOGY*, *supra* note 1, at 218.

Interrogator: Was she walking toward you or was she walking away from you?

Suspect: I think she saw me and continued walking away . . .

Interrogator: Did you talk to her at that point?

Suspect: I must have said something, I don't know . . .

Interrogator: What happened then?

Suspect: I think she tried to kinda go away and I (long pause) and I kinda pulled her around or something and it's, think I backhanded her or something.

Interrogator: What did, what'd she do at that point? Did she fall or what?

Suspect: I think she fell down on her side, around the backside, kinda around the tree. She fell by the tree.

Interrogator: Could you tell if she hit the tree at all?

Suspect: I think she just barely, I think she fell right about the side of it. I don't think she

Interrogator: All right. As, as you saw her there, did she appear injured?

Suspect: I picture her unconscious there.

Interrogator: Did you see any injuries like blood or anything like that?

Suspect: (Sighs) She mighta had a bloody nose.³²⁰

Despite agreeing to a memory blackout and concluding that he is guilty, the false confessor lacks personal knowledge of the crime and therefore is unable to volunteer previously unknown or accurate details of the crime. Persuaded of his guilt but ignorant of the crime facts, one suspect said, "I mean I'm sure by what you've shown me that I did it, but, what I'm not sure of is how I did it. It's still not all coming to me."³²¹

b. *Edgar Garrett's False Confession*

The interrogation of Edgar Garrett³²² illustrates how persuaded false confessions arise. Though police in Goshen, Indiana, had no evidence suggesting that Garrett was guilty, they believed that he killed his sixteen-year-old daughter, Michelle Garrett, who had disappeared one Sunday morning. During Garrett's interrogation, detectives repeatedly confronted him with false evidence: that multiple witnesses had seen him with his daughter shortly before she disappeared; that they had provided statements implicating him and were willing to testify; and that shoeprints, hairs, and blood evidence linked him to his daughter's murder. The investigators also suggested that Garrett acted suspiciously following his daughter's disappearance, and that he had given po-

320. Interrogation Transcript of Page, *supra* note 76, Tape 2, at 2-4.

321. Interrogation Transcript of Reilly, *supra* note 75, at 199.

322. See OFSHE & LEO, *SOCIAL PSYCHOLOGY*, *supra* note 1.

lice inconsistent statements. Finally, one detective informed Garrett that he had failed a polygraph test “worse than anybody I’ve ever seen,”³²³ a test that he said was “100% reliable.”³²⁴ The evidence that Garrett murdered his daughter was conclusive: “There’s no question in anybody’s mind about what happened,”³²⁵ they insisted.

Though he denied the accusations for hours, Garrett eventually became confused and distressed. He resisted the false evidence until a detective suggested that Garrett, who had previously experienced alcohol-induced blackouts, may have suffered a blackout on the morning of his daughter’s disappearance.³²⁶

Interrogator: Let me talk about something else here. Now, we know you were far enough, now you might have had a blackout, right? It’s possible.

Garrett: Possible.

Interrogator: Possible that you were down, well, we know that, you were down at the river bank, down at the river bank.

Garrett: Looking for my daughter.

Interrogator: Right, okay. The only question is what day were you down at the river bank? Well, maybe you were in a blackout. Maybe you were down there with your daughter at the river bank because you’re in a blackout. I don’t know. But before I leave this room today there’s one thing that you and I are going to know, I’m going to help you remember this shit so we can be done.³²⁷

As his belief that he did not see his daughter the morning she disappeared came under attack, Garrett’s confidence in the certainty of his memory began to break down, and he began to express doubts about what he knew.

Garrett: But I just don’t remember if I went out, if I did talk to Michelle Sunday morning or not.

Interrogator: You did.

Garrett: I just don’t, don’t remember.³²⁸

Continuing to confront Mr. Garrett with fabricated incriminating evidence, the investigator suggested the outline of the police theory of the case that had been developed prior to commencing Garrett’s interrogation:

Garrett: I can’t remember fighting with Michelle on Sunday.

Interrogator: You did. Not only did you fight but you thumped her. You didn’t mean to hurt her.

Garrett: What did I thump her with?

323. Interrogation Transcript of Garrett, *supra* note 53, at 25.

324. *Id.* at 50.

325. *Id.* at 44.

326. Garrett had not consumed any alcohol for more than 24 hours prior to his daughter’s disappearance.

327. *Id.* at 319.

328. *Id.* at 327.

Interrogator: I don't know.

Garrett: I don't know either.

Interrogator: But you thumped her.

Garrett: Well, I killed my own daughter?

Interrogator: Yeah.³²⁹

Garrett continued to insist that he knew nothing of the killing, until the investigator revisited the question of his memory and again suggested the possibility that he had amnesia. By emphasizing the blackout hypothesis, by exerting intense pressure to comply with their demands and by neutralizing Garrett's belief in his innocence, the investigators convinced Garrett that he may have killed his daughter.

Interrogator: Tell me about hitting her. Now, you remember that part of it and I know that and you know that and you know that I know that.

Garrett: Maybe I did thump her on top of the head.

Interrogator: Okay. Where did this happen at?

Garrett: Oh, man, I don't know.

Interrogator: Yes, you do. Yes, you do. You know exactly where it happened at.

Garrett: Well, apparently this happened out at Studebaker Park.

Interrogator: Tell me exactly where it happened at. There's, I know there's, remember you're talking to a drunk. You're talking to a guy that's blacked out himself. Okay. I know how them damn things work. Because I am one. I'm just like you, and that's why you and I are connected. Do you understand that?

Garrett: It must have been on that road there. I don't know where, that's where most of the blood is, I guess.³³⁰

Lacking knowledge of these circumstances, Garrett fed back to the police what they knew about the location where Michelle's body had likely been dumped in the river and accepted the investigator's wild speculation that Michelle had been killed by a blow to the head. Once police laid out the narrative, Garrett guessed answers to their specific questions (such as the location of the murder weapon) and confabulated an account of the crime story (such as why he argued with his daughter and what was said).

Because he had accepted as possibly true that he committed the crime, Garrett confessed in language that was conditional, tentative, and conjectural. He parroted back information that the investigator had introduced and inferred from his leading questions and suggestions the investigator's theory of the crime:

Interrogator: How did you cross the river?

329. *Id.*

330. *Id.* at 332-33.

Garrett: I must have went all the way to that school lot over there. That must have been the only way I could have gotten around, over there to get to the other side of the river.

Interrogator: Okay, then what happened next?

Garrett: I must have just left her there.

Interrogator: Okay.

Garrett: And I must have went home.

Interrogator: All right. What did you do with the stick.

Garrett: It's in the house. I must have took it back to the house.³³¹

Pressing for details of the murder, the investigators had to manage Garrett's uncertain belief in his guilt, counter his frequent backsliding, and keep him convinced that he probably did murder his daughter. In response to his denials and attempts to recant earlier admissions, the investigators forcefully restated the evidence against him. When he fed back the investigators' speculative theory of the murder and the few publicly known facts, they expressed approval. Since Garrett was unable to volunteer crime details, the investigator suggested the correct answers through leading questions or simply told him what they believed to be the crime facts. The investigator often asked Garrett to answer questions that might have proven his guilt and led to corroborating evidence, but his answers were apparent guesses, and none of them ever produced corroboration.

Interrogator: I'm going to give you another hint. Detectives don't ask questions unless they have pretty good reasons for asking that. You thought about blood being on your clothes, right? Right?

Garrett: Yeah.

Interrogator: Okay. Where was the blood on your clothes?

Garrett: Probably on my jeans somewhere.³³²

The hallmark of a persuaded false confession is the suspect's uncertainty in his conclusions. The persuaded false confessor typically alternates between expressing minimal certainty in his guilt and minimal confidence in his innocence. Confused and distressed at one moment, Garrett struggled to supply the interrogators with the details they were seeking:

Interrogator: So you think you may have carried her to the other side of the river? How did you get across the river?

Garrett: I don't know (inaudible). I can't swim anyways (inaudible) that day old grass, lot between the school, and Studebaker Park, there's a soccer field there.

Interrogator: Yeah. And then what?

331. *Id.* at 344-45.

332. *Id.*

Garrett: I must have walked around (inaudible) trees or something. I don't know.

Interrogator: And where did you, where did you put her at?

Garrett: On the ground, I guess.³³³

Yet at the next moment he declared that he had no memory of the crime and probably was innocent:

Interrogator: It's real important that you put everything together.

Garrett: I don't know if I even did this.

Interrogator: Listen to me.

Garrett: (Inaudible) admitting to things that I didn't even know if I did, and I'm going to prison for something I probably didn't even have nothing to do with it to begin with.³³⁴

Exhausted, frightened, and unsure of himself, Garrett repeatedly told the interrogators that he did not know or was not certain of his answers. By the end of the fourteen-hour interrogation, Garrett had signed four increasingly detailed statements describing how he murdered his daughter. Shortly after the interrogation, Garrett recanted his confession statements, and eventually a jury acquitted him of capital murder.³³⁵

IV. CONCLUSION

Because the law requires that confessions be voluntary, a contradiction lies at the heart of all psychological interrogation procedures. If police obtain a confession by overbearing a suspect's will or impairing his rational decision-making ability, the law requires it to be excluded from admission into evidence at trial. However, if a suspect wishes to avoid arrest and punishment, it is never in his rational self-interest to voluntarily confess.³³⁶ Depending on what information and experience a suspect brings with him into an interrogation room, he will be more or less well informed about the nature of the criminal justice system and the case against him. A person with relatively complete and accurate information about his circumstances would know the state of the evidence against him, that a confession almost always leads to arrest, prosecution, and conviction, and that it inevitably weakens a defense attorney's position in any plea bargaining negotiation.

Because it is not in a person's rational self-interest to admit guilt if he understands his situation correctly, in order to obtain a confession from someone who prefers to avoid responsibility for an offense, investigators try to determine the information available to the suspect, manipulate his perception

333. *Id.* at 355.

334. *Id.* at 356.

335. *See supra* text accompanying note 60.

336. As David Simon points out, "The fraud that claims it is somehow in a suspect's interest to talk with police will forever be the catalyst in any criminal interrogation. It is a fiction propped up against the greater weight of logic itself." SIMON, *supra* note 22, at 201. *See also* Richard A. Leo, *Miranda's Revenge: Police Interrogation as a Confidence Game*, 30 LAW & SOC'Y REV. 259-88 (1996).

of his situation, and usually offer some form of incentive to elicit the decision to confess. Because of the importance of controlling crime and because guilty suspects typically seek to evade detection, courts permit investigators to lie to suspects about the evidence against them, to manipulate their perception of the significance of acknowledging culpability, and to emphasize the moral and self-image benefits of confessing. Investigators are permitted to emphasize the advantages of telling the truth and to express their desire to help the suspect. Sometimes, however, in order to overcome a suspect's reluctance to confess, investigators make statements that an intellectually normal individual would reasonably conclude constitute an offer that, if accepted, will lead to significantly less punishment but, if rejected, will lead to the most severe possible punishment. Sometimes this is accomplished boldly and directly, but often it is done indirectly and relies on human information processing and reasoning abilities.

It appears impossible to satisfy the requirement that a confession be entirely voluntary unless strict standards are imposed that limit an interrogator's freedom to manipulate a suspect, and requirements of fairness and accuracy are placed on what the police can tell a suspect. If such requirements were imposed on the interrogation process and police were obliged to fairly and accurately apprise a suspect of his situation and the consequences and relative merits of the alternative they advocate, it is unlikely that someone who initially denied responsibility would reverse his choice and confess.

In the age of psychological interrogation, the situation of an innocent citizen mistakenly exposed to modern interrogation procedures raises some very troubling questions. Because psychological interrogation is an influence process—each next step building on what has already been accomplished up to that point—it is difficult, if not impossible, to identify the single procedure that should be proscribed. Although physical coercion is prohibited, psychological coercion is more difficult to detect because it does not leave marks on the body. The modern equivalents to the third-degree practice of threatening harm and finding ways to injure the person without leaving marks have also developed. The modern equivalent to the rubber hose is the indirect threat communicated through pragmatic implication.

Because false confessions come about from the inept and/or improper use of interrogation as a whole, no single procedure can be proscribed and thereby adequately protect the innocent. Because the impulse to deviant conduct by some citizens and some police is as immutable as the survival ability of the cockroach, it is unlikely that deviance in the interrogation room will soon disappear. How then can the danger of eliciting and acting upon false confessions from the innocent be diminished without damaging the ability of the police to obtain reliable confessions from the guilty, and without changing what is presently accepted as a tolerable degree of departure from the ideal of an entirely voluntary confession?

The constitutional law of criminal procedure provides police with general guidelines about the line between permissible and impermissible practices.

Currently, the Fourteenth,³³⁷ Sixth,³³⁸ and Fifth amendments³³⁹ provide little protection against the admission of unreliable or false confessions into evidence at trial.

Although the Fourteenth Amendment due process test may have once focussed on the reliability of a confession in determining its voluntariness, this is no longer the case.³⁴⁰ The Fourteenth Amendment due process test protects a suspect from coercive and/or fundamentally unfair police questioning methods. If an unreliable confession is excluded under the Fourteenth Amendment due process test, it is only because the confession is judged to be involuntary or because police tactics are judged to be so unfair as to shock the judicial conscience. In the event that standard interrogation methods or procedures are not judged to be legally coercive or fundamentally unfair, the Fourteenth Amendment due process test does not prevent unreliable or false confessions from being admitted into evidence.

The Sixth Amendment's entirely procedural concern with post-indictment questioning also offers little or no protection against the admission of false confessions since virtually all police interrogations occur prior to indictment. Like the Fourteenth Amendment due process test, the Sixth Amendment is concerned entirely with the procedural fairness that occurs during *the process* of police interrogation, but not at all with the substantive reliability of the confession statement that is *the outcome* of police interrogation.

The Fifth Amendment also offers little or no protection against the admission of unreliable statements. For all its fanfare, *Miranda* is concerned only with the procedural fairness of the interrogation process—whether a suspect retains his rational and voluntary decision-making ability in the face of inherently compelling police pressures—not with the substantive truth of the interrogation outcome. While it may prevent some suspects from speaking to police or allow suspects to terminate an intolerable inquisition, *Miranda* offers little or no protection against the elicitation of false confessions from innocent suspects or their admission into evidence. Typically innocent suspects waive *Miranda* before the accusatory phase of interrogation begins. Once police issue warnings and obtain a waiver, *Miranda* is virtually irrelevant to the problem of

337. According to current interpretations of the Fourteenth Amendment due process clause, a confession is inadmissible if police interrogation methods overbear the suspect's will and thus cause him to make an involuntary confession. *Rogers v. Richmond*, 365 U.S. 534, 544 (1961). Under this standard, the voluntariness (and hence admissibility) of a confession is evaluated case-by-case based on the totality of the circumstances (i.e., the facts of the case, the suspect's personality characteristics, the specific police interrogation methods, etc.). *Davis v. North Carolina*, 384 U.S. 737, 741-42 (1966). The Fourteenth Amendment due process clause additionally permits courts to exclude as "involuntary" confessions obtained by fundamentally unfair police methods, regardless of the confession's voluntariness. See *Rogers v. Richmond*, 365 U.S. 534 (1961); see also Yale Kamisar, *What is an Involuntary Confession? Some Comments on Inbau and Reid's CRIMINAL INTERROGATIONS AND CONFESSIONS*, 17 RUTGERS L. REV. 728-59 (1963).

338. According to the Sixth Amendment, a confession may be excluded from evidence if *after a suspect has been indicted* he is questioned outside the presence of a lawyer. *Massiah v. United States*, 377 U.S. 201 (1964).

339. The Fifth Amendment privilege against self-incrimination permits judges to exclude confessions from evidence if police did not properly recite the *Miranda* warnings or if they did not obtain a knowing and voluntary waiver. *Miranda v. Arizona*, 384 U.S. 436 (1966).

340. See *White*, *supra* note 5.

false confessions³⁴¹ since few suspects subsequently invoke their *Miranda* rights.³⁴² At the moment when an innocent suspect is most likely to feel the inherently compelling pressures of police questioning, he is least likely to invoke his constitutional right to end interrogation. If he has been exposed to improper threats and promises, he is likely to believe that terminating the interrogation will result in his arrest, while continuing to interact with the interrogator may correct the mistake in which he is trapped. When the innocent suspect reaches the point at which he recognizes that continuing to resist is futile, the choices before him reduce to silence coupled with the most serious charge versus false confession and minimizing his punishment.

Oddly, the constitutional law of criminal procedure has no substantive safeguards in place to specifically prevent the admission of even demonstrably false confessions.³⁴³ But, the more general problem is that the constitutional law seems concerned only with the procedural fairness of police questioning, so much so that it currently lacks any rules to guarantee the reliability of confession statements. Yet it is not uncommon for suspects—especially highly suggestible ones such as the mentally handicapped, juveniles, and individuals who are unusually trusting of authority—to give false confessions in response to police inducements that do not legally qualify as coercive or fundamentally unfair.³⁴⁴

There are two types of false confessions that interrogators may elicit without relying on threats of the most extreme punishment and promises of prosecutorial leniency: the stress-compliant false confession and the non-coerced persuaded false confession.³⁴⁵ Some psychologically vulnerable individuals, such as the intellectually impaired or phobic, will knowingly give a stress compliant false confession to escape an interrogation experience which for them is aversive and punishing, but not necessarily legally coercive.³⁴⁶ Similarly, a psychologically and intellectually normal individual can be equally motivated to end an interrogation if it is allowed to become too punishing in its intensity or duration or through some other facet of the process. And some suspects give a non-coerced persuaded false confession after they have been convinced that it is more likely than not that they committed an offense despite no memory of having done so.³⁴⁷ Since neither type of false confession is elicited in response to coercive or “fundamentally unfair” police methods, the law currently offers little or no protection against their admission into evidence.

341. See generally Richard A. Leo, *Miranda and the Problem of False Confessions*, in RICHARD A. LEO & GEORGE C. THOMAS III, *THE MIRANDA DEBATE: LAW, JUSTICE AND POLICING* (forthcoming 1998).

342. See Cassell & Hayman, *supra* note 26; Leo, *Inside the Interrogation Room*, *supra* note 4.

343. The Supreme Court has recently stated that assessing a confession's lack of reliability “is a matter to be governed by the evidentiary law of the forum . . . and not by the Due Process Clause of the Fourteenth Amendment.” *Colorado v. Connelly*, 479 U.S. 157, 167 (1986). See generally White, *supra* note 5.

344. See GUDJONSSON, *supra* note 5; OFSHE & LEO, *SOCIAL PSYCHOLOGY*, *supra* note 1; Leo & Ofshe, *Consequences*, *supra* note 1.

345. For a discussion of the various types and logic of police-induced false confession, see *supra* Parts II.F.1-3.

346. See *id.*

347. See *supra* Part III.B.3.

The most common type of false confession is elicited through tactics that depend on communicating obvious or implied threats of harm or promises of leniency. Since investigators understand that such coercive tactics are impermissible, they are more likely to employ them when the interrogation is not being recorded or in an indirect and subtle manner that may slip by judicial scrutiny. When this occurs, the interrogator is likely to deny any wrongdoing, while the suspect insists that he was threatened harm and/or promised leniency. State actors typically prevail in such "swearing contests,"³⁴⁸ and when this occurs, a coerced false confession may be admitted into evidence.

To prevent the admission of false confessions (regardless of how they were elicited) courts should evaluate the reliability of confession statements. To accomplish this courts need not create any new rules or rely on any cumbersome procedures. Rather, consistent with the judge's role as a gatekeeper responsible for excluding untrustworthy evidence that has a strong tendency to mislead the jury, the judge should not admit confessions without finding that the confession meets minimal standards of reliability. For example, judges routinely apply a minimum standard of reliability when deciding whether to admit hearsay testimony. It has been shown that placing a confession before a jury is tantamount to an instruction to convict, even when the confession fails to accurately describe the crime, fails to produce corroboration, and is contradicted by considerable evidence pointing to a suspect's innocence.³⁴⁹ Even a demonstrably unreliable confession is likely to greatly confuse, mislead, and prejudice jurors against a defendant and should not be admitted into evidence.

Interrogations that fail to produce a good fit between the post-admission narrative and the crime facts are highly suspect because they may have been induced from an innocent party. When no complete record of the interrogation is available, it is impossible to objectively demonstrate that the confession has not been coerced or produced by extraordinary persuasion. The suspect's "I did it" admission has little to no trustworthy probative value absent independent corroborating evidence, a confirming confession, or a record demonstrating that the admission was made voluntarily.

Both admissions and confession statements are nothing more than two pieces of proposed evidence that, correctly interpreted, point either to a suspect's guilt or innocence. No piece of evidence really speaks for itself, and even a photograph can be doctored. Answering the question of whether a piece of evidence is valid and appropriate for the purpose for which it will be used by a juror is fundamental to the reasoning behind rules governing the exclusion of potential evidence. A judge would never knowingly admit into evidence a doctored photograph that is the product of modern computer graphic techniques and depicts a scene that never happened. A false confession is analogous to a doctored photograph. The mechanism for creating it is the ancient technology of human influence carried forward into the interrogation room.

348. *Stephan v. State*, 711 P.2d 1156, 1159 n.6 (Alaska 1985) (noting that "[w]hile [this] observation may be an overstatement in absolute terms, it is probably generally valid") (citing *Harris v. State*, 678 P.2d 397 (Alaska App. 1984)).

349. See *Leo & Ofshe, Consequences*, *supra* note 1.

It is possible to establish a standard of minimum reliability for a confession so that true confessions, like real photographs, can be separated from the doctored frauds constructed through the techniques of psychological interrogation. Police can be better trained to obtain statements that satisfy the legal definition of the word confession. Most investigators currently operate within legal constraints, but all could be trained to elicit more reliable confessions. A confession that fully describes the circumstances of a crime should and could be crafted to always permit the confession to be corroborated. Corroboration is the key to erecting a standard of minimum reliability for confession evidence.

Assuming that it is possible to control for the contamination that arises when an interrogator suggests crime fact information previously unknown to a suspect, the reliability of a confession statement can usually be objectively determined by evaluating the fit between a post-admission narrative and the crime facts. A guilty confessor necessarily has personal knowledge of the crime, while an innocent confessor (who did not witness the crime) will be ignorant of the crime facts unless educated by the press, community gossip or the police. The guilty confessor will be able to supply information that only the police know, to provide dramatic and mundane crime scene information that the offender should know, and to provide an explanation for unusual and anomalous crime scene facts. His post-admission narrative should match the crime scene details and will very often corroborate the crime facts by reporting provable facts that the police did not know, thus verifying his actual knowledge of the crime and his guilt.

By contrast, the innocent confessor lacks personal knowledge of the crime facts. As a result, he can only repeat information given to him or provide guesses to the interrogators' questions. A well-developed post-admission narrative by a false confessor is likely to be riddled with demonstrable factual errors, and thus casts substantial doubt on the validity of the confession. If a suspect's post-admission narrative fits poorly with the facts of the crime, produces no corroboration, and is disconfirmed by the suspect's wrong answers to questions about major issues (such as the weapon used, how the victim was kept silent, etc.), the confession should be considered inadmissible because it lacks sufficient indicia of reliability. By focusing on the substantive accuracy of the suspect's statement rather than exclusively on the procedural fairness of the interrogation process,³⁵⁰ courts can test for a minimum standard of reliability before admitting a confession into evidence.

If the courts did this, police would improve their practices and false confessions would be far less likely to occur. Those that did occur would be far less likely to be admitted into evidence, and there would be far fewer instances of the costly, lengthy, and unjust deprivations of liberty and miscarriages of

350. Although the constitutional law of criminal procedure currently offers no substantive safeguards against the use of false confession evidence at trial, the Fourteenth Amendment due process clause could be interpreted to forbid the admission of unreliable confession evidence independent of the interrogation procedures used to elicit confessions. For more general suggestions about possible constitutional safeguards against the admission of unreliable confession evidence, see White, *supra* note 5.

justice that false confession needlessly spawn.³⁵¹

Training police to obtain adequately corroborated, reliable confessions would both improve the fact-finding practices of criminal justice officials and save scarce judicial resources. If police and prosecutors recognized that the mere admission "I did it" is not necessarily a true statement, they would be far less likely to arrest and prosecute suspects who give false confessions. As a result, the time and expense associated with the trials and incarcerations of the innocent would diminish. Moreover, if police were trained to make certain that all confessions included detailed descriptions of the crime and thereby produced a basis for evaluating their internal reliability and the possibility of locating new corroborating evidence, guilty defendants would be more likely to plead out rather than require the state to prove its case in costly and sometimes drawn-out trials. If judges had the advantage of working with a clearly articulated standard to help them to decide whether to suppress or admit a confession, miscarriages of justice arising from police-induced false confessions would diminish greatly in the American criminal justice system.³⁵²

To further improve interrogation practices and the truth-finding function of the criminal justice system, mandatory taping of interrogations should be adopted. The supreme courts of Alaska and Minnesota have already established this requirement.³⁵³ As many commentators have pointed out,³⁵⁴ recording requirements create an objective and reviewable record of the interrogation process that enhances the truth-finding function of the criminal process; that protects custodial suspects from potential police abuses; that protects interrogators from potentially frivolous claims of misconduct; that helps the prosecutor, defense attorney, judge, and jury carry out their tasks more efficiently and effectively; and that saves precious judicial time and resources.³⁵⁵

This article has demonstrated an additional reason why police should be required to record all interrogations. In little more than fifty years, American interrogation practices have undergone a remarkable evolution: where once police routinely relied on third-degree practices, today interrogation tactics are more psychological. As American investigators have abandoned the use of force, they have articulated, developed, and refined increasingly subtle and sophisticated interrogation methods and strategies.³⁵⁶ Although police are

351. See Leo & Ofshe, *Consequences*, *supra* note 1.

352. When judges do in fact suppress false confession statements, prosecutors almost always dismiss all charges against the innocent suspect because they lack any other evidence linking him to the crime. See Leo & Ofshe, *Consequences*, *supra* note 1.

353. See *State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994); *Stephan v. State*, 711 P.2d 1156 (Alaska 1985); *Mallott v. State*, 608 P.2d 737, 743 n.5 (Alaska 1980).

354. See YALE KAMISAR, *POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY* (1980); Heather S. Berger, *Let's Go to the Videotape: A Proposal to Legislate Videotaping of Confessions*, 3 ALB. L.J. SCI. & TECH. 165; Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387 (1996); Leo, *Miranda Revisited*, *supra* note 79; White, *supra* note 5; Glanville Williams, *The Authentication of Statements to the Police*, 1979 CRIM. L. REV. 6; Ingrid Kane, Note, *No More Secrets: Proposed Minnesota State Due Process Requirement That Law Enforcement Officers Electronically Record Custodial Interrogation and Confessions*, 77 MINN. L. REV. 983 (1993); Geller, *Police Videotaping* *supra* note 11.

355. See Leo, *Miranda Revisited*, *supra* note 79; Geller, *Police Videotaping*, *supra* note 11.

356. See Leo, *From Coercion to Deception*, *supra* note 14.

trained in the constitutional law of criminal procedure, they have developed and implemented strategies that circumvent the well-established legal prohibitions against the use of threats and promises to motivate statements against a suspect's self-interest. Investigators communicate promises of prosecutorial leniency and threats of greater punishment through maximization and minimization strategies that vary in their degree of explicitness. Rather than relying on overt threats and promises, investigators have discovered, or have been taught, how to communicate promises of leniency and/or threats of harm by "pragmatic implication."³⁵⁷ As Kassin and McNall have demonstrated with laboratory data,³⁵⁸ and as this article has demonstrated with field data, maximization and minimization techniques reliably communicate that a suspect will receive substantially less punishment if he confesses to the version of the facts an interrogator suggests but will be punished most severely if he continues to deny guilt.

Because maximization and minimization strategies are so subtle that they depend on a reasonable inference from an investigator's words, and because human memory is reconstructive, suspects cannot reasonably be expected to recall the exact words with which police communicated differential sentencing expectations. A suspect's inference may be completely justified and the inference may, in fact, be precisely the one that the investigator intended him to make. The suspect's inference may be reasonable even if manual writers, police trainers, and investigators do not realize that these strategies can coerce false confessions from the innocent. If a suppression hearing does not occur until months after an interrogation, suspects will certainly not be able to remember the precise language through which an investigator implemented the maximization/minimization strategy. The investigator will be equally unable to recall exactly what he said. Because of the subtlety of the language used to deliver maximization and minimization strategies and the limitations of human memory, neither investigators nor suspects can reasonably be expected to accurately recall the entire sequence of questions and answers that happened during an interrogation. The only way to insure that potentially crucial evidence is not lost forever is for it be collected and preserved.³⁵⁹

Not only is it beyond human ability to remember just what happened during an interrogation, there is also the problem of bias. Investigators are often committed team players whose desire to win is overriding, and the best evidence will sometimes show investigators to be acting improperly. It is therefore foolhardy to assume that any procedure that leaves the decision about what evidence to collect to police will always produce a complete and fair record of the interrogation.³⁶⁰ To decide whether an investigator directly

357. See Kassin & McNall, *Police Interrogations*, *supra* note 6.

358. See *id.*

359. Interrogators are trained to make no notes while extracting a confession statement. See INBAU ET AL., *supra* note 20, at 173. They are also advised to engage in activities that will contaminate innocent suspects' knowledge of crime facts. See *id.* at 171, 189.

360. *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995). The court was addressing a prosecutor's "responsibility for failing to disclose favorable evidence rising to a material level of importance . . ." *Id.* The state's defense was that the prosecutor did not withhold—he did not know, because the police did not tell him. The court noted that "no one doubts that police investigators some-

or indirectly elicited a coerced statement or whether he obtained a voluntary and uncontaminated admission, it is imperative to have the entire record of questioning available.

The protection of the innocent is paramount in a criminal justice system whose ideology and rules are predicated on the belief that there can be no worse harm than wrongful conviction and incarceration. Researchers have repeatedly documented the existence of numerous and inexcusable miscarriages of justice arising from police-induced false confession.³⁶¹ We need not tolerate these injustices. If courts institutionalized a reasonable standard of confession reliability and required police to record the entirety of all felony interrogations, the suppression hearing would offer significant protection against the admission of false confessions into evidence and the number of miscarriages of justice attributable to false confession would be significantly reduced.

times fail to inform a prosecutor of all they know." *Id.* at 438 (emphasis added).

361. See GUDJONSSON, *PSYCHOLOGY OF INTERROGATIONS*, *supra* note 5; HUFF ET AL., *supra* note 2; WRIGHTSMAN & KASSIN, *supra* note 5; YANT, *supra* note 2; Bedau & Radelet, *supra* note 2; Kassin, *supra* note 3; Leo & Ofshe, *Consequences*, *supra* note 1; Ofshe, *supra* note 36; Radelet et al., *supra* note 2.