

# Preventing False Confessions: Is *Oickle* Up to the Task?

DALE E. IVES\*

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Police, legal professionals, and lay persons generally consider confessions to be convincing evidence of guilt.<sup>1</sup> Many confessions are truthful, but there is ample evidence that at least some confessions are false. The actual rate of false confessions is not known. However, there is a growing number of United States studies examining proven and probable cases of

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\* Assistant Professor, Faculty of Law, University of Western Ontario.

1. See *Smith v. The Queen*, [1989] 2 S.C.R. 368, 389. Psychological research confirms the compelling nature of confession evidence. See Saul M. Kassir & Katherine Neumann, *On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis*, 21 LAW & HUM. BEHAV. 469, 469 (1997). It also suggests that knowledge that the confession was coerced does not alter the damning nature of such evidence. See Saul M. Kassir & Holly Sukel, *Coerced Confessions and the Jury: An Experimental Test of the "Harmless Error" Rule*, 21 LAW & HUM. BEHAV. 27, 27 (1997).

wrongful convictions, and the more recent studies have attempted to identify and quantify the various factors that contributed to the conviction. These studies reveal that false confessions played an important role in the wrongful conviction in approximately fourteen to twenty-five percent of the cases examined.<sup>2</sup> Unfortunately, there have been no similar attempts in either Canada or the United Kingdom to systematically identify and quantify the factors that have contributed to the known wrongful convictions in these jurisdictions.

Surprisingly, even when a confession is false, many accused will either plead guilty, or contest the case and be convicted at trial.<sup>3</sup> This situation is improving because false confessions are increasingly being revealed prior to trial as a result of early DNA testing.<sup>4</sup> However, even when there is early exposure of a false confession, the individual involved often still endures significant liberty and other deprivations as a result of making the false confession.<sup>5</sup> Innocent individuals falsely confess to committing crimes for many reasons.<sup>6</sup> An expanding body of research<sup>7</sup> indicates that two of the main factors are the personal characteristics of the individual, and the interrogation methods that the police use on the individual, including the actual conditions of interrogation and detention.<sup>8</sup>

In *R. v. Oickle*, the Supreme Court of Canada expressly stated that the Canadian confessions rule “should recognize which interrogation techniques commonly produce false confessions so as to avoid miscarriages of justice.”<sup>9</sup> As a result, the Court reformulated the traditional confessions rule in an attempt to better protect against false confessions. An obvious question is whether the Court succeeded in attaining this goal. An

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2. Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 901–07 (2004).

3. See Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 477–85 (1998) [hereinafter Leo & Ofshe, *Consequences*]; Richard A. Leo & Richard J. Ofshe, *The Truth About False Confessions and Advocacy Scholarship*, 37 CRIM. L. BULL. 293, 306–10 (2001); Drizin & Leo, *supra* note 2, at 921–23, 961–62.

4. Drizin & Leo, *supra* note 2, at 900, 950–53.

5. Leo & Ofshe, *Consequences*, *supra* note 3, at 472; Drizin & Leo, *supra* note 2, at 900, 949–55.

6. For a review of the literature on the psychological basis for false confessions, see GISLI H. GUDJONSSON, *THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS: A HANDBOOK* 193–215 (2003).

7. I refer to this research throughout this Article. For a recent excellent summary of much of the psychological research and its implications, see generally Saul M. Kassir & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 PSYCHOL. SCI. IN PUB. INT. 33 (2004).

8. *Id.* at 51, 53. A further factor is the nature of the offense. See GUDJONSSON, *supra* note 6, at 146–48.

9. [2000] 2 S.C.R. 3, 25.

examination of the reformulated rule indicates that, viewed in the abstract and measured against the current state of knowledge on false confessions, the modern rule does offer considerable protection to innocent persons, but it also has some significant shortcomings. Additional reforms are necessary to further reduce the risk of false confessions. These reforms should include greater judicial recognition of the individual risk factors associated with false confessions, mandatory videotaping of interrogation, and direct regulation of particular interrogation tactics. The Court should also consider incorporating a post-confession reliability analysis into the modern confessions rule.

### I. THE CONFESSIONS RULE

The Canadian confessions rule excludes any statement that an accused makes to a person in authority, unless the Crown proves beyond a reasonable doubt that the accused made the statement voluntarily. Traditionally, courts would only find that a statement was involuntary if it had been obtained by “fear of prejudice or hope of advantage” or, in modern terms, by inducements in the form of threats or promises.<sup>10</sup> The rule was eventually expanded to exclude statements that were not the product of an “operating mind,” because accused persons did not know what they were saying, or that the statement could be used to their detriment,<sup>11</sup> as well as statements obtained through an interrogation conducted in an oppressive manner.<sup>12</sup> There was also some suggestion in the case law, which never received full Supreme Court approval, that a statement could be excluded if the police had engaged in a form of trickery that shocked the conscience of Canadians.<sup>13</sup> However, the courts tended to treat each of these actual or potential branches of the rule as independent grounds of exclusion: a violation of a specific branch of the rule usually had to be shown to exclude an accused person’s statement.<sup>14</sup>

As reformulated in *Oickle*, the trial judge may rule a statement involuntary if it was obtained by an inducement, the lack of an operating

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10. *Prosko v. The King*, [1922] 63 S.C.R. 226, 229–30 (adopting *Ibrahim v. The King*, [1914] A.C. 599, 609 (P.C.) (appeal taken from H.K.)).

11. *Ward v. The Queen*, [1979] 2 S.C.R. 30, 40; *Horvath v. The Queen*, [1979] 2 S.C.R. 376, 392; *R. v. Whittle*, [1994] 2 S.C.R. 914, 939.

12. *Hobbins v. The Queen*, [1982] 1 S.C.R. 553, 556–57.

13. *Rothman v. The Queen*, [1981] 1 S.C.R. 640, 697 (Lamer, J., concurring).

14. *See Oickle*, [2000] 2 S.C.R. at 22–23, 25, 44.

mind, oppression, or a combination of any these circumstances.<sup>15</sup> The modern inquiry into voluntariness thus requires an assessment of the totality of the circumstances—a trial judge must consider *all* aspects of the rule to determine whether the various aspects, either alone or in combination, raise a reasonable doubt as to the voluntariness of the statement.<sup>16</sup> A contextual approach is explicitly mandated, one which generally eschews hard and fast rules.<sup>17</sup> If there is a reasonable doubt that a statement is voluntary, it must be excluded.<sup>18</sup> In addition to this contextual analysis, a statement will be excluded as involuntary if the police obtained the statement through trickery that shocks the conscience of Canadians.<sup>19</sup> Police trickery is therefore recognized as a distinct branch of the voluntariness inquiry.<sup>20</sup>

## II. FALSE CONFESSIONS RESEARCH AND THE REFORMULATED RULE

The likelihood of an innocent individual falsely confessing to a crime varies depending on a host of considerations. The two main considerations are the personal characteristics of the individual and the interrogation methods that the police use on the individual, including the actual conditions of interrogation and detention.<sup>21</sup> An examination of the modern rule as set out in *Oickle*, in light of the current state of psychological and legal knowledge on the causes of false confessions, indicates that the modern rule offers considerable protection to innocent persons, but it also has some significant shortcomings.

### A. Problematic Suspects

False confession researchers have identified certain categories of individuals who are more likely than others to make false confessions. These categories include individuals with intellectual disabilities,<sup>22</sup>

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15. *Id.* at 42–43. The Court recently reaffirmed the approach set out in *Oickle*. See *R. v. Spencer*, 2007 S.C.C. 11, 217 C.C.C. (3d) 353, 358–59 (2007).

16. See *Oickle*, [2000] 2 S.C.R. at 31.

17. *Id.*

18. *Id.* at 25.

19. *Id.* at 42.

20. *Id.* at 41.

21. See Kassin & Gudjonsson, *supra* note 7, at 51–53 (personal characteristics), 53–55 (situational factors).

22. WELSH S. WHITE, *MIRANDA'S WANING PROTECTIONS: POLICE INTERROGATION PRACTICES AFTER DICKERSON* 201–03 (2001) [hereinafter WHITE, *MIRANDA'S WANING PROTECTIONS*]; Drizin & Leo, *supra* note 2, at 970–73; Paul T. Hourihan, *Earl Washington's Confession: Mental Retardation and the Law of Confessions*, 81 VA. L. REV. 1471, 1491–94 (1995); Welsh S. White, *Confessions in Capital Cases*, 2003 U. ILL. L. REV. 979, 989–90, 995–1002 (2003) [hereinafter White, *Capital Cases*]; Welsh S. White, *Miranda's Failure to Restrain Pernicious Interrogation Practices*, 99 MICH. L. REV.

individuals with mental illnesses,<sup>23</sup> young persons,<sup>24</sup> and individuals with compliant or suggestible personalities.<sup>25</sup> Not every individual who falls within one of these categories is equally prone to making a false confession; however, in cases involving such individuals there should be careful scrutiny of their personal characteristics in order to identify and evaluate the degree of vulnerability that is present.<sup>26</sup>

Individuals with intellectual disabilities are considered problematic suspects because they are often particularly susceptible to pressure and coercion, and are highly suggestible and eager to please authority figures.<sup>27</sup> They may also fail to appreciate the long-term consequences of their statements or actions. These two attributes, when coupled with police interrogation techniques that make it clear to the individual that the interrogator wants a statement, may induce an innocent, intellectually disabled individual to falsely confess to a crime. Indeed, individuals with intellectual disabilities may have difficulty coping with “even the average level of stress built into an interrogation . . . .”<sup>28</sup> Young persons are considered problematic suspects for many of the same reasons. They do not yet have fully developed intellectual capacities, they often wish to please authority figures, and they may not fully appreciate the long-term consequences of making a false confession.<sup>29</sup> Moreover, the younger the

1211, 1232 (2001) [hereinafter White, *Miranda's Failure*]; Welsh S. White, *What is an Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001, 2044–46 (1998) [hereinafter White, *Involuntary Now*].

23. GISLI H. GUDJONSSON, *THE PSYCHOLOGY OF INTERROGATIONS, CONFESSIONS AND TESTIMONY* 284–86 (1992); Drizin & Leo, *supra* note 2, at 973–74; Kassin & Gudjonsson, *supra* note 7, at 53. Further research is required to ascertain the risk factors associated with specific mental disorders. For a summary of how various mental disorders may increase an individual's risk of making a false confession, see Deborah Davis & William T. O'Donohue, *The Road to Perdition: Extreme Influence Tactics in the Interrogation Room*, in *HANDBOOK OF FORENSIC PSYCHOLOGY: RESOURCE FOR MENTAL HEALTH AND LEGAL PROFESSIONALS* 897, 963–67 (William T. O'Donohue & Eric R. Levensky eds., 2004).

24. GUDJONSSON, *supra* note 6, at 141–43; Drizin & Leo, *supra* note 2, at 944–45, 963, 968–69; White, *Miranda's Failure*, *supra* note 22, at 1232.

25. GUDJONSSON, *supra* note 23, at 142–62; Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L.L. REV. 105, 120 (1997).

26. See White, *supra* note 25, at 121.

27. GUDJONSSON, *supra* note 23, at 284–86; Morgan Cloud et al., *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495, 511–14 (2002); White, *supra* note 25, at 118–23.

28. WHITE, *MIRANDA'S WANING PROTECTIONS*, *supra* note 22, at 202.

29. Steven A. Drizin & Beth A. Colgan, *Tales from the Juvenile Front: A Guide to How Standard Police Interrogation Tactics Can Produce Coerced and False Confessions*

children, the greater the risk that they will succumb to the pressures of interrogation and make a false confession.<sup>30</sup>

Individuals with compliant personalities exhibit two key personality traits. First, they wish to please and they need to protect their self-esteem when interacting with other people. Second, they try to avoid conflict and confrontation with other people, especially authority figures.<sup>31</sup> Compliant individuals, therefore, will generally wish to agree with the interrogator even if it means agreeing to a version of facts that differs from their own recollection of the events, particularly if the interrogator emphasizes certainty in the individual's guilt.<sup>32</sup>

Suggestible individuals also appear to be more prone to making false confessions.<sup>33</sup> Interrogative suggestibility differs from compliance because it requires individuals to personally accept the information the interrogator communicates to them, while compliance merely requires agreement.<sup>34</sup> Various factors affect suggestibility, including low intelligence, age, poor memory, low self-esteem, lack of assertiveness, and anxiety.<sup>35</sup> Trusting individuals also tend to be more suggestible than suspicious individuals, as do sleep-deprived individuals and individuals who are withdrawing from alcohol or drugs.<sup>36</sup>

The modern confessions rule addresses the personal characteristics of the individual being interrogated in two respects. First, the operating mind doctrine expressly requires that the individuals know what they are saying and know that the statement can be used to their detriment in

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*from Juvenile Suspects*, in INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT 127, 130, 157 (G. Daniel Lassiter ed., 2004); Allison D. Redlich et al., *The Police Interrogation of Children and Adolescents*, in INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT, *supra*, at 107, 109, 112–16.

30. See Kassin & Gudjonsson, *supra* note 7, at 52–53; Allison D. Redlich & Gail S. Goodman, *Taking Responsibility for an Act Not Committed: The Influence of Age and Suggestibility*, 27 LAW & HUM. BEHAV. 141, 151–52 (2003).

31. Kassin & Gudjonsson, *supra* note 7, at 51.

32. White, *supra* note 25, at 124–25. Psychologists use a compliance scale to measure an individual's fear of authority and his or her eagerness to please. There is a correlation between higher scale scores and the likelihood of making a false confession, but further research is necessary to establish the predictive validity of the scale. See Kassin & Gudjonsson, *supra* note 7, at 51.

33. Kassin & Gudjonsson, *supra* note 7, at 51–52. Suggestibility refers to the likelihood of the individual modifying his or her behavior as a result of accepting the messages that the police communicate to him or her during the course of the interrogation. *Id.*

34. GUDJONSSON, *supra* note 23, at 137.

35. Gisli H. Gudjonsson, *The Application of Interrogative Suggestibility to Police Interviewing*, in HUMAN SUGGESTIBILITY: ADVANCES IN THEORY, RESEARCH AND APPLICATION 279, 282–83 (John F. Schumaker ed., 1991); Kassin & Gudjonsson, *supra* note 7, at 52.

36. R. v. Oickle, [2000] 2 S.C.R. 3, 29, 38–39.

court.<sup>37</sup> However, this is an extremely low test of cognitive capacity. The doctrine will not generally operate on its own to exclude many confessions, even in cases involving vulnerable individuals.<sup>38</sup> More important is the modern rule's recognition that individual vulnerabilities that fall short of establishing a lack of an operating mind are still relevant factors in the overall assessment of voluntariness. As the Supreme Court stated in *Oickle*, judges must "be sensitive to the particularities of the individual suspect."<sup>39</sup> The modern rule therefore allows judges to consider all personal characteristics of the individual, such as intellectual disability and age, as well as personality traits like compliance and suggestibility, all of which may not establish that the individual lacked an operating mind when making the statement. It equally allows judges to consider incident-specific concerns including intoxication, alcohol or drug withdrawal, and sleep deprivation, which may intensify the vulnerability of an already vulnerable suspect or create vulnerabilities in an otherwise non-vulnerable suspect.<sup>40</sup> This represents a significant advance over the previous law and its compartmentalized approach to the assessment of voluntariness.

However, there is cause for concern in this area. Most notably, the Court in *Oickle* does not discuss in any detail the types of personal characteristics and incident-specific concerns that lead to an enhanced risk of false confessions. The Court's only direct reference to this issue, drawing on the work of Professor White, is as follows:

False confessions are particularly likely when the police interrogate particular types of suspects, including suspects who are especially vulnerable as a result of their background, special characteristics, or situation, suspects who have compliant personalities, and, in rare instances, suspects whose personalities make them prone to accept and believe police suggestions made during the course of the interrogation.<sup>41</sup>

The Court therefore fails to provide any real guidance to judges and counsel on this important issue.

In addition, in its general discussion of the relationship between false confessions and police interrogation techniques, the Court makes some

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37. *Id.* at 40.

38. See Christopher Sherrin, *False Confessions and Admissions in Canadian Law*, 30 QUEEN'S L.J. 601, 639–56 (2005).

39. *Oickle*, [2000] 2 S.C.R. at 29.

40. See generally GUDJONSSON, *supra* note 6, at 389–90, 415–33 (discussing the effect of alcohol and drugs on suspect vulnerability).

41. *Oickle*, [2000] 2 S.C.R. at 29 (quoting White, *supra* note 25, at 120).

comments that arguably undermine its recognition that the particular characteristics of the individual must always be kept in mind. Drawing on the work of Professors Ofshe and Leo, the Court accepts that “[f]alse confessions are rarely the product of proper police techniques,”<sup>42</sup> but rather “almost always involve ‘shoddy police practice and/or police criminality.’”<sup>43</sup> It also accepts that “in most cases, ‘eliciting a false confession takes strong incentives, intense pressure and prolonged questioning.’”<sup>44</sup> The Court’s ready acceptance of these comments is problematic because it ignores the work of other leading false confession researchers who have demonstrated the enhanced risk that exists for vulnerable individuals even when law enforcement uses proper interrogation techniques, as well as the thin line between legitimate and illegitimate interrogation techniques. As Professors Kassin and Gudjonsson state, “[A]n individual may be so dispositionally naive, compliant, suggestible, delusional, anxious, or otherwise impaired that little interrogative pressure is required to produce a false confession.”<sup>45</sup> Moreover, judges and counsel may be led astray by such comments and may fail to properly consider individual vulnerabilities in a particular case, because the police rely on interrogation strategies and techniques that either do not in the abstract appear particularly problematic, or do not rise to the level described by the Court. Indeed, a recent review of the confessions case law suggests this is occurring.<sup>46</sup> This is a significant shortcoming given that researchers have indicated that individual vulnerabilities are an important cause of false confessions.<sup>47</sup>

### *B. Problematic Interrogation Strategies and Techniques*

The police have available to them a wide variety of legitimate and illegitimate interrogation strategies and techniques including using

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42. *Id.* at 30.

43. *Id.* (quoting Leo & Ofshe, *Consequences*, *supra* note 3, at 492.)

44. *Id.* (quoting Richard J. Ofshe & Richard A. Leo, *The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions*, 16 *STUD. IN L., POL. & SOC’Y* 189, 193 (1997)).

45. Kassin & Gudjonsson, *supra* note 7, at 56. The Court also ignores Ofshe and Leo’s own acknowledgement of this reality. *See* Ofshe & Leo, *supra* note 44, at 192–93.

46. Sherrin, *supra* note 38. Based on a review of the case law Sherrin concludes that “the confessions rule has not generally been interpreted or applied in a way that adequately takes [individual] vulnerabilities into account.” *Id.* at 656.

47. *See, e.g.*, Gisli H. Gudjonsson, *Disputed Confessions and Miscarriages of Justice in Britain: Expert Psychological and Psychiatric Evidence in the Court of Appeal*, 31 *MANITOBA L.J.* 489 (2006). Gudjonsson examined thirty of the leading false confessions cases in Britain and found that in approximately two-thirds of the cases the primary cause of the false confession was the individual’s psychological vulnerability, not police misconduct. *Id.* at 492.



threats and promises, flattering or sympathizing with the individual, sidestepping the individual's denials and objections, minimizing the moral seriousness of the individual's offense, exaggerating the strength of the evidence against the individual, and even relying on fabricated evidence. In most cases, the police will utilize more than one technique during an interrogation, which can intensify the effect of an individual technique.<sup>48</sup> Through their examination of interrogation strategies and techniques in individual cases, as well as psychological research, false confession researchers have identified several strategies and techniques that appear to have a greater likelihood of inducing individuals to falsely confess. The strategies and techniques that have raised the most concern among researchers are third degree interrogation tactics, promises of leniency, threats of adverse consequences for third parties, police deception about the strength of the evidence in the case, and lengthy interrogations.<sup>49</sup>

It has long been recognized and accepted that third degree interrogation tactics, including both actual and threatened violence, have the potential to induce innocent individuals to falsely confess.<sup>50</sup> The available research substantiates this view because a number of the proven and probable cases of false confessions involve the use of direct physical violence against the individual.<sup>51</sup> Other types of explicit or implicit threats, such as threats of further charges or enhanced punishment, can also induce false confessions.<sup>52</sup> Even a threat directed at a third party may induce an innocent individual to falsely confess if the individual has sufficient ties to the threatened third party—for example, a close friendship

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48. White, *Miranda's Failure*, *supra* note 22, at 1233.

49. See generally Kassin & Gudjonsson, *supra* note 7, at 53–55, 60; WHITE, *MIRANDA'S WANING PROTECTIONS*, *supra* note 22, at 204, 212; White, *supra* note 25, at 143–53.

50. Ofshe & Leo, *supra* note 44, at 205–06. For a description of the actual range of third degree techniques used to obtain confessions, see Drizin & Leo, *supra* note 2, at 908–09.

51. LAWRENCE S. WRIGHTSMAN ET AL., *PSYCHOLOGY AND THE LEGAL SYSTEM* 223 (5th ed. 2002); Wayne T. Westling, *Something is Rotten in the Interrogation Room: Let's Try Video Oversight*, 34 J. MARSHALL L. REV. 537, 543 (2001).

52. Ofshe & Leo, *supra* note 44, at 192; Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 1077–78, 1084–88 (1997) [hereinafter Ofshe & Leo, *Decision to Confess*]; White, *Involuntary Now*, *supra* note 22, at 2052. These techniques are often referred to as maximization strategies. See Saul M. Kassin & Karlyn McNall, *Police Interrogations and Confessions: Communicating Promises and Threats by Pragmatic Implication*, 15 LAW & HUM. BEHAV. 233, 234–35 (1991).

or a family relationship—and the threat involves serious adverse consequences for that third party.<sup>53</sup> In such circumstances, the individual may decide that shielding the other individual from harm must take precedence over trying to maintain innocence.

Promises of leniency may also lead to a false confession, particularly where the promised leniency is significant.<sup>54</sup> The promise need not be express. Research indicates that implied promises of leniency, such as when the interrogator minimizes the individual's legal culpability by suggesting that the individual was provoked or acted in self-defense or under the influence of alcohol or drugs, are almost as problematic as express promises of leniency because they can cause the individual to believe that a confession to such conduct will yield a more lenient sentence or no charges.<sup>55</sup> However, the police are unlikely to induce an innocent individual, at least one who is not vulnerable in some way, to make a false confession if they only hold out some moderate or minimal benefit for the individual.<sup>56</sup> As Ofshe and Leo state, "The psychological benefits of reducing guilt, doing the right thing, showing empathy for the victim's family, straightening things out with God, and appearing honorable in the eyes of the investigator or the community are not likely to elicit a decision to confess from an innocent person . . . ."<sup>57</sup> The following types of statements are, therefore, usually not problematic in themselves: "You'll feel better after confessing"; "Confession is good for the soul"; or "Your family and friends will think better of you if you confess."<sup>58</sup>

False confession researchers have also expressed considerable concern over the use of deceptive practices and, in particular, police deception

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53. WHITE, *MIRANDA'S WANING PROTECTIONS*, *supra* note 22, at 210–11; Ofshe & Leo, *Decision to Confess*, *supra* note 52, at 1080–82; Ofshe & Leo, *supra* note 44, at 229–30; White, *Miranda's Failure*, *supra* note 22, at 1241–42.

54. WHITE, *MIRANDA'S WANING PROTECTIONS*, *supra* note 22, at 205–06; White, *Involuntary Now*, *supra* note 22, at 2050–52; White, *Miranda's Failure*, *supra* note 22, at 1234–36.

55. WHITE, *MIRANDA'S WANING PROTECTIONS*, *supra* note 22, at 205; Saul M. Kassir, *A Critical Appraisal of Modern Police Interrogations*, in *INVESTIGATIVE INTERVIEWING: RIGHTS, RESEARCH AND REGULATION* 207, 217 (Tom Williamson ed., 2006); Kassir & Gudjonsson, *supra* note 7, at 55; Ofshe & Leo, *supra* note 44, at 204–05; Ofshe & Leo, *Decision to Confess*, *supra* note 52, at 1088–89; White, *Miranda's Failure*, *supra* note 22, at 1235–36. See also Melissa B. Russano et al., *Investigating True and False Confessions within a Novel Experimental Paradigm*, 16 *PSYCHOL. SCI.* 481, 484–86 (2005). These techniques are often referred to as minimization strategies. See Kassir & McNall, *supra* note 52, at 234–35.

56. WHITE, *MIRANDA'S WANING PROTECTIONS*, *supra* note 22, at 205; White, *Miranda's Failure*, *supra* note 22, at 1234–35.

57. Ofshe & Leo, *Decision to Confess*, *supra* note 52, at 1060. One reason for this is that the officer is asking the suspect to do the very thing that is prohibited by the cultural standards appealed to by the officer, namely, tell a lie.

58. White, *Miranda's Failure*, *supra* note 22, at 1236.

about the strength of the evidence.<sup>59</sup> This type of deception is designed to convince the individual that the police have conclusive evidence of the individual's guilt, which research indicates increases the likelihood that an individual will confess.<sup>60</sup> Moreover, research suggests that confronting innocent individuals with false evidence not only increases the risk of a false confession, it also increases the risk that the individuals will internalize a false belief in their guilt.<sup>61</sup> Police deception about the strength of the case can take many forms. The police may assert that the "case is cracked" or that the evidence "speaks for itself" as to the individual's guilt. They may exaggerate the strength of specific pieces of evidence, make up witnesses who will testify against the individual, assert that the individual has failed a polygraph test, or present fake forensic evidence. The likelihood that these forms of deception will cause an individual to falsely confess depends on the personal characteristics of the individual and the specific tactic that the police employ.

Most false confession researchers believe that the first form of deception—generally exaggerating the strength of the evidence or the interrogator's belief in the individual's guilt—is unlikely to lead to false confessions in the vast majority of cases.<sup>62</sup> They also believe that most innocent individuals who are told there are witnesses who can testify as to their involvement in the crime will simply conclude the witness made an honest error or is lying,<sup>63</sup> with the possible exception of cases where the police falsely inform the individual that someone has confessed and implicated the individual in the crime.<sup>64</sup> In contrast, most researchers have concluded that the other forms of deception—using fake forensic evidence that purportedly establishes the individual's guilt and, perhaps,

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59. WHITE, *MIRANDA'S WANING PROTECTIONS*, *supra* note 22, at 211–14; Kassin, *supra* note 55, at 216–17; Kassin & Gudjonsson, *supra* note 7, at 54–55; White, *Miranda's Failure*, *supra* note 22, at 1243.

60. See Stephen Moston et al., *The Effects of Case Characteristics on Suspect Behaviour During Questioning*, 32 *BRIT. J. CRIMINOLOGY* 23, 34 (1992).

61. Saul M. Kassin, *On the Psychology of Confessions: Does Innocence Put Innocents at Risk?*, 60 *AM. PSYCHOLOGIST* 215, 221 (2005).

62. WHITE, *MIRANDA'S WANING PROTECTIONS*, *supra* note 22, at 211; White, *Miranda's Failure*, *supra* note 22, at 1243.

63. WHITE, *MIRANDA'S WANING PROTECTIONS*, *supra* note 22, at 211; Ofshe & Leo, *supra* note 44, at 202; Ofshe & Leo, *Decision to Confess*, *supra* note 52, at 1017. *But see* White, *Miranda's Failure*, *supra* note 22, at 1245 (noting that the force of the false eyewitness evidence could nonetheless convince an individual it was futile to continue to resist).

64. Drizin & Leo, *supra* note 2, at 976, 981; Ofshe & Leo, *Decision to Confess*, *supra* note 52, at 1018.

falsifying polygraph results—may induce an innocent individual to falsely confess.<sup>65</sup> In particular, this type of deception may be sufficient to convince suggestible or compliant innocent individuals that they are in fact guilty, or other less suggestible individuals that it is futile to continue to assert innocence because they will be convicted anyway.<sup>66</sup>

The modern confessions rule addresses the risk created by specific police interrogation strategies and techniques in a variety of ways. First, the inducements aspect of the rule excludes any statement obtained by improper police inducements. More specifically, any statement that is obtained through actual or threatened physical violence, the so-called third degree interrogation techniques, will usually be excluded as involuntary.<sup>67</sup> In addition, an explicit offer by the police to secure lenient treatment in return for a statement constitutes a very strong inducement to confess and will, therefore, generally lead to a finding of involuntariness.<sup>68</sup> Less explicit offers indicating the possibility of a reduced charge or sentence, at least when coupled with protracted questioning, will also usually raise a reasonable doubt about a statement's voluntariness.

However, milder inducements, such as promises of psychiatric assistance or other forms of counseling are less likely to lead in themselves to a conclusion of involuntariness.<sup>69</sup> Moreover, moral or spiritual inducements will rarely result in the exclusion of a statement.<sup>70</sup> These general principles extend to implicit as well as explicit threats or promises. For example, police use of the phrase "it would be better . . ." may result in exclusion if, viewed in context, it amounts to an implicit threat or promise.<sup>71</sup> Finally, implicit or explicit threats or promises directed against a third party will raise a reasonable doubt about voluntariness if there is a sufficiently close relationship between the individual and the third party.<sup>72</sup> Ultimately, the key considerations are the existence of a quid

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65. WHITE, *MIRANDA'S WANING PROTECTIONS*, *supra* note 22, at 211–13; Ofshe & Leo, *Decision to Confess*, *supra* note 52, at 1023, 1031–32, 1036–41; Ofshe & Leo, *supra* note 44, at 189, 202–03; White, *Capital Cases*, *supra* note 22, at 1015–19; White, *Involuntary Now*, *supra* note 22, at 2053–55; White, *supra* note 25, at 128. This may include inventing fake technologies or procedures. See Ofshe & Leo, *Decision to Confess*, *supra* note 52, at 1032–35. For psychological research supporting this view, see Robert Horselenberg et al., *Individual Differences and False Confessions: A Conceptual Replication of Kassin and Kiechel (1996)*, 9 *PSYCHOL., CRIME & L.* 1 (2003); Saul M. Kassin & Katherine L. Kiechel, *The Social Psychology of False Confessions: Compliance, Internalization and Confabulation*, 7 *PSYCHOL. SCI.* 125 (1996).

66. WHITE, *MIRANDA'S WANING PROTECTIONS*, *supra* note 22, at 211.

67. *R. v. Oickle*, [2000] 2 S.C.R. 3, 32, 34.

68. *Id.* at 32.

69. *Id.* at 33.

70. *Id.* at 36–37.

71. *Id.* at 36, 48–49.

72. *Id.* at 33–34.

pro quo offer, whether phrased as a threat or a promise,<sup>73</sup> and a showing that the offer was strong enough, either individually or in combination with other factors, to overcome the individual's will to remain silent.<sup>74</sup>

Second, the oppression doctrine recognizes that police use of false evidence may contribute to an atmosphere of oppression that renders a confession involuntary.<sup>75</sup> However, even under the modern rule, conveying false forensic or eyewitness evidence to the individual will not by itself usually render a statement involuntary. Similarly, police exaggeration of the reliability of evidence, including polygraph evidence, will rarely by itself raise issues as to voluntariness. As the Court stated in *Oickle*, "While the police admittedly exaggerated the reliability of such devices, the tactic of inflating the reliability of incriminating evidence is a common, and generally unobjectionable one."<sup>76</sup> The independent police trickery branch of the modern rule also recognizes that a statement may be excluded as involuntary if the police engage in conduct that shocks the conscience of Canadians. This is a very difficult standard to satisfy, which is apparent in the examples cited by the Court—where the interrogator pretends to be a chaplain, lawyer, or doctor.<sup>77</sup> The use of exaggerated or fabricated evidence will rarely rise to a level that is sufficient to justify exclusion under this branch of the confessions rule.<sup>78</sup> Finally, the modern rule requires judges to consider the impact of specific interrogation strategies and techniques in light of the overall circumstances of the case. The strength or weakness of the inducement, therefore, is not ultimately determinative. As the Court stated in *Oickle*,

[A] relatively minor inducement . . . may amount to an impermissible inducement if the suspect is deprived of sleep, heat, and clothes for several hours in the middle of the night. . . . On the other hand, where the suspect is treated properly, it will take a stronger inducement to render the confession involuntary.<sup>79</sup>

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73. *Id.* at 37–38.

74. *Id.* at 37; *see also* R. v. Spencer, 2007 S.C.C. 11, 217 C.C.C. (3d) 353, 359–60 (2007).

75. *Oickle*, [2000] 2 S.C.R. at 54, 58.

76. *Id.* at 14.

77. One can question why such statements are caught by the confessions rule because the accused would likely not believe that he or she was speaking to a person in authority. The examples nonetheless emphasize the test's strictness. For an analysis of the limited impact of the police trickery branch of the confessions rule, *see generally* Michael C. Plaxton, *Who Needs Section 23(4)? Or: Common Law Sleight-of-Hand*, 10 CRIM. REP. (6th) 236 (2003).

78. *Oickle*, [2000] 2 S.C.R. at 54, 58.

79. *Id.* at 44 (citation omitted).

The Court's formulation of the threats and promises component of the modern confessions rule therefore generally precludes police reliance on three of the interrogation strategies and techniques that false confession researchers have identified as the most likely to induce an innocent individual to falsely confess. These are third degree tactics,<sup>80</sup> promises of leniency in conjunction with an intense and lengthy interrogation,<sup>81</sup> and threats against a third party where there is a sufficiently close relationship between the party and the individual.<sup>82</sup> In contrast, in accordance with the existing research, more moderate and minimal threats and promises, particularly moral and spiritual inducements, will rarely themselves justify a finding of involuntariness, but must instead be assessed in light of all of the circumstances.<sup>83</sup>

In addition, in its reformulation of the rule the Court expressly acknowledged that the use of fabricated evidence can be a dangerous ploy.<sup>84</sup> At the same time, it held that not all types of deception give rise to the same risk of inducing false confessions.<sup>85</sup> What the Court did not do, and arguably should have done, is provide more guidance to judges and counsel by identifying more directly the types of deceptive behavior that are most likely to induce an individual to falsely confess. The Court should also have given more serious consideration to police deception about the existence of forensic evidence implicating the individual, and whether it is truly necessary to allow the police to engage in this form of deception,<sup>86</sup> particularly because recent psychological research suggests that this technique may be more effective in inducing confessions from innocent individuals than from guilty individuals.<sup>87</sup> That is, although a key factor in an individual's decision to confess is the perceived strength of the evidence against that individual,<sup>88</sup> the likelihood of a confession appears to diminish if the individual recognizes that the evidence is

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80. *Id.* at 32, 33, 34.

81. *Id.* at 32.

82. *Id.* at 33–34.

83. *Id.* at 33, 35–38.

84. *Id.* at 39.

85. *Id.* at 54.

86. In England, police deceit about the existence of forensic or eyewitness evidence is not allowed. *See R v. Mason*, (1987) 3 All E.R. 481, 484–85. In contrast, the United States Supreme Court does not appear to be very concerned over the use of this tactic. *See Frazier v. Cupp*, 394 U.S. 731, 739 (1969). For a discussion of the merits of allowing police deception, see generally Miriam S. Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 *FORDHAM URB. L.J.* 791 (2006), and Deborah Young, *Unnecessary Evil: Police Lying in Interrogations*, 28 *CONN. L. REV.* 425 (1996).

87. *See Moston et al.*, *supra* note 60, at 29–40; Mark R. Keibell et al., *Mock-suspects' Decisions to Confess: The Accuracy of Eyewitness Evidence is Crucial*, 20 *APPLIED COGNITIVE PSYCHOL.* 477, 483–84 (2006).

88. *See Moston et al.*, *supra* note 60, at 34.

inaccurate.<sup>89</sup> At the very least the Court should indicate that the use of false forensic evidence is a particularly dangerous interrogation technique if it is used in combination with an express or implied promise of leniency.

### C. Problematic Conditions of Interrogation and Detention

Police interrogations are inherently coercive. The individual being interrogated is faced with an unfamiliar and uncomfortable environment, isolated from the outside world and other people, and subject to the control of those in authority. The basic conditions of interrogation and detention, in other words, create stress and exert pressure on individuals to speak with the police.<sup>90</sup> Altering these conditions to increase the stress and pressure on the individual can increase the risk of a false confession.

In particular, false confession researchers have assembled a considerable body of evidence that shows that the risk of a false confession increases with the length of the interrogation.<sup>91</sup> Lengthy interrogations give rise to greater fatigue, uncertainty, confusion, fear, anxiety, stress, and despair on the part of the individual, all of which can increase the individual's desire to bring the interrogation process to a conclusion no matter the cost.<sup>92</sup> In other words, the more prolonged the interrogation, the greater the likelihood that the individual will become fixated on the immediate benefit of confessing (removal from the interrogation process) to the neglect of the potential long-term consequences of falsely confessing (conviction and imprisonment).<sup>93</sup> As Professor White states, "No matter how benign the process, virtually continuous questioning by the police will at some point be unfair because it exerts too much pressure on the

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89. See Kebbell et al., *supra* note 87, at 483–84.

90. Kassir & Gudjonsson, *supra* note 7, at 53–54. As already noted, an individual's personal characteristics and situation can either diminish or intensify the stress and pressure of the interrogation. See WHITE, *MIRANDA'S WANING PROTECTIONS*, *supra* note 22, at 211; Kassir & Gudjonsson, *supra* note 7, at 56.

91. Kassir & Gudjonsson, *supra* note 7, at 53–54; White, *Involuntary Now*, *supra* note 22, at 2042, 2046–49; White, *Miranda's Failure*, *supra* note 22, at 1232. The effect of a lengthy interrogation may be moderated by factors such as the suspect's age and the time of day that the interrogation occurs. See Kassir, *supra* note 61, at 221.

92. Kassir, *supra* note 55, at 216; Kassir & Gudjonsson, *supra* note 7, at 52–53, 60; Ofshe & Leo, *Decision to Confess*, *supra* note 52, at 1061.

93. Kassir & Gudjonsson, *supra* note 7, at 53.

suspect.”<sup>94</sup> In addition, lengthier interrogations allow the police to utilize a greater variety of techniques in their bid to obtain a confession.

However, the research does not indicate the precise point at which one can say that the length of the interrogation has itself created a perceptively higher risk of false confession. This is in part because it is not just the length of the interrogation that increases the potential for a false confession; it is also the individual’s perception about how long the interrogation may last. Individuals who want to bring an end to what is perceived to be a mentally and physically debilitating process may decide to falsely confess even if they feel able to endure the questioning for another hour or two if they also believe that the police will be allowed to continue the interrogation past that point.<sup>95</sup> All the research shows at this point is that most of the proven and probable cases of false confessions have involved interrogations of six to twenty-four hours, with an average length of just over sixteen hours,<sup>96</sup> and many of them have also involved deception as to the strength of the evidence and promises of lenient treatment in exchange for a confession.<sup>97</sup>

The modern confessions rule addresses the risk created by the actual conditions of interrogation and detention in two respects. First, the oppressions doctrine aspect of the rule expressly acknowledges that oppressive circumstances can contribute to a false confession and that oppression may, therefore, render a confession involuntary.<sup>98</sup> In the Court’s words:

If the police create conditions distasteful enough, it should be no surprise that the suspect would make a stress-compliant confession to escape those conditions. Alternately, oppressive circumstances could overbear the suspect’s will to the point that he or she comes to doubt his or her own memory, believes the relentless accusations made by the police, and gives an induced confession.<sup>99</sup>

A variety of factors may create an atmosphere of oppression, including ignoring the individual’s basic needs, such as sustenance, clothing, sleep, and medical attention; depriving the individual of access to counsel; and subjecting the individual to excessively aggressive, intimidating, and prolonged questioning.<sup>100</sup> The Court therefore properly acknowledged

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94. WHITE, *MIRANDA’S WANING PROTECTIONS*, *supra* note 22, at 203–04.

95. White, *supra* note 25, at 144.

96. Drizin & Leo, *supra* note 2, at 948–49; Kassir & Gudjonsson, *supra* note 7, at 54; Ofshe & Leo, *Decision to Confess*, *supra* note 52, at 997–98; White, *supra* note 25, at 143–45.

97. White, *supra* note 25, at 128, 130.

98. *R. v. Oickle*, [2000] 2 S.C.R. 3, 38–39.

99. *Id.* at 38.

100. *Id.* at 39. The court included police use of nonexistent evidence as a potential ground of oppression. *Id.* However, it is more properly viewed as a problematic



that the manner in which the police structure the interrogation environment and conduct the questioning helps to create the stress and pressure that researchers have linked to the making of false confessions.<sup>101</sup> However, it would have been better if the Court had independently listed both the tone of questioning and the length of questioning when identifying the types of factors that can contribute to oppression, because each has an independent role to play in enhancing the risk of a false confession.

#### *D. Application of the Rule*

As the above discussion demonstrates, the degree of protection that the modern confessions rule affords against the risk of false confessions depends in large measure on a contextual application of the rule. This is particularly necessary to ensure that personal vulnerabilities that fall short of establishing cognitive incapacity under the operating mind doctrine are not neglected in a court's assessment of voluntariness. A further caveat is, therefore, in order. The manner in which the Court applied the reformulated confessions rule in *Oickle* raises the concern that it ultimately fixated too narrowly on the individual tactics that the police used and failed to properly assess the overall effect of those techniques.<sup>102</sup> If lower courts apply the same approach to the totality of circumstances test, the protective force of the modern rule may be significantly undermined.

A more detailed examination of *Oickle* illustrates the validity of this concern. According to the Court, *Oickle's* statements were voluntary because the police conducted the interrogation in a proper manner:

Their questioning, while persistent and often accusatorial, was never hostile, aggressive, or intimidating. They repeatedly offered the accused food and drink. They allowed him to use the bathroom upon request. Before his first confession and subsequent arrest, they repeatedly told him he could leave at any time. In this context, the alleged inducements offered by the police do not raise a reasonable doubt as to the confessions' voluntariness. Nor do I find fault with the role played by the polygraph test in this case. While the police admittedly exaggerated the reliability of such devices, the tactic of inflating the reliability

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interrogation technique, and I have therefore addressed it in that context. *See supra* notes 48–55, 64–67 and accompanying text.

101. *See, e.g.,* Richard A. Leo, *False Confessions: Causes, Consequences, and Solutions*, in *WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE* 36, 42–43 (Saundra D. Westervelt & John A. Humphrey eds., 2001).

102. Other commentators have reached a similar conclusion. *See, e.g.,* DON STUART, *CHARTER JUSTICE IN CANADIAN CRIMINAL LAW* 134–43 (4th ed. 2005).

of incriminating evidence is a common, and generally unobjectionable one. Whether standing alone, or in combination with the other mild inducements used in this appeal, it does not render the confessions involuntary.<sup>103</sup>

However, a fuller consideration of the personal and situational risk indicators that were present in *Oickle* casts doubt on this conclusion.

In particular, the police were dealing with a sleep-deprived individual. The overall interrogation process was lengthy—played out over a period of approximately ten hours without a significant break.<sup>104</sup> The police minimized the moral culpability of the offenses. They suggested that Oickle would feel better if he confessed, and that admitting his problem would earn him the respect of his fiancée and members of the community.<sup>105</sup> They held out minor inducements to Oickle, suggesting that a confession would make it easier to address his apparent pyromania, a fact downplayed by the Court on the basis that there was no real quid pro quo offer. They made a minor threat by indicating that in the absence of a confession it might be necessary to polygraph Oickle's fiancée,<sup>106</sup> which the Court minimized because it concluded that Oickle would have understood that his fiancée would be interviewed as an alibi witness rather than as a suspect.<sup>107</sup> The police initially questioned Oickle in a gentle, reassuring manner so as to gain his trust and then exploited that trust in later questioning. They impliedly offered to treat the fires as a “package deal,” which the Court downplayed on the basis that it was Oickle who first suggested it.<sup>108</sup> They exaggerated the reliability of the polygraph test. Although the Court is correct that none of these elements alone might justify exclusion based on the current state of false confessions research, the existence of all of these factors in one case ought to have raised more cause for concern about the reliability of the confession.

#### *E. Procedural Protections*

False confessions researchers have universally concluded that a mandatory videotaping requirement offers considerable protection against false

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103. *Oickle*, [2000] 2 S.C.R. at 14.

104. The polygraph examination started at about 3 p.m., and the final interrogation session ended at about 1:00 a.m. the next morning. After the conclusion of the polygraph test, Oickle was interrogated with only short breaks for approximately six hours. Three police officers were involved in the overall process. *Id.* at 15–18.

105. *Id.* at 48.

106. *Id.* at 49–50.

107. *Id.* at 50–51.

108. *Id.* at 46–47.

confessions.<sup>109</sup> A videotape record provides a complete, objective, and reviewable account of the interrogation, thereby facilitating both the investigative and fact-finding processes.<sup>110</sup> This is particularly important given the known limitations of memory, particularly for conversation.<sup>111</sup> A videotape record allows investigators to focus fully on the suspect's verbal and nonverbal communications, which helps to ensure investigators do not ignore relevant forensic information.<sup>112</sup> The record preserves this information so that both investigators and counsel can review the interview and assess the quality and reliability of the information obtained from the suspect, including determining who is the actual source of the information. At trial, the videotape record minimizes the need to make credibility assessments in order to resolve disputes between the individual and the interviewing officers regarding what occurred in the interrogation room.

In addition, a videotape record will reveal the individual's general condition at the time of the interrogation and any specific vulnerabilities that are present. It will also reveal any abuse or other improper police

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109. See, e.g., WHITE, *MIRANDA'S WANING PROTECTIONS*, *supra* note 22, at 190–95; Steven A. Drizin & Marissa J. Reich, *Heeding the Lessons of History: The Need for Mandatory Recording of Police Interrogations to Accurately Assess the Reliability and Voluntariness of Confessions*, 52 *DRAKE L.R.* 619 (2004); Kassin & Gudjonsson, *supra* note 7, at 60–61; Leo & Ofshe, *Consequences*, *supra* note 3, at 494–95; Ofshe & Leo, *Decision to Confess*, *supra* note 52, at 1120–22; Ofshe & Leo, *supra* note 44, at 238; White, *Capital Cases*, *supra* note 22, at 1025–30.

110. Videotaping is not superior to audiotaping in all respects. For example, research indicates that people are better able to assess the truth or falsity of a confession based on auditory cues alone. See Saul M. Kassin, Christian A. Meissner & Rebecca J. Norwick, "I'd Know a False Confession if I Saw One": A Comparative Study of College Students and Police Investigators, 29 *LAW & HUM. BEHAV.* 211, 222 (2005). However, as these researchers recognize, recommendations to videotape interrogations are intended to achieve multiple goals including, but not limited to, improving the ability of the fact-finder to assess the reliability of the confession. It may also be possible to minimize the impact of misleading visual cues through appropriate camera placement. See G. Daniel Lassiter & Andrew L. Geers, *Bias and Accuracy in the Evaluation of Confession Evidence*, in *INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT*, *supra* note 29, at 197, 210.

111. See generally Deborah Davis & Richard D. Friedman, *Memory for Conversation: The Orphan Child of Witness Memory Research*, in 1 *HANDBOOK OF EYEWITNESS PSYCHOLOGY: MEMORY FOR EVENTS* 3, 12–41 (Michael P. Toglia et al. eds., 2007) (analyzing reasons why conversational memory is deficient).

112. For an assessment of the advantages and disadvantages of videotaping from the law enforcement perspective, see William A. Geller, *Videotaping Interrogations and Confessions* (1992), *reprinted in* *THE MIRANDA DEBATE* 303, 303–13 (Richard A. Leo & George C. Thomas III eds., 1998) and THOMAS P. SULLIVAN, *POLICE EXPERIENCES WITH RECORDING CUSTODIAL INTERROGATIONS* (special report by Northwestern U. Sch. of Law Center on Wrongful Convictions, Chicago, IL), Summer 2004.

conduct during the interrogation, thereby acting as a deterrent against such misconduct. At the same time, it offers protection to interviewing officers against false accusations of such tactics.<sup>113</sup> There are also few negative consequences to videotaping because the presence of the videotape does not seem to diminish the willingness of individuals to make confessions and may even increase the guilty pleas and conviction rates.<sup>114</sup> Nor is videotaping a particularly costly practice.<sup>115</sup> For these and other reasons, many law enforcement personnel favor the videotaping of suspect interrogations.<sup>116</sup> However, the usefulness of a videotape in assessing voluntariness depends in part on the manner of taping. In particular, an equal-focus perspective, which includes both the interrogator and suspect, should be used because viewers tend to underestimate the coerciveness of the situation when only the suspect is visible on the tape.<sup>117</sup> In addition, the full interrogation, not just the final statement of the individual, should be videotaped to help minimize the risk that the confession is the result of improper off-camera interactions between the police and the individual.<sup>118</sup>

The modern rule does not make the admissibility of a confession dependent on its being videotaped. The Court in *Oickle* acknowledges

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113. The videotapes of interrogations can also be used for training purposes to improve the quality of police interviewing methods. See SULLIVAN, *supra* note 112, at 18.

114. See Geller, *supra* note 112, at 311–12; Christopher Slobogin, *An Empirically Based Comparison of American and European Regulatory Approaches to Police Investigation*, 22 MICH. J. INT'L L. 423, 450 (2001). It may also decrease the length of some interrogations.

115. Kassir & Gudjonsson, *supra* note 7, at 61.

116. Thomas P. Sullivan, *Electronic Recording of Custodial Interrogations: Everybody Wins*, 95 J. CRIM. L. & CRIMINOLOGY 1127, 1128 (2005). But such support is clearly not universal. See, e.g., Steven A. Drizin & Beth A. Colgan, *Let the Cameras Roll: Mandatory Videotaping Is the Solution to Illinois' Problem of False Confessions*, (2001) 32 LOY. U. CHI. L.J. 337, 412–19 (2001) (recounting how police and prosecutors successfully opposed such an initiative in Illinois).

117. Lassiter & Geers, *supra* note 110, at 201–10. For a recent review of the research on the effect of camera perspective on observer assessments of the degree of coercion present during videotaped interrogations, see G. Daniel Lassiter et al., *Videotaped Confessions: Panacea or Pandora's Box?*, 28 LAW & POL'Y 192 (2006). The authors conclude that “the advantages associated with the videotape method—for example, a more detailed record of the interrogation is provided to trial participants—can be maintained without introducing bias if an equal-focus perspective is taken by the video camera.” *Id.* at 204.

118. Admittedly, ensuring that there is a full video recording of the formal interrogation process does not itself eliminate the possibility that the confession is the result of off-camera interactions between the police and the individual. For a thoughtful discussion of the problem and potential consequences of unrecorded questioning, see David Dixon, “A Window in the Interviewing Process?” *The Audio-Visual Recording of Police Interrogation in New South Wales, Australia*, 16 POLICING & SOC. 323, 335–342 (2006).

the benefits of videotaping suspect interrogations, but then emphasizes that this does not mean “that non-recorded interrogations are inherently suspect.”<sup>119</sup> This aspect of *Oickle* is unsatisfactory, particularly given the Court’s recognition of the many benefits of videotaping. There appears to be little reason today not to impose a mandatory videotaping requirement.<sup>120</sup> Ideally this should be part of a comprehensive regime that regulates all aspects of the interrogation process.<sup>121</sup> Unfortunately, at present this seems unlikely to occur. Therefore, at the very least the Court should hold that absent some valid explanation from the police, a nonrecorded interrogation is inherently suspect if videotape recording equipment was available to the officers and could have been used to record the interrogation.<sup>122</sup>

### III. CONCLUSION

There is undeniably a need for further research with respect to the role that individual vulnerabilities and police interrogation tactics play in false confessions. The Supreme Court’s reformulation of the Canadian confessions rule in *Oickle* does conform quite closely to current knowledge

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119. *R. v. Oickle*, [2000] 2 S.C.R. 3, 31. The court’s reluctance to mandate videotaping of suspect interrogations is surprising given its enthusiastic embrace of videotaping in earlier decisions. *See R. v. B. (K.G.)*, [1993] 1 S.C.R. 740.

120. The Federal Provincial Territorial Working Group on Miscarriages of Justice has recommended videotaping all custodial interrogations in cases involving allegations of significant personal violence. *See* FED. PROVINCIAL TERRITORIAL HEADS OF PROSECUTIONS COMMITTEE WORKING GROUP, REPORT ON THE PREVENTION OF MISCARRIAGES OF JUSTICE 73, 84 (2004), <http://canada.justice.gc.ca/en/dept/pub/hop/PreventionOfMiscarriagesOfJustice.pdf>. However, there is no compelling reason to limit the initiative to these cases. *See* Christopher Sherrin, *Comment on the Report on the Prevention of Miscarriages of Justice*, 52 CRIM. L.Q. 140, 155–65 (2007).

121. *See generally* Dixon, *supra* note 118 (discussing the advantages and disadvantages of videotaping).

122. The Ontario Court of Appeal initially adopted this approach, but subsequently retreated from it by holding it is not absolute. *Compare R. v. Moore-McFarlane*, (2001) 160 C.C.C. (3d) 493, 517 (Ont. C.A.) (finding purposely unrecorded interrogation inherently suspect), *with R. v. Backhouse*, (2005) 194 C.C.C. (3d) 1, 46–47 (Ont. C.A.) (finding record of interrogation adequate despite lack of police attempt to make a recording). Other provincial appellate courts have refused to adopt similar approaches on the basis that it conflicts with *Oickle*. *See R. v. Crockett*, (2002) 170 C.C.C. (3d) 569, 573–76 (B.C.C.A.); *R. v. Ducharme*, (2004) 182 C.C.C. (3d) 243, 254–57 (Man. C.A.). The Ontario Court of Appeal has held that where a confession is disputed, trial judges must instruct the jury that the failure to make a proper recording of the statement is an important factor to consider in deciding whether to accept the officer’s version of the statement. *See R. v. Wilson*, (2006) 210 C.C.C. (3d) 23, 32 (Ont. C.A.); *R. v. Swanek*, (2005) 28 C.R. (6th) 93, 96–97 (Ont. C.A.).

about false confessions. The rule affords considerable protection to innocent individuals. However, it also has some significant shortcomings. The rule provides provincial appeal and trial courts with only some of the tools to recognize and exclude potentially unreliable confessions. Moreover, if the rule is to operate properly, both counsel and judges must be alert to the factors that indicate an enhanced risk of false confession. In particular, counsel and judges must be cognizant of the fact that interrogation strategies and tactics that are unobjectionable in themselves, when used in combination or in relation to vulnerable individuals, may lead innocent individuals to falsely confess.

Ultimately, while *Oickle* is an important response to the risk of false confessions and wrongful convictions, it should not be the Court's final response. Further reforms are not only desirable but also necessary. In particular, the Supreme Court should provide further guidance to trial judges on the role of individual vulnerabilities in false confessions by specifically identifying relevant vulnerabilities and indicating how those vulnerabilities can impact the reliability of a confession. In addition, the Court should mandate the videotaping of all interrogations. To ensure the best possible protection, the interrogation should be recorded in its entirety and the camera should include in its focus both the interviewer and the suspect. Videotaping is admittedly not a perfect solution. As *Oickle* demonstrates, even with a videotape there may be debate over the exact nature of the strategies and techniques the police employed and the impact they had on the accused individual.

The Court should also reconsider whether it is time to at least partially abandon the totality of circumstances approach to assessing voluntariness and, instead, begin the process of regulating more directly the conduct of interrogations and the permissibility of certain interrogation techniques. There are two key areas for potential reform: imposing limits on continuous interrogations by mandating regular meal and sleep breaks, and prohibiting the use of false forensic evidence to deceive an individual about the strength of the case.<sup>123</sup> Not all commentators agree that research investigating the role that police interrogation techniques play in causing false confessions is sufficiently advanced to warrant greater regulation of these techniques.<sup>124</sup> However, in the face of verified evidence of false confessions leading to wrongful convictions, a proactive approach in this area is clearly desirable,

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123. See, e.g., WHITE, *MIRANDA'S WANING PROTECTIONS*, *supra* note 22, at 204, 212; Kassin & Gudjonsson, *supra* note 7, at 60; see also White, *Capital Cases*, *supra* note 22, at 1007, 1015–25.

124. Sherrin, *supra* note 38, at 622–29. Sherrin therefore prefers to focus on individual vulnerabilities. Sherrin, *supra* note 120, at 156–57. See also Laura Magid, *Deceptive Police Interrogation Practices: How Far is Too Far?*, 99 MICH. L. REV. 1168, 1193 (2001).

particularly because the research confirms that law enforcement obtains many false confessions from individuals who do not possess psychological vulnerabilities.<sup>125</sup> The Court should also consider the desirability of adding an additional component to the modern rule, namely a post-interrogation reliability analysis that focuses on the vulnerabilities of the individual, the probable truth of the confession, and any police improprieties in obtaining the statement, including conduct that may have tainted the statement.<sup>126</sup> More particularly, the analysis should examine the extent to which the individual was independently able to describe the crime and crime scene, identify features of the crime or crime scene that were not public knowledge, and supply information that generated new evidence relating to the crime.<sup>127</sup> Although false confessions cannot be entirely prevented, implementing these reforms, or even some of them, would help to reduce the overall number of false confessions, while simultaneously improving the ability of courts to detect those that do occur.

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125. See Drizin & Leo, *supra* note 2, at 918–20; Gudjonsson, *supra* note 47, at 492, 495, 499.

126. See generally Kent Roach, *Unreliable Evidence and Wrongful Convictions: The Case for Excluding Tainted Identification Evidence and Jailhouse and Coerced Confessions*, 52 CRIM. L.Q. 210, 228–35 (2007).

127. See Kassir, *supra* note 55, at 221; Ofshe & Leo, *supra* note 44, at 198–99, 239; Ofshe & Leo, *Decision to Confess*, *supra* note 52, at 992–94, 996–97, 1118–20; White, *Involuntary Now*, *supra* note 22, at 2024–26; Welsh White, *False Confessions in Criminal Cases*, 17 CRIM. JUST. 5, 5–7 (2003).

