

# Assessing the Treatment of Confession Evidence in Court: The Confessions Rule and the Case of *R. v. Oickle*

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*In R. v. Oickle (2000), an arson conviction was upheld by the Supreme Court of Canada (SCC) despite the defendant's claim that his confession was involuntary. As well, the common law confessions rule was formally restated in this ruling. The confessions rule outlines the conditions under which an admission of guilt should be admissible as evidence for triers of fact. In part, the rule states that confessions should not be obtained through the use of threats, promises, oppression, or police trickery that shocks the community. There are two psychological assumptions within this ruling: (1) the interrogation tactics used against the defendant would not have caused an involuntary confession, and (2) community attitudes, or perceptions of those attitudes, are a sufficient benchmark for assessing the acceptability of police interrogation tactics. A review of the relevant empirical literature suggests that the first assumption is invalid, and that the shock the community standard is untenable. The implications of these two unfounded assumptions for the truth-seeking function of the justice system are discussed.*

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In 2000, the Supreme Court of Canada (SCC) ruled that the psychological interrogation tactics used by the police to get a confession from Richard Oickle posed minimal risk of extracting an involuntary confession. Oickle was originally convicted of arson; he appealed his conviction and claimed that his false confession was police-induced. As a result of his appeal, his conviction was overturned. When the case was later appealed to the SCC, the majority argued that the confession was voluntary; the appeal was overturned, and conviction upheld. This case has had widespread implications for interrogation practices and subsequent prosecutions. Specifically, a major restatement of the common law confessions rule (i.e., a set of guidelines protecting against police-induced confessions) was written into this decision. The confessions rule prohibits the use of certain coercive interrogation tactics (i.e., threats, promises, overt oppression). Additionally, the SCC's ruling stated that confessions elicited through police trickery may be deemed admissible so long as the tactics used do not shock the community.<sup>1</sup>

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The SCC's decision on *Oickle*, including the restatement of the confessions rule, rests on two main assumptions. First is the assumption that the psychological interrogation tactics used against Oickle by the police would not have resulted in an involuntary confession. Second is the assumption that the acceptability of an interrogation tactic can be based reliably on community attitudes and/or perceptions of those attitudes by the judiciary. The goal of this commentary is to examine the validity of these two assumptions using relevant evidence from the forensic, social, cognitive, and behavioural psychology literature.

### 1. *R. v. OICKLE: A LANDMARK CASE*

In April of 1995, Richard Oickle was brought in for questioning in relation to a series of eight house and car fires in Waterville, Nova Scotia. He was first subjected to a polygraph examination at around 3:00 p.m., and upon completing the exam nearly two hours later, was informed that he had failed the examination. He was questioned for an additional two hours, after which he admitted to setting one fire, but denied responsibility for the others. At 8:15 p.m., he was transferred to the police station where he was questioned for nearly three additional hours, at which point he confessed to setting seven fires. At 2:45 a.m., Oickle was placed in a cell to get some rest. At around 6:00 a.m. — 15 hours after the initial questioning began — one of the interviewing officers noticed that Oickle was awake and asked if he would participate in a videotaped re-enactment of the fires. He agreed and was brought to the scene of each fire and asked to describe how he set them. At trial, he was convicted on all counts. On appeal, however, questions about the voluntariness of Oickle's confessions led to his conviction being overturned.

The main arguments of the Nova Scotia (NS) Court of Appeal concerned several issues relating to the voluntariness of Oickle's statements as a result of tactics used by the police. First, the officers repeatedly stated that confessing to all of the fires would result in the same outcome as only confessing to one fire, referring to this as a "packaged deal". Second, the interrogating officers implied that Oickle would receive psychiatric help if he confessed. Third, they repeatedly suggested to Oickle that "it would be better" if he confessed.<sup>2</sup> Fourth, they implied that Oickle's wife would have to come in for questioning and undergo a polygraph if he did not confess. Finally, they exaggerated the reliability of polygraph evidence. For instance, Sergeant Taker referred to the polygraph by saying "basically it's a cold scientific instrument . . . it will show that you're lying", and asserted that "before the day is over there's going to be two of us that knows if you've lit any of these fires, right?", implying that the polygraph would undoubtedly detect whether or not Oickle was telling the truth.<sup>3</sup> Sergeant Taker

<sup>1</sup> *R. v. Oickle*, 2000 SCC 38, 2000 CarswellNS 257, 2000 CarswellNS 258, [2000] 2 S.C.R. 3, 147 C.C.C. (3d) 321, 36 C.R. (5th) 129 at para. 66 [*Oickle*].

<sup>2</sup> *Ibid.* at para. 79.

also said that “to pass the polygraph you must be 100 percent truthful. It’s like a girl who comes home and says to her mother, she says, “Mum, I’m a little bit pregnant.” Well, you and I both know . . . that doesn’t work, right?”<sup>4</sup> This statement implied that polygraph results are black and white and will unequivocally indicate truthfulness or deceit. The NS Court of Appeal reasoned that, taken together, the use of these tactics and inducements would render any elicited statements involuntary.

This decision was then appealed to the SCC. In a six-to-one majority ruling on this case, the SCC disagreed with the NS Court of Appeal, stating that the appeal should be set aside and Oickle’s conviction restored. The court argued that, based on an analysis of the entire context of the interrogation (e.g., consideration of all the tactics used in combination with one another), Oickle’s statements were voluntary. Contrary to the argument from the appeals court, the SCC maintained that Oickle was treated fairly by his interrogators and that any inducements used against him were not strong enough to call into question the voluntariness of his statements.

## 2. COMMON LAW CONFESSIONS RULE

The primary contributing factor to the SCC’s decision on *Oickle* was the common law confessions rule, which exists to protect against the admission of involuntary confessions into evidence in Canadian courts. The components of this rule existed prior to this case, but the *Oickle* ruling was the first court decision where all the components were presented together as a comprehensive rule (i.e., this case is considered a formal restatement of the confessions rule). The rule is concerned with determining whether a confession was given voluntarily (i.e., whether it was coerced), and whether the statement is reliable (i.e., whether the content of a statement is correct).

According to the confessions rule, there are four main factors to be considered when making decisions regarding the voluntariness and reliability of confessions and the admissibility of confession evidence in court. The first criterion of the confessions rule outlined in *R. v. Oickle* (2000) indicates that statements cannot be elicited using *threats of punishment* or *promises of leniency*. This criterion relates to the use of improper inducements, primarily those that indicate a *quid pro quo* exchange. Second, statements should not be elicited under an *atmosphere of oppression*. Situations that constitute oppression include deprivation of food, water, or sleep, denied access to legal counsel, or falsifying evidence. Third, a suspect under questioning must possess an *operating mind* (i.e., must be aware of what they are saying and able to understand the associated consequences). Finally, police interrogators must not engage in a high degree of *police trickery* (i.e., tactics used by the police to induce confessions).<sup>5</sup> This final component of the rule does not prohibit police trickery entirely; a certain degree

<sup>3</sup> *Ibid.* at paras. 118, 119.

<sup>4</sup> *Ibid.* at para. 119.

of trickery is allowed, as long as the tactics used do not rise to a level that would *shock the community*.

The confessions rule was created to limit the use of police tactics that would raise a reasonable doubt as to the voluntariness of elicited statements as determined by the judiciary. In *Oickle*, it was stated that the confessions rule should be interpreted on a contextual basis, meaning that all four factors should be considered together when determining the admissibility of statements in a particular case. For example, a police tactic that renders a confession inadmissible in one case may not have the same effect in a completely different case. *Oickle* is the leading decision on voluntariness and the admissibility of confession evidence in Canadian courts.

### 3. KEY PSYCHOLOGICAL ASSUMPTIONS WITHIN THE *OICKLE* RULING

An application of the confessions rule onto the facts of the case in *Oickle* resulted in the decision that Oickle's confession was voluntary and thus could be admitted as evidence. As mentioned, two main assumptions were made by the SCC within this decision. The first assumption was that the *tactics used by the police would not have resulted in an involuntary confession*. The court came to the decision that Oickle's confession was voluntary by analyzing significant police behaviors and tactics through the lens of the first three components of the confessions rule (i.e., threats and promises, oppression, operating mind). Majority opinion was that, in considering the police tactics used against Oickle in light of the confessions rule and the context surrounding the case, there was no evidence to suggest that his statements should be deemed inadmissible.

The second assumption made in *Oickle* was that *community attitudes are a valid and reliable benchmark for evaluating*, specifically, *the acceptability of police behavior*, and broadly, *the admissibility of confessions in court*. This assumption relates to the fourth part of the confessions rule, which states that confessions elicited using police trickery are acceptable as long as the tactics used do not shock the community. In *Oickle*, the justices ruled that the deception used by the police did not rise to a shocking level. Additionally, since *Oickle* is the leading SCC case on the confessions rule, any Canadian court cases that contain issues relating to interrogation tactics will look to this ruling for guidance. The mere existence of the *shock the community* rule for evaluating confession evidence implies the belief that community attitudes, or perceptions thereof, represent a reliable way to measure the acceptability of police interrogation tactics.

These two aforementioned assumptions concern the efficacy of the confessions rule. By making these assumptions, the SCC justices accepted that the confessions rule protects against the admission of involuntary confessions into evidence. Within the SCC decision on *Oickle*, written by Justice Iacobucci

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<sup>5</sup> *R. v. Rothman*, 1981 CarswellOnt 43, 1981 CarswellOnt 93, [1981] 1 S.C.R. 640, 59 C.C.C. (2d) 30, 20 C.R. (3d) 97 [*Rothman*].

for the majority, there was minimal empirical evidence cited to support the claims made about the voluntariness of Oickle's confession or the confessions rule in general — thus, the validity of the assumptions is unknown. Therefore, it is important to examine the validity of these assumptions; beyond the obvious consequences of miscarriage of justice and wrongful conviction in *Oickle*, invalid assumptions may have more widespread consequences, considering that it is the leading case on the confessions rule.

#### 4. ASSUMPTION 1: PSYCHOLOGICAL TACTICS USED AGAINST OICKLE WOULD NOT HAVE RESULTED IN AN INVOLUNTARY CONFESSION

Police interrogations are crucial for investigations and prosecutions because they can result in a confession — which is often viewed as the most powerful piece of evidence that a prosecutor can bring court.<sup>6</sup> As a result, police officers go to great lengths to secure such confessions and, in most cases, resort to the use of accusatorial interrogation tactics to trick suspects into confessing. Accusatorial methods are confrontational and guilt-presumptive, and place value on obtaining incriminating statements over eliciting information.<sup>7</sup> Police officers who use accusatorial methods attempt to gain control over a suspect throughout the course of an interrogation and use psychological manipulation to pressure them into confessing. Accusatorial interrogations generally serve to confirm pre-conceived notions about a suspect's involvement in a crime.<sup>8</sup>

The most popular accusatorial approaches for police interrogators in North America is the Reid Model of Interrogation. Since its creation in 1962, this model has been taught to hundreds of thousands of police officers in the US, Canada, and beyond, and evidence demonstrates that at least some of the techniques taught as part of Reid are commonly used in the field.<sup>9</sup> Unsurprisingly, then, accusatorial tactics have been associated with a higher confession rate compared with direct questioning methods (i.e., Hedge's  $g = 0.90$  versus 0.19).<sup>10 11</sup>

<sup>6</sup> Saul M. Kassir & Katherine Neumann, "On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis" (1997) 21:5 L & Human Behavior 469.

<sup>7</sup> Richard A. Leo, *Police Interrogation and American Justice* (Cambridge, MA: Harvard University Press, 2008).

<sup>8</sup> Christian A. Meissner et al., "Accusatorial and Information-Gathering Interrogation Methods and their Effects on True and False Confessions: A Meta-Analytic Review" (2014) 10:4 J Experimental Criminology 459.

<sup>9</sup> See Fred E. Inbau et al., *Criminal Interrogation and Confessions*, 5th ed (Gaithersburg, MD: Aspen, 2011); Saul M. Kassir et al., "Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs" (2007) 31:4 L & Human Behavior 38; Lesley King & Brent Snook, "Peering Inside a Canadian Interrogation Room: An Examination of the Reid Model of Interrogation, Influence Tactics, and Coercive Strategies" (2009) 36:7 Crim Justice & Behavior 674.

<sup>10</sup> Hedge's  $g$  is a measure of effect size, similar to *Cohen's d*.  $g$  and  $d$  are interpreted in the

Considering the goal of accusatorial interviews, success at eliciting confessions is often celebrated by proponents of this type of approach as evidence of its status as a superior method of interrogation.<sup>12</sup> However, research also suggests that the psychological tactics that comprise accusatorial interrogations may heighten the risk of involuntary confessions — an outcome that most would agree is undesirable.<sup>13</sup>

Of the two types of confessions (i.e., true and false confessions), false confessions have received the most research attention. A false confession occurs when someone admits to a crime that they did not commit, or exaggerates their involvement in a crime, and generally includes a detailed statement of how and why the crime was committed.<sup>14</sup> Confessions can be identified as false when it is discovered that there was actually no crime committed, when the real perpetrator comes forward, when evidence makes it clear that the suspect could not have committed the crime, or through exculpatory scientific evidence (e.g., DNA).<sup>15</sup>

Making the appropriate decision as to whether a confession should be admitted is critical. A suspect who confesses is likely to be treated differently at every stage of the criminal justice process — they are 20% more likely to be charged, 25% more likely to take a plea bargain, and 26% more likely to be found guilty.<sup>16</sup> As well, confession evidence has been shown to increase the likelihood of recanting by alibi witnesses.<sup>17</sup> Research with mock jurors has shown that confession evidence increased conviction rates by 25%, even when it was known that the confession was coerced.<sup>18</sup> It has been posited that jurors

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same way, with  $d/g = 0.20$  considered as a small effect size (i.e., low practical significance),  $d/g = 0.50$  as a medium effect size (i.e., moderate practical significance), and  $d/g = 0.80$  as a large effect size (i.e., high practical significance). ). Using the analogy of height of teenage girls, a small effect size would be the equivalent of the minimal height difference between 15 and 16 year-old girls, a medium effect size would be the equivalent of a perceptible height difference between 14 and 18 year-old girls, and a large effect size compares to the more substantial height difference between 13 and 18 year-old girls. For more information on effect sizes see Jacob Cohen, *Statistical Power Analysis for the Behavioral Sciences*, 2nd ed (New York: Academic Press, 1988); David C. Howell, *Statistical Methods for Psychology*, 8th ed (Belmont, CA: Wadsworth, 2013) 626.

<sup>11</sup> Meissner et al., *supra* note 8.

<sup>12</sup> For example, Inbau et al., *supra* note 9.

<sup>13</sup> For example, Saul M. Kassin, “Confession Evidence: Commonsense Myths and Misconceptions” (2008) 35:10 *Crim Justice & Behavior* 1309; Meissner et al., *supra* note 8.

<sup>14</sup> Saul M. Kassin et al., “Police-Induced Confessions: Risk Factors and Recommendations” (2010) 34:1 *L & Human Behavior* 3.

<sup>15</sup> Steven A. Drizin & Richard Leo, “The Problem of False Confessions in the Post-DNA World” (2004) 82 *NC L Rev* 891.

<sup>16</sup> Richard A. Leo, “Inside the Interrogation Room” (1996) 86:2 *J Crim L & Criminology* 266.

<sup>17</sup> Stephanie B. Marion et al., “Lost Proof of Innocence: The Impact of Confessions on Alibi Witnesses” (2016) 40:1 *L & Human Behavior* 65.

have a difficult time discounting false confessions because (1) they do not believe that an individual would make false self-incriminating statements, (2) they are unable to distinguish between true and false confessions, and (3) false confessions and true confessions are similar in structure and content.<sup>19</sup> Few would dispute that the admittance of a false confession into evidence in court could have dire consequences for an innocent suspect.

Statistics from the Innocence Project help to shed light on the frequency of false confessions, indicating that 28% of DNA exonerees in the US made a false statement of guilt.<sup>20</sup> Innocence Canada reports that false confessions were involved in 15% of their wrongful conviction cases.<sup>21</sup> However, it is impossible to know the true prevalence or incidence rates because cases of false confessions have not always been recorded, and even today there is no single organization that keeps track of these miscarriages of justice. As well, in the absence of concrete exculpatory evidence (e.g., DNA), it is often difficult to establish ground truth and know with certainty that a confession is false. Thus, many false confessions go unnoticed, including in cases where the defendant enters a guilty plea, when charges are dropped or the confession is disproven before trial, when crimes are minor in nature, or in cases with confidentiality issues.<sup>22 23</sup> The problem of false confessions may be much larger and more widespread than what is now known.

Researchers in psychology, criminology, and legal studies have used various methods to learn about the occurrence and characteristics of false confessions and those who give them. Self-report surveys of police officers, prison inmates, and university students provide estimates of false confession rates between 4% and 12%.<sup>24 25 26 27</sup> Historical records of known false confessions indicate that

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<sup>18</sup> Saul M. Kassin & Holly Sukel, “Coerced Confessions and the Jury: An Experimental Test of the “Harmless Error” Rule” (1997) 21:1 L & Human Behavior 27.

<sup>19</sup> Sara C. Appleby, Lisa E. Hasel, & Saul M. Kassin, “Police-Induced Confessions: An Empirical Analysis of their Content and Impact” (2011) 19:2 Psychology, Crime & L 111.

<sup>20</sup> Innocence Project, (2017) online: < [www.innocenceproject.org](http://www.innocenceproject.org) > .

<sup>21</sup> Innocence Canada, (2018) online: < [www.innocencecanada.com](http://www.innocencecanada.com) > .

<sup>22</sup> Kassin et al., *supra* note 14.

<sup>23</sup> Saul M. Kassin, “False Confessions: How Can Psychology so Basic be so Counter-intuitive?” (2017) 72:9 American Psychologist 951.

<sup>24</sup> Gisli H. Gudjonsson et al., “Custodial Interrogation, False Interrogation, False Confession, and Individual Differences: A National Study among Icelandic Youth” (2006) 41:1 Personality & Individual Differences 49.

<sup>25</sup> Kassin et al., *supra* note 9.

<sup>26</sup> Jon F. Sigurdsson & Gisli H. Gudjonsson, “False Confessions: The Relative Importance of Psychological, Criminological and Substance Abuse Variables” (2001) 7:3 Psychology, Crime and L 275.

<sup>27</sup> Gunnthora Steingrimsdottir et al., “False Confessions and the Relationship with Offending Behaviour and Personality among Danish Adolescents” (2010) 12:2 Leg & Criminological Psychology 287.

they have come from men, women, and children, from around the world, and across many time periods.<sup>28</sup> A content analysis of 125 proven false confessions revealed that the vast majority of false confessions occurred in murder cases (81%) and were given by men (93%); the population of false confessors was relatively young (33% under 18); a significant minority had intellectual disabilities (22%) or mental illnesses (10%); and almost four-fifths were wrongfully convicted at trial.<sup>29</sup>

In the past few decades, several false confession typologies have been created.<sup>30</sup> One of the first and most widely recognized of these typologies was developed by Kassin and Wrightsman.<sup>31</sup> Using principles of social psychology and knowledge of the legal context of interrogations, these researchers divided false confessions into three categories: voluntary, coerced-compliant, and coerced-internalized. Voluntary false confessions are those that are freely given by a suspect without pressure or coercion from the police. Coerced confessions, on the other hand, occur when a suspect is pressured in some way by the police to confess. Coerced-compliant confessions occur when a suspect is induced to confess to a crime during interrogation but is cognitively aware of their innocence. This type of confession normally results from an overwhelming desire to obtain a promised reward, avoid punishment, or escape an oppressive interrogation. For example, a suspect may confess to be able to eat, sleep, go home, or feed a drug habit.<sup>32</sup> Coerced-compliant confessions are thought to be the most common type of false confession.<sup>33</sup> Coerced-internalized confessions, on the other hand, occur when an innocent suspect is coerced by police into confessing and actually comes to believe they are guilty, leading to internalization of guilt and sometimes even confabulation of false memories relating to commission of the crime.<sup>34</sup>

Extensive research has shown that there are factors that put certain individuals at a higher risk for false confession. One of the most widely-studied risk factors is age; a large body of field and laboratory research indicates

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<sup>28</sup> Kassin, *supra* note 13.

<sup>29</sup> Drizin & Leo, *supra* note 15.

<sup>30</sup> For example, Gisli H. Gudjonsson, *The Psychology of Interrogations and Confessions: A Handbook* (Chichester: UK: Wiley, 2003); Richard A. Leo & Richard J. Ofshe, "The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions" (2008) 16 *Studies in L, Politics & Society* 189; Joseph T. McCann, "A Conceptual Framework for Identifying Various Types of Confessions" (1998) 16:4 *Behavioral Sciences & L* 441.

<sup>31</sup> Saul M. Kassin & Lawrence S. Wrightsman, *The Psychology of Evidence and Trial Procedure*, by eds. Saul M. Kassin & Lawrence S. Wrightsman (Beverly Hills, CA: Sage Publications, 1985) 67.

<sup>32</sup> Gudjonsson, *supra* note 30.

<sup>33</sup> Gisli H Gudjonsson & James MacKeith, "Retracted Confessions: Legal, Psychological, and Psychiatric Aspects" (1988) 28:3 *Medicine Science & L* 187.

<sup>34</sup> Kassin & Wrightsman, *supra* note 31.



that younger individuals are at a higher risk for false confessions.<sup>35</sup> For instance, in one study, 65% of 12- to 13-year-old participants agreed to sign a confession compared to only 33% of college-age participants.<sup>36</sup> Other dispositional risk factors have also been identified, including mental illness<sup>37</sup>, compliance and suggestibility<sup>38</sup>, intellectual disability<sup>39</sup>, and sleep deprivation.<sup>40</sup>

In addition to the dispositional factors that put individuals at risk, the risk of false confessions is inextricably linked to police interrogation tactics. The goal of the analysis of the first assumption in *Oickle* is to discover whether the tactics used are capable of inducing an involuntary confession. In *Oickle*, the tactics of particular concern were (a) the interrogators' use of minimization and maximization tactics, and (b) their treatment of polygraph evidence.

#### (a) Minimization and Maximization

A set of tactics common in accusatorial interrogations are known as minimization and maximization. Minimization tactics (also known as “soft sell” tactics) refer to those that are designed to comfort a suspect, make them feel at ease, and lead them to believe that everything will work in their favour.<sup>41</sup> Overall, these tactics serve to downplay the seriousness of the crime and minimize the perceived consequences associated with confessing.<sup>42</sup> Maximization tactics (also known as “scare tactics”), on the other hand, exaggerate the seriousness of an offence. Unlike minimization tactics, they serve to *maximize* the perceived consequences associated with *not* confessing.<sup>43</sup> Some evidence suggests that both types of tactics are fairly common in real-life interrogations.<sup>44 45</sup>

<sup>35</sup> Drizin & Leo, *supra* note 15; Jessica Owen-Kostelnik, Nicholas Dickon Reppucci, & Jessica R. Meyer, “Testimony and Interrogation of Minors: Assumptions about Maturity and Morality” (2006) 61:4 *American Psychologist* 286; Allison D. Redlich & Gail S. Goodman, “Taking Responsibility for an Act Not Committed: The Influence of Age and Suggestibility” (2003) 27:2 *L & Human Behavior* 141.

<sup>36</sup> *Ibid.* Redlich & Goodman.

<sup>37</sup> For example, Drizin & Leo, *supra* note 15.

<sup>38</sup> For example, Jessica R. Klaver, Zina Lee, & Gordon Rose, “Effects of Personality, Interrogation Techniques and Plausibility in an Experimental False Confession Paradigm” (2010) 13:1 *Leg & Criminological Psychology* 71.

<sup>39</sup> For example, Gudjonsson, *supra* note 30.

<sup>40</sup> For example, Mark Blagrove, “Effects of Length of Sleep Deprivation on Interrogative Suggestibility. 2:1 *J of Experimental Psychology: Applied* 48; Steven J Frenda et al., “Sleep Deprivation and False Confessions” (2016) 113: 8 *PNAS* 2047.

<sup>41</sup> Saul M. Kassin, “The Psychology of Confession Evidence” (1997) 52:3 *American Psychologist* 221.

<sup>42</sup> Leo & Ofshe, *supra* note 30.

<sup>43</sup> Kassin, *supra* note 41.

<sup>44</sup> Kassin et al., *supra* note 9.

<sup>45</sup> Saul M. Kassin et al., “Police Reports of Mock Suspect Interrogation: A Test of Accuracy and Perception” (2017) 41:3 *L & Human Behavior* 230.

In the common law confessions rule, it is stated that confessions will not be deemed admissible if they were induced through explicit threats or promises. Moreover, it has been accepted widely by the courts for over a century that threats of punishment and promises of leniency in interrogations are problematic.<sup>46</sup> However, guidelines for the use of minimization and maximization tactics are ambiguous.

To test the effect of minimization and maximization tactics on sentencing decisions, Kassin and McNall (1991) had participants read interrogation transcripts in which interrogators used either leniency, minimization, threats, maximization, or none, and indicate their sentencing expectations on a 10-point scale (1 = minimum, 10 = maximum). Across two studies, results showed that participants expected the suspect to receive a more lenient sentence when leniency (4.17) and minimization (4.83) were used compared to a control (6.00), and a harsher sentence with maximization (6.67) compared to a control (5.40). The authors suggested that participants responded this way because they *perceived* minimization and maximization tactics as implications of leniency and threats, even though no explicit offer of leniency or threat of punishment was made.<sup>47</sup>

Other experimental research has directly linked minimization and maximization to false confessions. In one study, a paradigm was developed to test the effect of minimization and explicit leniency on rates of both true and false confessions.<sup>48</sup> Participants were asked to complete a problem-solving task in the company of a confederate posing as another participant. Participants were told to work on some problems individually and some together; most importantly, they were not allowed to work together on the individual problems. In some cases, the confederate asked for help on an individual problem — if the participant agreed, they were considered “guilty” of cheating. In other cases, the confederate did not ask for help, meaning the participants were innocent. In all cases, the experimenter accused the participant and confederate of cheating, interrogated the participant alone, and asked them to sign a written confession to admit that they cheated. During the interrogation, the experimenter used either minimization tactics, explicit leniency (i.e., offer of a deal), both, or neither. Their results showed that when both tactics were used, the false confession rate increased dramatically, from 6% in the no tactics condition, to 14% with the offer of a deal, 18% with minimization, and 43% with a deal and minimization. Similarly, the true confession rate increased from 46% in the control condition to 72% with a deal and 81% with minimization, suggesting that guilty participants were also coerced by the tactics. Diagnosticity (i.e., the ratio of true to false

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<sup>46</sup> *Ibrahim v. R.*, [1914] UKPC 1 (Hong Kong P.C.) [*Ibrahim*].

<sup>47</sup> Saul M. Kassin & Karlyn McNall, “Police Interrogations and Confessions: Communicating Promises and Threats by Pragmatic Implication” (1991) 15:3 *L & Human Behavior* 233.

<sup>48</sup> Melissa B. Russano et al., “Investigating True and False Confessions within a Novel Experimental Paradigm” (2005) 16:6 *Psychological Science* 481.

confessions) was reduced by around 40% when either tactic was used and 74% when both were used. These results further clarify the notion that minimization tactics tend to result in similar outcomes as explicit promises of leniency (e.g., increased risk of false confessions).<sup>49</sup>

Russano et al.'s paradigm has been replicated and extended by researchers. In one study, an accusatorial interview style that incorporated minimization and maximization was shown to be much less diagnostic than an information-gathering method that used no such tactics (ratios of 1.57 and 4.59, respectively).<sup>50</sup> Another group of researchers sought to use the paradigm to assess the effect of different types of minimization and maximization tactics on false confessions. They divided tactics into two categories: those that manipulate the perceived consequences of confessing and those that do not. They found that tactics that did not manipulate consequences were nearly two and a half times more diagnostic than those that did.<sup>51</sup> This study provides evidence that it is the manipulation of perceived consequences inherent in minimization and maximization tactics that cause these tactics to operate in a manner that is similar to overt promises of leniency and threats.

There is a vast amount of basic social psychology literature that, when applied to police interrogations, can serve as evidence cautioning against the use of certain psychological tactics and help explain why these tactics are problematic. For instance, Latané's social impact theory lays the groundwork for explaining false confessions.<sup>52</sup> The main tenant of social impact theory is that the impact of social forces is a function of (1) strength of the source (e.g., authority figures, status, age), (2) immediacy of the source (e.g., proximity, lack of barriers), and (3) number of sources. In a police interrogation, all of these factors are present at a high level. Police officers are clear authority figures and are afforded certain legal powers. In some interrogations, there are multiple officers interrogating a single individual. Additionally, the interrogation environment is one of custody and isolation; to a suspect, they may feel that they are trapped with no way of escape.

One of the most widely apparent social forces is compliance, which refers to the tendency to publicly yield to a request despite awareness that such behavior is being encouraged by someone else and regardless of private feelings of disapproval.<sup>53 54</sup> To elaborate on the first tenant of social impact theory (i.e., strength of source), authority figures exert a high level of social influence on

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<sup>49</sup> *Ibid.*

<sup>50</sup> Mary E. Rigoni, *Is It Time for a Revolutionary Technique in the Interrogation Room? Empirically Validating the Influence of Inquisitorial Techniques on True and False Confessions* (Master's thesis, University of Texas, El Paso, 2007) [unpublished].

<sup>51</sup> Allyson J. Horgan et al., "Minimization and Maximization Techniques: Assessing the Perceived Consequences of Confession and Confession Diagnosticity" (2012) 18:1 *Psychology Crime*, 65.

<sup>52</sup> Bibb Latané, "The Psychology of Social Impact" (1981) 36:4 *American Psychologist* 343.

those who feel subordinate to them. Considering their ability to limit freedom by detaining and interrogating people and laying charges, police officers are viewed as powerful authority figures to most people.

Decades of research have indicated that when faced with the pressures of authority, people can be induced to comply with requests and perform behaviors that they normally would never consider.<sup>55</sup> In the most notable of these studies by Stanley Milgram, ordinary citizens complied with orders to administer shocks to another person to the point where they became unresponsive — simply because a scientist in a lab coat told them to do so.<sup>56</sup> A recent replication of the Milgram study demonstrated that the effect of authority pressure still holds.<sup>57</sup> These findings reveal the power that authority figures have in eliciting compliance. If individuals could be induced to inflict severe bodily harm on a fellow participant (or at least believe they were doing so) in an experimental setting, it follows that in a stressful interrogation setting involving a powerful authority (i.e., interrogator), the pressure to comply would be greater. Kassin even suggested that the contexts of the Milgram experiment and police interrogations are quite comparable.<sup>58</sup> In both cases, an individual is alone in an unfamiliar place. They are confronted by an authority figure and agree to proceed via a contract (i.e., informed consent, rights waiver). Additionally, in both cases the individual is deceived about their actions; in Milgram's study, participants were led to believe they were actually harming someone, while in an interrogation, suspects are tricked into believing that confessing is more beneficial than denial. The participants in both scenarios are subjected to constant, relentless, and escalating demands until eventually, they demonstrate full obedience to the authority figure and comply with their most substantial request: administering the final shock, or producing a full confession.<sup>59</sup>

It is thought that part of the reason why people comply with authority figures is because doing so comes with practical advantages.<sup>60</sup> In the Milgram experiment, it may have been the case that by complying with the experimenter's orders, the participants felt they were pleasing him — a sort of internal reward. This theory can help to explain the effects of minimization and maximization in

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<sup>53</sup> Robert B Cialdini & Noah J. Goldstein, "Social Influence: Compliance and Conformity" (2004) 55 *Ann Rev of Psychology* 591.

<sup>54</sup> David Myers & Steven J. Spencer, *Social Psychology* (Toronto, ON: McGraw Hill Ryerson Higher Education, 2003).

<sup>55</sup> Kassin, *supra* note 13.

<sup>56</sup> Stanley Milgram, *Obedience to Authority: An Experimental View* (New York, NY: Harper & Row, 1974).

<sup>57</sup> Jerry M Burger, "Replicating Milgram: Would People Still Obey Today?" (2009) 64: 1 *American Psychologist* 1.

<sup>58</sup> Kassin, *supra* note 23.

<sup>59</sup> *Ibid.*

<sup>60</sup> Robert B Cialdini & Melanie R Trost, *The Handbook of Social Psychology*, ed by Daniel T Gilbert, Susan T Fiske, & Gardner Linzey (New York, NY: McGraw-Hill, 1998) 151.

interrogations. Minimization and maximization tactics are used by interrogators to imply certain benefits of confessing (and consequences of denial) that increase the value of complying with their requests. Part of the power of these tactics, then, is their ability to elicit compliance to an authority figure (i.e., the interrogator) by implicitly relaying the potential benefits of doing so.

Another well-known compliance tool is the foot-in-the-door technique, whereby people who first comply with a small request tend to comply with subsequent larger requests.<sup>61</sup> In a study that asked participants to agree to a household inspection, those participants who were first asked to respond to a survey about household product usage were much more likely to agree to the second, larger task than those who were only approached once (57.8% vs. 22.2%, respectively).<sup>62</sup> It is argued that this strategy works through the need to maintain a consistent self-perception, which can be achieved by making decisions in line with previous behavior.<sup>63</sup> The foot-in-the-door technique can help explain the effect of minimization on eliciting confessions. Suspects — whether innocent or guilty — more often than not want to minimize their involvement in a crime. Even when they confess, suspects will generally try to downplay certain details of what happened in an attempt to reduce the associated consequences. By using minimization, interrogators offer suspects the opportunity to admit to a lesser act than the one they were originally accused of committing, an opportunity which is presented as the only way to escape their current circumstances with minimal consequences.<sup>64</sup> Suspects will often take this opportunity, confessing only when it has been suggested that the crime was an accident, that it was provoked by the victim, and so on.<sup>65</sup> What suspects do not realize in doing this, however, is that the minimized request for a confession represents the beginning of a sequential request strategy (i.e., foot-in-the-door), and that their initial admission opens the door for a subsequent non-minimized confession to the crime. According to research on such strategies, since the suspect already confessed partially to the crime, the chances of then complying with a larger request would increase.<sup>66</sup> When a suspect is guilty, this strategy would likely be extremely effective in producing a confession. When the suspect is innocent, on the other hand, the

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<sup>61</sup> Cialdini & Goldstein, *supra* note 53.

<sup>62</sup> Jonathan L. Freedman, & Scott C. Fraser, “Compliance without Pressure: The Foot-in-the-Door techniques” (1966) 4:2 *J Personality & Social Psychology* 195.

<sup>63</sup> See Jerry M. Burger, “The Foot-in-the-Door Compliance Procedure: A Multiple-Process Analysis and Review” (1999) 3:4 *Personality & Social Psychology R* 303; Robert B. Cialdini, Melanie T. Trost, & Jason T. Newsom, “Preference for Consistency: The Development of a Valid Measure and the Discovery of Surprising Behavioural Implications” (1995) 69:2 *J Personality & Social Psychology* 318.

<sup>64</sup> Drizin & Leo, *supra* note 15.

<sup>65</sup> Jessica K. Swanner, Denise R. Beike, & Alexander T. Cole, “Snitching, Lies and Computer Crashes: An Experimental Investigation of Secondary Confessions” (2010) 34:1 *L & Human Behavior* 53.

<sup>66</sup> For example, Freedman & Fraser, *supra* note 62.

foot-in-the-door phenomenon could contribute to the risk of false confession. In either case, the use of the foot-in-the door technique raises doubts about the voluntariness of any type of confession that is obtained.

In addition to the social psychology mechanisms that help explain the effect of minimization and maximization tactics, behavioural mechanisms may also play a role. Simplistically, interrogations are governed by the powers of punishment and reward, which can be explained using the concepts of reinforcement, shaping, and other aspects of basic learning.<sup>67</sup> The role of behaviorism in interrogations relates directly to minimization and maximization techniques, since they have been shown empirically to imply the existence of rewards and punishments.<sup>68</sup>

Knowledge about the effectiveness of minimization and maximization tactics can also be found in research on behavioral economics. Research has shown that people generally tend to make decisions that maximize their well-being within a given context while taking into account any existing constraints — a concept called the matching law.<sup>69</sup> In an interrogation context, minimization and maximization serve to manipulate a suspect's perception of the effect of confessing on their well-being, leading to an increased likelihood of confessing. Furthermore, several theoretical models have been developed that attempt to explain the confession decision-making process as an assessment of the benefits and consequences of confession versus denial.<sup>70</sup>

Most recently, a model was proposed to explain the decision-making process of suspects that is based on expected utility,<sup>71</sup> which refers to the amount of utility expected to be experienced as a result of a particular outcome.<sup>72</sup> According to this theoretical model, suspects make the decision to deny or confess based on a comparison of the expected utility of each choice.<sup>73</sup> Also affecting a suspect's decisions are external factors such as crime details, disposition, and interrogation factors. The model helps to explain the effect of

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<sup>67</sup> See Burrhus F. Skinner, *The Behavior of Organisms* (New York, NY: Harper, 1936); Edward L. Thorndike, *Animal intelligence: Experimental studies* (New York, NY: MacMillan, 1911).

<sup>68</sup> Kassin & McNall, *supra* note 47.

<sup>69</sup> Richard J Herrnstein, Howard Rachlin, & David I Laibson, *The matching law: Papers in Psychology and Economics* (New York, NY: Russell Sage Foundation; Cambridge, MA: Harvard University Press, 1997).

<sup>70</sup> For example, Gudjonsson, *supra* note 30; Linden E. Hilgendorf & Barrie Irving, *Psychology in Legal Contexts: Application and Limitations*, ed by Sally M. Lloyd-Bostock (London, England: MacMillan Press, 1981) 67; Leo & Ofshe, *supra* note 30.

<sup>71</sup> Yueran Yang, Max Guyll, & Stephanie Madon, "The Interrogation Decision-Making Model: A General Theoretical Framework for Confessions" (2017) 41:1 *L & Human Behavior* 80.

<sup>72</sup> Paul J. H. Schoemaker, "The Expected Utility Model: Its Variants, Purposes, Evidence and Limitations" (1982) 20:2 *J Economic Literature* 529.

<sup>73</sup> Yang et al., *supra* note 71.

minimization and maximization on a suspect's decision-making process, because these tactics can distort perceptions of the expected utility of each option. On one hand, maximization decreases the expected utility of denials by emphasizing the possibility of negative outcomes (e.g., harsh sentence); on the other hand, minimization increases the expected utility of confessing by allowing the suspect to believe that it will lead to positive outcomes (e.g., lenient sentence, feelings of relief).<sup>74</sup> When weighing the expected utilities of each option, a suspect would likely see confessing as the more advantageous choice.

In Oickle's interrogation, both minimization and maximization tactics were used. There appears to be a discrepancy between the acceptability of minimization and maximization tactics in the SSC's ruling on *Oickle*, and the convergence of evidence within the research literature showing the harm that can be caused by such tactics. According to Justice Arbour's dissent in the SCC decision, the interrogators' suggestions that (a) confessing to multiple fires would result in a packaged deal (i.e., would not increase his sentence), (b) their assertions that it would be better to confess, and (c) their implied offer of psychiatric help were instances of minimization.<sup>75</sup> Additionally, the implication that Oickle's fiancée would be forced to undergo a stressful interrogation if he did not confess was thought by Justice Arbour to be a form of maximization.

Although most empirical minimization and maximization studies took place after the *Oickle* ruling, the results of Kassin and McNall's work should have at least alerted the court to concerns about the effect of such tactics on the voluntariness of a confession.<sup>76</sup> Importantly, much of the social and behavioral psychology research that helps to explain the risks of minimization and maximization was published prior to the ruling and could have warned of the obvious issues with such tactics. The preponderance of evidence — even without data published after 2000 — suggests that the use of minimization and maximization should be discouraged in police interrogations due to the associated risk of involuntary confessions. Moreover, with the emergence of recent empirical data, it ought to be clear that the confessions rule does not adequately protect against involuntary confessions and that it should be revisited.

### **(b) False and Manipulated Evidence**

One of the most notorious police interrogation tactics is the false evidence ploy, which involves either completely fabricating evidence or exaggerating existing evidence to use against a suspect. There is evidence to suggest that false evidence ploys are actually used in some real-world police interrogations.<sup>77 78</sup>

<sup>74</sup> *Ibid.*

<sup>75</sup> *Oickle*, *supra* note 1.

<sup>76</sup> Kassin & McNall, *supra* note 47.

<sup>77</sup> Kassin et al., *supra* note 9.

<sup>78</sup> Kassin et al., *supra* note 45.

Furthermore, the use of false or manipulated evidence has been documented in the majority of proven false confession cases.<sup>79</sup>

Experimental studies that have tested the effect of false evidence on false confession rates have produced concerning findings. The first and most famous of these studies, referred to as the “ALT key study”, was conducted by Kassin and Kiechel.<sup>80</sup> The procedure involved participants completing a computer-based task in which they pressed a series of keys as instructed by a second participant (who was actually a confederate). The participants were told specifically to never press the ALT key because it would lead to a loss of data. Prior to completion of the task, the computer crashed, and the participant was accused by the experimenter of pressing the forbidden ALT key. In addition, half of the participants were asked to complete the task at a slow speed and the other half were asked to complete the task at a fast-paced speed (i.e., making them more vulnerable to the uncertainty of their own actions). Participants were then interrogated about the event and were asked to sign a written confession admitting to pressing the key. No participants actually pressed the ALT key, meaning that anyone who made a confession would be doing so falsely. Among other variables, the presence of false evidence given by the confederate was manipulated. In the false evidence condition, the confederate admitted to seeing the participant press the ALT key; in the no false evidence condition, they said they did not see what happened.

Nearly all participants (94%) confessed in the false evidence condition, while only about half (48%) confessed with no false evidence.<sup>81</sup> Additionally, the effect of false evidence was amplified when the participant was in a relatively more vulnerable position. Granted the high base rate of false confessions and issues with external validity (e.g., not a realistic representation of a crime), this study provided the first empirical evidence implicating false evidence in the elicitation of involuntary confessions. Replications of this paradigm have both mirrored the results of the original study and extended them, indicating that false evidence increased the false confession rate with heightened consequences of confessing, when the plausibility of committing the act is high, and even in the case of secondary confessions from an informant.<sup>82 83 84</sup>

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<sup>79</sup> Saul M. Kassin et al., “Police-Induced Confessions: Risk Factors and Recommendations” (2010) 34:1 *L & Human Behavior* 3.

<sup>80</sup> Saul M Kassin & Katherine L. Kiechel, “The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation” (1996) 7:3 *Psychological Science* 125.

<sup>81</sup> *Ibid.*

<sup>82</sup> Robert Horselenberg, Harold Merckelback, & Sarah Josephs, “Individual Differences and False Confessions: A Conceptual Replication of Kassin and Kiechel” (2003) 9:1 *Psychology, Crime & L.* 1.

<sup>83</sup> Robert Horselenberg et al., “False Confessions in the Lab: Do Plausibility and Consequences Matter?” (2006) 12: 1 *Psychology, Crime, & L* 61.

<sup>84</sup> Swanner, Beike, & Cole, *supra* note 65.



Other experimental paradigms have been used to study the effect of false evidence as well. In a study that confronted participants with doctored video evidence that showed them cheating in a computer-based gambling task, all participants confessed, and those who were shown the video evidence were more likely to confess when first asked (versus having to ask a second time) than those who were simply told about it (100% versus 73%).<sup>85</sup> Other researchers conducted a study where participants were falsely told they failed a polygraph exam during questioning about a theft of which they were innocent. Results showed that 17% of participants falsely confessed to committing the theft when confronted with the false feedback.<sup>86</sup>

In addition to studying the effect of explicit false evidence on false confessions, researchers have also examined more subtle manipulations of evidence. One such tactic is called the bluff, whereby police officers imply the existence of evidence without explicitly stating that it is incriminating (e.g., implying that video footage is available).<sup>87</sup> Perillo and Kassin tested the bluff technique using the ALT key paradigm and discovered that the rate of false confessions elicited in the bluff condition (87%) was significantly higher than that of the condition where no tactics were used (27%). Moreover, the rates were similar between the bluff and the false evidence conditions.<sup>88</sup> Upon further examination of this tactic using a cheating paradigm<sup>89</sup>, the researchers found that the use of the bluff increased false confession rates from 0% to 50%; thus, suggesting that even a subtle manipulation of evidence is capable of producing false confessions.<sup>90</sup>

The literature on social impact, authority, compliance, and decision-making processes, discussed above with reference to minimization and maximization, can also help us to understand the power of false evidence in interrogations.<sup>91</sup> The difference between minimization and maximization techniques and false evidence lies within the way a suspect's reality is manipulated. The use of minimization and maximization techniques serves to subtly suggest an alternate reality to a suspect — for example, using minimization can suggest that confessing will lead to a more positive outcome, without explicitly saying so. False evidence, on the other hand, is an explicit manipulation of perceived reality, whereby

<sup>85</sup> Robert A. Nash & Kimberly L. Wade, "Innocent but Proven Guilty: Eliciting Internalized False Confessions Using Doctored-Video Evidence" (2008) 23:5 Applied Cognitive Psychology 624.

<sup>86</sup> Robert G. Meyer & James R Youngjohn, "Effects of Feedback and Validity Expectancy on Response in a Lie Detector Interview" (1991) 4 Forensic Reports 235.

<sup>87</sup> Inbau et al., *supra* note 9.

<sup>88</sup> Jennifer T. Perillo & Saul M. Kassin, "Inside Interrogation: The Lie, the Bluff, and False Confessions" (2010) 35:4 L & Human Behavior 327.

<sup>89</sup> Russano et al., *supra* note 48.

<sup>90</sup> Perillo & Kassin, *supra* note 88.

<sup>91</sup> See Cialdini & Goldstein, *supra* note 53; Latané, *supra* note 52; Milgram, *supra* note 56; Yang et al., *supra* note 71.

interrogators invent or manipulate evidence, completely changing a suspect's perception of their situation.

Of relevance to false evidence, some research has demonstrated the extent to which normative social forces can affect perceptions. In a classic study, participants were exposed to the autokinetic effect, a phenomenon by which a stationary point of light appears to be moving erratically in an otherwise dark space. Participants were placed in a dark room and asked to estimate the distance the light moved. When participants completed the task alone, they gave an estimate of the distance traveled by the light and tended to keep subsequent estimates close to that original estimate. When later asked to complete the task in a group setting, participants' original estimates converged to create a new group norm. The most interesting effect, however, occurred when the group setting came first: from the first trial, a clear group norm emerged, and even when participants were subsequently tested individually, the group consensus guided individual estimates.<sup>92</sup> Since the light did not actually move, these results demonstrate the effect that the influence of others can have on individual perceptions and the establishment of norms that guide decision making.

Social psychology research has also shed light on the extent to which misleading people via norms can alter perceptions. A seminal study had participants make judgements on the length of a line in groups. Unbeknownst to the real participant, all the other individuals in the room were actually confederates of the researcher and were instructed to respond in a particular manner. The confederates were told to give responses that were clearly wrong on the majority of trials, and the real participant was set up to always respond last. The manipulation was set up this way to see if the incorrect norms set forth by the rest of the group would influence the participant's responses. The result of this manipulation was groundbreaking: 75% of all participants conformed to the group's incorrect responses at least once, and overall, participants conformed to the group on 32% of all trials.<sup>93</sup> Although conformity rates have decreased since the 1950's, many studies have replicated the same pattern of results as Asch's original experiment.<sup>94</sup>

The two studies described above expose the power of normative influences (i.e., the tendency to follow what others are doing when in uncertain situations) on changing an individual's perceptions and actions. This research relates to interrogations because in most cases, similar to the above studies, such an experience is novel and uncertain for a suspect, and a frame of reference for how to behave is difficult to find. When false evidence is introduced into an interrogation, it serves both to provide more context upon which the suspect can

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<sup>92</sup> Muzafer Sherif, *The Psychology of Social Norms* (Oxford, UK: Harper, 1936).

<sup>93</sup> Solomon E. Asch, "Studies of Independence and Conformity: I. A Minority of One against a Unanimous Majority" (1956) 70:9 *Psychological Monographs: General and Applied* 1.

<sup>94</sup> See Rod Bond & Peter B Smith, "Culture and Conformity: A Meta-Analysis of Studies using Asch's (1952, 1956) Line judgement task" (1996) 119:1 *Psychological Bull* 111.

base their decisions, and to manipulate them into perceiving the probability of their denials being believed as much lower than previously thought. Thus, according to the research on normative influence, such a tactic has the power to create within a suspect a new or altered norm upon which they will base their decisions. What is more, it has been argued that the pressure to conform to norms established by an interrogator will increase the longer the suspect is held for interrogation and is unable to access other norms of reference.<sup>95</sup> Thus, even if a suspect is innocent, the use of false evidence can result in a shift of normative beliefs, which may lead to an increased likelihood of complying with a request to confess.

Cognitive psychological science can also help to explain the impact of false evidence, or implying the existence of non-existent evidence, on the elicitation of false confessions. Research on the misinformation effect, which is the change in reported memory as a result of receiving misleading information, reveals the power of false information to alter perceptions, beliefs, and even actual memories.<sup>96</sup> In a seminal study on the power of misinformation, participants were asked to describe a car accident that they previously witnessed. In some cases, they were asked to describe how fast the cars were going when they hit, while in other cases “hit” was replaced with another word, such as “smashed” or “contacted”. Results showed that the word used to describe the crash greatly influenced perceptions of vehicle speeds: when the word “smashed” was used speed estimates were much higher than they were when less superlative words were used (e.g., contacted; 65 km/hour versus 51 km/hour). Most interestingly, when asked at one-week follow up whether they remembered seeing any broken glass during the crash, those who heard “smashed” were much more likely to say yes — even though there was no glass at the scene.<sup>97</sup>

Dozens of misinformation effect studies have replicated and extended this result.<sup>98</sup> A meta-analysis of studies testing the effect of misinformation showed that false beliefs can be elicited by experimentally inflating imagination for a false event, providing false feedback, and through memory implantation techniques.<sup>99</sup> It is thought that misinformation has such a powerful effect in part because it is used to “fill in gaps” of memories that are unclear.<sup>100</sup> Additionally, research has shown that the formation of false memories depends on time since the original

<sup>95</sup> Hilgendorf & Irving, *supra* note 70.

<sup>96</sup> Elizabeth F. Loftus, “Planting Misinformation in the Human Mind: A 30-Year Investigation of the Malleability of Memory” (2005) 12:4 *Learning & Memory* 361.

<sup>97</sup> Elizabeth F. Loftus & John C. Palmer, “Reconstruction of Automobile Destruction: An Example of the Interaction between Language and Memory” (1974) 13:5 *J Verbal Learning and Verbal Behavior* 585.

<sup>98</sup> See Loftus, *supra* note 96.

<sup>99</sup> Chris Brewin & Bernice Andrews, “Creating Memories for False Autobiographical Events in Childhood: A Systematic Review” (2017) 31:1 *Applied Cognitive Psychology* 2.

<sup>100</sup> Jacqueline E. Pickrell, Daniel M. Bernstein, & Elizabeth F. Loftus, *Cognitive Illusions: A*

event, subtlety and plausibility of false information, availability of disconfirming information, and ignorance to risks of misinformation.<sup>101 102</sup>

Misinformation is thought to be an issue in police interrogations because leading questions and suggestions have the potential to elicit false beliefs by contaminating a suspect's original memory.<sup>103</sup> Undoubtedly, the presentation of false or misleading evidence could also contribute to this issue.<sup>104</sup> Indeed, false memories for committing a crime have been elicited in an experimental setting, in part through the use of false evidence.<sup>105</sup> Recent research assessed the memory distortion effects of the bait question, an interrogation tactic whereby a police officer implies the existence of a hypothetical and nonexistent piece of evidence (e.g., is there a reason why security footage would show you at her house?). Across four studies that used a typical misinformation effect, results showed that participants' accuracy for remembering information they were misled about via the bait tactic (i.e., evidence described incorrectly in an interrogation — for example, the police report described skin cells found on the gun but the interrogating officer mentions fingerprints on the gun using a bait tactic) was much lower than their accuracy for control items ( $d = 0.77$ ). What is more, participants actually reported believing in the existence of over 50% of the hypothetical (i.e., non-existent) evidence presented through bait questions.<sup>106</sup> This research suggests that the bait technique may serve as a source of misinformation during police interrogations.

As described in the dissenting opinion of Justice Arbour, the interrogating officers failed to properly explain the test to Oickle, were ambiguous regarding the admissibility of polygraph evidence in court, and made comments throughout the examination (e.g., “the polygraph says that you are not truthful . . . the machine does not lie”) that led the accused to believe that the test was infallible.<sup>107</sup> Looking to the confessions rule as outlined in the present case, it is specifically stated that falsifying or exaggerating evidence can be a form of oppression in interrogations.<sup>108</sup> Moreover, Justice Arbour argued that the

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*Handbook on Fallacies and Biases in Thinking, Judgement and Memory*, ed by Rudiger F. Pohl (Hove, UK & New York, NY: Psychology Press, 2004) 345.

<sup>101</sup> Brewin & Andrews, *supra* note 99.

<sup>102</sup> Pickrell, Bernstein & Loftus, *supra* note 100.

<sup>103</sup> Loftus, *supra* note 96.

<sup>104</sup> Kassin et al., *supra* note 14.

<sup>105</sup> Julia Shaw & Stephen Porter, “Constructing Rich False Memories of Committing Crime” (2015) 26:3 *Psychological Science* 291; but see Kimberly A. Wade, Maryanne Garry, & Kathy Pezdek, “De-constructing Rich False Memories of Committing Crime: Commentary on Shaw and Porter (2015)” (2017) 29:3 *Psychological Science* 471, for some concerns.

<sup>106</sup> Timothy J. Luke, William E. Crozier, & Deryn Strange, “Memory Errors in Police Interviews: The Bait Question as a Source of Misinformation” (2017) 6:3 *J Applied Research in Memory and Cognition* 260.

<sup>107</sup> *Oickle*, *supra* note 1, at para. 94.

treatment of polygraph evidence constituted an atmosphere of oppression in that it manipulated Oickle into believing he had no choice but to confess since his body already betrayed him.<sup>109</sup> In line with this, it has been argued by some researchers that ploys such as manipulation of polygraph evidence can lead to false confessions because suspects feel trapped by the perceived weight of the evidence against them.<sup>110</sup>

Considering the empirical evidence indicating that the false evidence ploy is a clear risk factor for false confessions, and preliminary evidence suggesting that even subtle manipulation of evidence can lead suspects to falsely confess, it is puzzling as to why the court came to the conclusion that the treatment of polygraph evidence did not affect the voluntariness of Oickle's statements. Furthermore, social and cognitive psychology research, demonstrating the power of normative pressure and misinformation on altering perceptions, provides additional support for the risk of false confessions afforded by false and manipulated evidence. As with minimization and maximization tactics, some of the empirical studies on false evidence were conducted after the *Oickle* ruling and would not have been available during the analysis of this case. However, some of the key empirical studies, and most of the basic psychological literature, were published before the ruling but still were not considered by the court. This evidence supports the notion that the use of exaggerated polygraph evidence against Oickle should have rendered his confession inadmissible. Moreover, considering that *Oickle* is now the leading case on the confessions rule, the emergence of new evidence contrary to the decisions made by the court should have led to an update to the rule in light of what is now known.

In sum, there is a reasonable body of converging evidence to suggest that minimization and maximization techniques and the use of false or exaggerated evidence, both of which were used in *Oickle*, result in a heightened risk for false confessions — they raise doubts of the voluntariness of confessions in which such tactics are used. In the *Oickle* ruling, Justice Iacobucci states that “the confessions rule should recognize which interrogation techniques commonly produce false confessions so as to avoid miscarriages of justice”.<sup>111</sup> Since a goal of the SCC is to protect the innocent from conviction, the confessions rule should protect against factors that put innocent suspects at risk. The *Oickle* ruling, however, makes it clear that the confessions rule as it currently stands does not succeed in achieving this goal. Not only did the confessions rule fail to protect Oickle, but the decision also opened the door for police officers to use the problematic techniques evidenced in *Oickle* in future interrogations, without fear of repercussions.

<sup>108</sup> *Ibid.* at para. 61.

<sup>109</sup> *Ibid.* at para. 122.

<sup>110</sup> For example, Lisa E. Hasel & Saul M. Kassin, *Conviction of the Innocent: Lessons from Psychological Research*, ed by Brian L. Culter (Washington DC: American Psychological Association, 2012) 53.

<sup>111</sup> *Oickle*, *supra* note 1, at para. 32.

## 5. ASSUMPTION 2: COMMUNITY ATTITUDES ARE A VALID AND RELIABLE BENCHMARK FOR EVALUATING THE ACCEPTABILITY OF POLICE BEHAVIOUR

The fourth criterion in the confessions rule in *Oickle* is the permitted use of trickery and deception as long as the tactics do not “shock the community”.<sup>112</sup> The shock the community concept originally came from *R. v. Rothman*, a case where the voluntariness of a statement elicited by an undercover police officer was called into question.<sup>113</sup> A suspect, who invoked his right to silence and refused to speak with police, was brought to a holding cell to spend the night. During his stay, a second person was brought to the cell who introduced himself as a truck driver. During their conversation, the accused confessed to the truck driver, unaware that he was actually an undercover officer. The trial judge in *Rothman* concluded that the police tactic used against the accused was unacceptable and deemed his confession inadmissible as evidence.<sup>114</sup> On appeal, the judge disagreed with the original ruling and ordered a new trial. The SCC agreed with the appeal court, arguing that some police deception is often necessary to elicit information from suspects, meaning police deception should be allowed to a certain degree. Justice Lamer suggested that it is often a necessity for police interrogators to use tricks and deceit because they are dealing with sophisticated criminals that would not confess otherwise. However, it was also noted that sometimes the tactics used by the police to elicit statements will be so shocking that to admit such statements into evidence would “put the criminal justice system into disrepute.”<sup>115</sup> In other words, such behavior would result in negative public perceptions of the court. In cases in which such conduct occurs, it is suggested that statements should be deemed inadmissible as evidence.

Although the *shock the community* standard originally came from *Rothman*, the comprehensive restatement of the confessions rule in *Oickle* was the first time that the standard was formally included as a criterion for determining the admissibility of confession evidence. One of the main ideas behind the *shock the community* standard is that a certain level of police deception is necessary to elicit confessions from guilty suspects. Similar to Justice Lamer, Justice Iacobucci stated that “few suspects will spontaneously confess to a crime” and suggested that police interrogators must use trickery to convince suspects that it is in their best interest to confess.<sup>116</sup> However, it is recognized that it is possible for the police to go too far, resulting in the creation and formal adoption of the *shock the community* standard.

Considering that the *shock the community* standard exists to protect against involuntary confessions, it would make sense that the standard would serve to

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<sup>112</sup> *Ibid.*, at para. 66.

<sup>113</sup> *Rothman*, *supra* note 5.

<sup>114</sup> *Ibid.*

<sup>115</sup> *Ibid.*, at para. 7.

<sup>116</sup> *Oickle*, *supra* note 1, at para. 57.

limit coercive police behavior. The *shock the community* standard is the last line of defense against the admission of involuntary confessions. That is, if a police tactic used to elicit statements from a suspect does not violate any of the other three criteria of the confessions rule (i.e., threats and promises, oppression, operating mind) the *shock the community* rule could still render the statements inadmissible. This rule was created primarily to preserve the integrity of the criminal justice system; it is meant to limit the use of tactics so shocking that allowing them would be more problematic in the eyes of the community than allowing a potentially guilty suspect to walk free.<sup>117</sup>

The main underlying assumption that is apparent in the *shock the community* standard is that community attitudes, or the perception of those attitudes by the judiciary, serve as a reliable benchmark for testing the acceptability of police tactics and admissibility of confession evidence. This assumption can be called into question for two reasons. First, the *shock the community* standard is ambiguous in terms of its meaning (i.e., the way in which a tactic must shock the community), as well as how the rule is actually applied by judges in practice. Second, there is evidence supporting the notion that community attitudes are an insufficient standard for the acceptability of interrogation tactics. Research on attitudes toward police interrogations and confessions, as well other related areas, suggests that community attitudes often do not line up with scientific findings. As well, the social psychology literature provides several explanations as to why community attitudes may not be an ideal benchmark.

## 6. APPLICATION OF THE SHOCK THE COMMUNITY STANDARD

The confessions rule suggests that statements elicited through police tricks that shock the community will not be admissible as evidence. However, neither the *shock the community* standard itself nor the accompanying case law outline the criteria that render a tactic shocking to the community. A tactic could be considered shocking simply because it is morally unacceptable in the eyes of the community, which relates to the function of the rule in protecting the reputation of the judicial system. A tactic may also be considered shocking if it is thought to result in unfavourable consequences. Since the confessions rule exists to protect against involuntary confessions, and since involuntary confessions are an obvious negative consequence of interrogation tactics, it follows that the *shock the community* standard *should* — at least in part — be concerned with beliefs regarding the potential for interrogation tactics to cause involuntary confessions.

Since the restatement of the confessions rule in *Oickle*, the *shock the community* rule has only been used once to prevent a confession from being admitted as evidence.<sup>118</sup> In *R. v. Holt* (2012), the interrogating officer pretended to turn off an audio recorder during the interrogation, when in fact it was still recording. In the *voir dire* concerning the admissibility of Holt's statements, the

<sup>117</sup> Rothman, *supra* note 5.

<sup>118</sup> *R. v. Holt*, 2012 BCSC 1121, 2012 CarswellBC 2270, 95 C.R. (6th) 276.

judge decided that the behavior of the interrogator would shock the community.<sup>119</sup> Within the judge's ruling, little was said about the reasoning for this decision, other than the assertion that it is reasonable to expect that police will tell the truth in interviews, and thus it would be shocking for police to lie to a suspect during an interview. In the only instance of the *shock the community* rule being used to prevent evidence from being admitted, it is unclear how the rule was applied.

In cases where tactics were judged *not* to shock the community, it is also unclear how decisions were made. For example, in *Rothman*, the use of an undercover police officer to manipulate a suspect into confessing was considered acceptable, and no explanation was given as to how the majority came to this decision. In *Oickle*, the tactics used by the police were judged as not rising to a level that would shock the community — but again, no explanation was given. The ambiguity inherent in the *shock the community* standard — specifically, the incomplete reasoning of judges — has been raised as a concern by some legal scholars.<sup>120</sup> Although it is unclear how judges use the *shock the community* standard to make their decisions, it appears that they do not actually consult the community in any way. Rather, it seems that they use their own judgement regarding what the community would think about the acceptability of tactics.

Even if the judiciary wanted to consult community attitudes in developing criteria regarding the acceptability of police interrogation practices, such published data on this topic does not exist. A recent study of a sample of Canadian community members revealed that respondents generally disapproved of physical tactics in interrogations, but perceived psychological tactics less negatively and reported that they would be unlikely to induce false confessions.<sup>121</sup> In another study, when asked to indicate the maximum amount of coercion that would be acceptable in a typical interrogation situation, nearly half of American participants (48.2%) said they would allow the police to use minimization/maximization tactics, one-third (32.4%) approved of oppressive conditions, and over one-tenth (11.5%) approved of explicit psychological torture.<sup>122</sup> Conversely, results from a study on Australian attitudes towards interrogation tactics indicated that the respondents disapproved of several common tactics, including minimization.<sup>123</sup> Two out of these three studies suggest that the general public considers psychological interrogation tactics to be

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<sup>119</sup> *Ibid.*

<sup>120</sup> Hamish Stewart, "The Confessions Rule and the Charter" (2009), 54 McGill L.J. 517.

<sup>121</sup> Laura Fallon, Brent Snook, & Karen Jones, "What Shocks the Community: An Assessment of Community Attitudes toward Police Interrogation Techniques" (under review) Psychology, Crime & L.

<sup>122</sup> Robert J. Homant & Michael J Witkowski, "Support for Coercive Interrogation Among College Students: Torture and Ticking Bomb Scenario" (2011) 6:2 J Applied Security Research 135.

<sup>123</sup> Stephen Moston & Megan Fisher, "Perceptions of Coercion in the Questioning of Criminal Suspects" (2008) 4:2 J Investigative Psychology & Offender Profiling 85.



acceptable — even though these tactics have been empirically shown to increase the risk of eliciting an involuntary confession — while the other suggests that community views on psychological interrogation tactics are more conservative.

A commonly studied group in forensic psychological research is the jury-eligible population. While not assessing community attitudes directly, studies on juror attitudes could potentially serve as a proxy measure. A study by Leo and Liu had jury-eligible students rate interrogation tactics on their coerciveness and their likelihood of eliciting confessions from guilty and innocent persons; most tactics were rated as somewhat to highly coercive and likely to induce a true confession, but not a false confession.<sup>124</sup> These results were replicated using actual jurors.<sup>125</sup> The results of these studies suggest that while jurors may understand that many police interrogation tactics are coercive, they may not be as clear on the negative consequences of using coercive tactics (e.g., false confessions).

Chojnacki, Cicchini, and White tested the assumption that information provided through expert testimony on false confessions is within the common knowledge of jurors. Results showed that on a test of false confession knowledge, participants answered only about half (56.4%) of questions correctly, which is not much higher than what would be expected by chance. On true or false questions, participants answered about three-quarters (71.0%) correctly. Additionally, 81% of participants agreed that knowledge of false confessions is outside the realm of common knowledge.<sup>126</sup> These results make a good case for expert testimony in trials involving disputed confessions and indicate that juror knowledge about false confessions is lacking.

Research has also shown that juror perceptions of pressure exerted during an interrogation are predicted by knowledge about interrogations and false confessions; participants with more knowledge had more negative perceptions of a high-pressure interrogation.<sup>127</sup> Another study had participants read the transcript of a disputed confession case and respond to a questionnaire before and after hearing expert testimony. Prior to hearing the testimony, most participants agreed that the police exerted a great deal of pressure on the accused and were unsure whether the confession was voluntary, but nevertheless found the defendant guilty and agreed that the confession was influential in their

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<sup>124</sup> Richard A. Leo & Brittany Liu, “What Do Potential Jurors Know About Police Interrogation Techniques and False Confessions?” (2009) 27:3 Behavioral Sciences & L 381.

<sup>125</sup> Iris Blandón-Gitlin, Katheryn Sperry, & Richard Leo, “Jurors Believe Interrogation Tactics are not likely to Elicit False Confession: Will Expert Witness Testimony Inform them Otherwise? 17:3 Psychology, Crime & L 239.

<sup>126</sup> Danielle E Chojnacki, Michael D Cicchini, & Lawrence T. White, “An Empirical Basis for the Admission of Expert Testimony on False Confessions” (2008) 40 Ariz St LJ 1.

<sup>127</sup> Skye A. Woestehoff & Christian A. Meissner, “Juror Sensitivity to False Confession Risk Factors: Dispositional vs. Situational Attributions for a Confession” (2016) 40:5 L & Human Behavior 564.

decision. When participants were exposed to knowledge about involuntary confessions through expert testimony, guilty verdicts decreased by 13% and interrogation tactics were rated as even more coercive.<sup>128</sup> This research indicates that a lack of knowledge about interrogation tactics and their influence on false confessions can be problematic for decision-making about the voluntariness of disputed confessions.

Although *shock the community* rule is concerned with public opinion regarding the acceptability of interrogation tactics, it does not appear that the community is ever actually consulted. This may be because there are minimal data outlining the beliefs of the Canadian public in this area, so it would not be easy for judges to obtain information about community attitudes. It is the judge who ultimately makes the decision. In practice, the *shock the community* standard is more akin to “what the *judge thinks* would shock the community”. Given that the judge has the final say in these situations, it is inevitable that their beliefs about the acceptability of police tactics will come into play.<sup>129</sup>

A study on judicial perceptions of interrogation tactics indicated that, when exposed to a confession elicited during a high-pressure interrogation, judges were more likely to find the defendant guilty than those in the no-confession condition (85.7% versus 50% of judges, respectively); this was despite the fact that fewer judges rated the high-pressure confession as being voluntary than the low-pressure confession (29.4% versus 84.2%, respectively).<sup>130</sup> Although replication and extension of this research is needed, the available evidence suggests that reliance on judicial attitudes toward police interrogations may be equally as problematic as relying on community attitudes.

Granted the lack of research on community attitudes toward police interrogation tactics, the social science literature is rife with studies illustrating the disconnect between attitudes and scientific findings in the forensic domain. One example pertains to the attitudes toward torture. In such studies participants are presented with a Ticking Time Bomb (TTB) scenario. More specifically, in the TTB scenario, participants are asked if they would torture a detained terrorist if it was the only way to defuse a bomb in a public place, and it had a high probability of saving the lives of many innocent civilians.<sup>131</sup> Research has shown that public support for torture in a TTB scenario is quite high, regardless of attitudes toward torture in general.<sup>132</sup> The TTB scenario rests on a major assumption — that, in terms of eliciting the information necessary to save lives,

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<sup>128</sup> Blandon-Gitlin, Sperry & Leo, *supra* note 125.

<sup>129</sup> Saul M Kassin, Itiel E Dror & Jeff Kukucka, “The Forensic Confirmation Bias: Problems, Perspectives, and Proposed Solutions” (2013) 20:1 J of Applied Research in Memory & Cognition 42.

<sup>130</sup> Brian D. Wallace & Saul M. Kassin, “Harmless Error Analysis: How Do Judges Respond to Confession Errors?” (2012) 36:2 L & Human Behavior 151.

<sup>131</sup> Joseph Spino & Denise D. Cummins, “The Ticking Time Bomb: When the Use of Torture Is and Is Not Endorsed” (2014) 5:4 Rev Philosophy & Psychology 543.

<sup>132</sup> For example, Homant & Witkowski, *supra* note 122; Shannon C Houck & Lucian G

torture would *work*. However, research shows that torture is ineffective when it comes to information gathering.<sup>133</sup> Similarly, research on attitudes toward capital punishment suggest that people support the practice primarily because it is seen as a powerful crime deterrent; in reality, there is no evidence to support the deterrent effect of capital punishment (Ellsworth & Ross, 1983; Fattah, 1983; Valliant & Oliver, 1997).<sup>134</sup> The fact that people's attitudes toward torture and capital punishment are at odds with the effectiveness of those tactics adds to the serious doubts about the extent to which community attitudes should inform policies about interrogation practices.

The apparent discrepancy between community attitudes toward interrogation tactics and the available scientific evidence can be better understood through basic psychology research. In particular, the social psychology literature discusses several mechanisms (i.e., legitimacy, naïve realism, and the fundamental attribution error) that allow further understanding of the discrepancy between attitudes and science in the context of police interrogation tactics and false confessions.

One concept from social psychology that could help to explain community attitudes regarding police interrogation tactics is legitimacy. Legitimacy refers to the belief that people or institutions in authority positions are appropriate, proper, and just, and the subsequent tendency to agree with decisions and rules made by those who possess legitimacy.<sup>135</sup> Individuals who accept the concept of legitimacy allow authority figures to define the boundaries of certain situations, including behaviors that are considered acceptable in that context. Sometimes, the societal obligation that comes with legitimacy can override an individual's moral values, meaning that something considered morally unacceptable may be viewed more favourably coming from someone who is considered legitimate.<sup>136</sup>

Considering that both police officers and judges are regarded as having a high level of authority, it is likely that the majority of community members

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Conway III, "What People Think about Torture: Torture is inherently bad. . . unless it can save someone I love" (2013) 8:4 J of Applied Security Research 429.

<sup>133</sup> For example, David Luban, "Liberalism, Torture, and the Ticking Bomb" (2005) 91 Va LR 1425; Darius Rejali, *Torture and Democracy* (Princeton, NJ: Princeton University Press, 2007); Henry Shue, "Torture in Dreamland: Disposing of the Ticking Bomb" (2006) 37:2 J Intl L 231.

<sup>134</sup> See Phoebe C Ellsworth & Lee Ross, "Public Opinion and Capital Punishment: A Close Examination of the Views of Abolitionists and Retentionists" (1983) 29:1 Crime & Delinquency 116; Ezzat A Fattah, "Canada's Successful Experience with the Abolition of the Death Penalty" (1983) 25 Can J Criminology 421; Paul M. Valliant & Carrie L. Oliver, "Attitudes Toward Capital Punishment: A Function of Leadership Style, Gender and Personality" (1997) 25:2 Social Behavior & Personality 161.

<sup>135</sup> Tom R. Tyler, "Psychological Perspectives on Legitimacy and Legitimation" (2006) 57:1 Annual Review of Psychology 375.

<sup>136</sup> Herbert C. Kelman & V. Lee Hamilton, *Crimes of Obedience: Toward a Social Psychology of Authority and Responsibility* (New Haven, CT: Yale University Press, 1989).

would view both groups as legitimate. According to legitimacy research, then, the general public would view police behavior as being generally acceptable, and the outcomes of trials as being fair.<sup>137</sup> The effect of legitimacy can even be so powerful that moral beliefs regarding police and judicial behavior are diminished.<sup>138</sup> Thus, the decisions and behaviours of police officers and judges, regardless of whether or not they are *actually* acceptable, may be considered acceptable by the general public simply due to the status and authority of those performing the behaviors and making the decisions.

Research on legitimacy can be connected to community beliefs about interrogation tactics; if a community member heard that a police officer used a certain tactic to elicit a confession, they may deem the use of that tactic as being acceptable simply based on the legitimacy of the police officer who used it. Similarly, if a confession elicited through questionable interrogation tactics is admitted into evidence in court and subsequently used to convict a suspect, then the perceived legitimacy of the court could result in more favourable attitudes toward their decision. If this is the case, then the protective value of the *shock the community* rule would be decreased due to the high legitimacy of the police officers who use these interrogation tactics, and the judiciary who accept the confessions that result from them.

A second concept that may shed light on the discrepancy between community attitudes and scientific evidence is naïve realism. The concept of naïve realism suggests that people believe that (1) they see the world objectively, (2) other people will share their experiences and react in the same way to given situations, and (3) if someone fails to react the same way, it is due to exposure to different information, unwillingness to act normatively, or bias.<sup>139</sup> Naïve realists find it difficult to believe that other people would do things that threaten their well-being and believe that behaving in a manner that does so must relate to an actor's disposition.<sup>140</sup>

As mentioned, the way in which a tactic must shock the community to be deemed unacceptable is unknown, but according to its placement in the confessions rule, it *should* relate to the risk of inducing an involuntary confession. Relatedly, it would make sense for a naïve realist to have a difficult time understanding the concept of involuntary confessions. It has been posited that people do not recognize the risk of involuntary confession because they believe that the things people do that go against their self-interest must be true.<sup>141</sup> If

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<sup>137</sup> For example, Tom R. Tyler, "Enhancing Police Legitimacy" (2004) 593 *Annals of the American Academy of Political & Social Science* 84; Tyler, *supra* note 135; Tom R. Tyler & Yuen J. Huo, *Trust in the Law* (New York, NY: Russell Sage Foundation, 2002).

<sup>138</sup> Kelman & Hamilton, *supra* note 136.

<sup>139</sup> Lee Ross & Andrew Ward, *The Jean Piaget Symposium Series: Values and Knowledge* by eds. Edward S. Reed, Elliot Turill, & Terrance Brown (Hillsdale, N.J.: Lawrence Erlbaum Associates, 1996) 103.

<sup>140</sup> *Ibid.*

<sup>141</sup> Kassin, *supra* note 23.

someone confesses to a crime, a naïve realist would likely assume that the individual must be guilty, because to confess in the absence of guilt would constitute deliberate damage to one's well-being. To illustrate this concept, one study revealed that when a suspect confessed (either truthfully or falsely) they were nearly always judged as being honest (95% and 88% respectively), while those who denied responsibility were only believed about half of the time (56%).<sup>142</sup> These results help to illustrate the concept of naïve realism in practice: when an individual does something that goes against their self-interest (i.e., confessing), they are more likely to be believed than someone who does something to enhance their self-interest (i.e., denial). This could have implications on the validity of the *shock the community* standard, in that the community may not understand the counter-intuitive decision processes inherent in the production of false confessions.

A third concept of relevance is the fundamental attribution error, which occurs when people overestimate dispositional causes for behavior while underestimating situational causes.<sup>143</sup> Similarly, the tendency to make assertions about an individual's stable personality traits based on their behavior, although the behavior could have been induced by a particular situation, is known as correspondence bias.<sup>144</sup> In a classic study demonstrating the potential for attributional bias, participants who read essays arguing either for or against a controversial issue (e.g., Castro's Cuba) tended to perceive the attitudes of the writer as relating to the angle they took in their essay — even when told that the writers had no choice in which side of the argument they wrote about.<sup>145</sup> This type of bias can occur in a wide variety of situations but tends to intensify when judging an individual who performed a questionable or negative behavior.<sup>146</sup> This tendency for overestimating dispositional causes for behavior goes directly against decades of research supporting the power of the situation in influencing behavior.<sup>147</sup>

Judging the cause of the behavior of others is difficult, since it is impossible to experience and understand a situation exactly as someone else does.<sup>148 149</sup>

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<sup>142</sup> Timothy R. Levine, Rachel K. Kim, & J. Pete Blair, "(In)accuracy at Detecting True and False Confessions and Denials: An Initial Test of a Projected Motive Model of Veracity Judgments" (2009) 36:1 *Human Communication Research* 82.

<sup>143</sup> Lee Ross, "The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process" (1977) 10 *Advances in Experimental Social Psychology* 173.

<sup>144</sup> Daniel T Gilbert & Patrick S. Malone, "The Correspondence Bias" 117:1 *Psychological Bull* 21.

<sup>145</sup> Edward E Jones & Victor A Harris, "The Attribution of Attitudes" (1967) 3:1 *J Experimental Social Psychology* 1.

<sup>146</sup> Edward E. Jones & Richard E Nisbett, *Attribution: Perceiving the Causes of Behavior* (Morristown, NJ: General Learning Press, 1972) 79.

<sup>147</sup> For example, Craig Haney, Curtis W Banks, & Philip G. Zimbardo, "Interpersonal Dynamics in a Simulated Prison" (1973) 1 *Intl J of Criminology & Penology* 69.

<sup>148</sup> Jones & Nisbett, *supra* note 146.

Thus, people look for alternate ways to determine why a behavior occurred, which is when attributional biases tend to emerge. Some of the reasons why this bias occurs include (1) the fact that an actor tends to be the focal point of a given situation, meaning that less attention is paid to situational causes for behavior while extra attention is paid to the actor, (2) a tendency to rely on mental shortcuts that help us to pinpoint common motivations for performing a behavior, (3) inappropriate expectations regarding how one should behave in a given situation, and (4) a lack of appreciation of the situational pressure in a particular context.<sup>150 151 152</sup>

The above factors can help to explain why community members assessing the acceptability of interrogation tactics may exhibit an attributional bias. By focusing too much on a suspect, an individual may lose focus on the equally important situation, clouding their judgement regarding the detrimental effects of interrogation tactics. Individuals may also not fully understand the situational factors inherent in police interrogations, making them even more likely to believe that a confession stemmed from a dispositional force (i.e., guilt). If the effects of interrogation tactics are not well-understood, and dispositional reasons for confessing are more prominent in the minds of community members, it is likely that the standard for acceptance of interrogation tactics would be relatively low (i.e., most tactics would be allowed).<sup>153</sup> This may help to explain why community attitudes toward interrogation tactics are not in line with evidence that warns of their associated risks.

In sum, one of the four criteria for the admission of incriminating statements into evidence in Canada is whether the tactics used to elicit the statement are thought to shock the community.<sup>154</sup> Based on the evidence that currently exists, the use of a community standard appears to be an unreliable method for evaluating the acceptability of police interrogation tactics. If avoiding interrogation tactics that would be condemned by the public was the sole function of this rule, then it would likely be successful; due to a lack of scientific knowledge in this area, the public is generally unaware of the negative effects of coercive interrogation techniques and thus would likely not be shocked by many commonly used subtle tactics. However, as a safeguard against police interrogation tactics that lead to coerced confessions, evidence suggests that a community standard is insufficient. To truly protect against the admission of involuntary confessions into evidence, the Supreme Court of Canada should consider abolishing the *shock the community* component of the confessions rule

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<sup>149</sup> Emily Pronin, Thomas Gilovich, & Lee Ross, "Objectivity in the Eye of the Beholder: Divergent Perceptions of Bias in Self versus Others" (2004) 111:3 Psychological R 781.

<sup>150</sup> Gilbert & Malone, *supra* note 144.

<sup>151</sup> Jones & Nisbett, *supra* note 146.

<sup>152</sup> Pronin, Gilovich, & Ross, *supra* note 149.

<sup>153</sup> Kassir, *supra* note 23.

<sup>154</sup> Oickle, *supra* note 1.

or amend the confessions rule so that all of its components are articulated precisely and based on scientific evidence.

## 7. CONCLUSION

The *Oickle* decision was submitted 18 years ago — since then, 1,266 court cases have cited the case. Thus, it is evident that the decision to allow Oickle's confession, and the formal restatement of the confessions rule, have had a major impact on the treatment of confession evidence in Canadian courts. Unfortunately, these decisions rest on two major assumptions that are not grounded in scientific evidence: that the tactics used in *Oickle* should not raise reasonable doubt about the voluntariness of the confession and that community attitudes are a sufficient measure of the acceptability of interrogation tactics. Had the SCC consulted the relevant literature in depth, the decision on this case — and those of hundreds of cases since then — may have differed greatly.

The first major assumption made in the *Oickle* decision was that the tactics used by police would not have caused an involuntary confession. A thorough examination of the empirical data on involuntary confessions, as well as wider body of relevant findings from social, cognitive, and behavioral psychology does not support this assumption. There is a wealth of empirical literature suggesting that the tactics used increase the risk of false confessions. Further, psychology research on compliance, normative pressure, misinformation, and decision-making help to explain why these interrogation tactics pose such a risk to suspects. It is evident that the relevant research was not consulted by the SCC, resulting in an unfortunate outcome for a suspect who was quite clearly treated inappropriately throughout his interrogation.

The second assumption in *Oickle* relates to the restatement of the confessions rule. Specifically, the formal inclusion of the *shock the community* standard rests on the assumption that community attitudes, or perceptions of those attitudes, represent a reliable benchmark upon which to test the admissibility of confession evidence. An examination of the legal and scientific literature suggests that this assumption is invalid. It is clear that the standard is ambiguous, as it does not provide guidance in terms of either its meaning or its application. In terms of community attitudes, research examining attitudes toward police interrogations tactics and other law enforcement behaviors indicates that they do not line up with scientific research. As well, social psychology research suggests that believing the police are legitimate, taking a naïve realist perspective, or falling prey to attribution biases may contribute to the public's lack of understanding of the coercive nature of interrogations. This evidence suggests that, when assessing the acceptability of police interrogation tactics, community attitudes are not a sufficient benchmark. Furthermore, emerging research suggests that even judges, who ultimately make the decision regarding confession admissibility, do not fully understand the risks associated with coercive interrogation. Taken together, this evidence suggests that it is time for the *shock the community* standard to be

removed from the confessions rule and for a more valid and reliable standard to take its place.

This analysis of the assumptions inherent in *Oickle* suggests that constant and continued scientific research on legal issues is imperative to maintain the integrity of the Canadian justice system. Although change is difficult to implement, and progress is undoubtedly slow, it is possible for scientific evidence to influence the legal process.<sup>155 156</sup> While it is clearly the responsibility of those involved in the justice system to ensure the proper functioning of its various components, it is also the responsibility of researchers to publish empirical literature that educates legal professionals on best-practices and up-to-date evidence.<sup>157</sup> Once a robust body of research has accumulated (e.g., multiple replications, increased ecological validity, convergence of evidence), the next step is to ensure the judiciary remains accountable for integrating the findings into their decision-making processes. In doing so, the treatment of confession evidence and police interrogation tactics within Canadian courts can be improved. Only when the justice system is making use of evidence-based decision making — for the confessions rule and beyond — can we be confident that the processes within the Canadian judicial system are fair and just.

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<sup>155</sup> Canada, *The Inquiry Regarding Thomas Sophonow: The Investigation, Prosecution and Consideration of Entitlement to Compensation* (Winnipeg: Department of Justice, 2002).

<sup>156</sup> Gary L. Wells et al., “From the Lab to the Police Station: A Successful Application of Eyewitness Research” (2000) 55:6 *American Psychologist* 581.

<sup>157</sup> Christian A Meissner, Maria Hartwig, & Melisa B. Russano, “The Need for a Positive Psychological Approach and Collaborative Effort for Improving Practice in the Interrogation Room” (2010) 34:1 *L & Human Behavior* 43.