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# EXPERT TESTIMONY ON INTERROGATION AND FALSE CONFESSION<sup>†</sup>

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## I. INTRODUCTION

Prior to the advent of forensic DNA testing and the corresponding emergence of what has been called the “innocence movement”<sup>1</sup> or the “innocence revolution,”<sup>2</sup> most observers of the criminal justice system—lay and professional alike—believed that the risk of error in criminal cases was remote to the point of being inconsequential.<sup>3</sup> Intuitively, that conclusion was especially self-evident in cases where the defendant had confessed to the crime.<sup>4</sup> For most prosecutors, courts, juries, and even defense lawyers, once the defendant confessed, the case was over; there was no point in further investigation, deliberation, or litigation.<sup>5</sup> While the law always recognized the possibility of false confessions and the

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<sup>1</sup> Sydney Schneider, *When Innocent Defendants Falsely Confess: Analyzing the Ramifications of Entering Alford Pleas in the Context of the Burgeoning Innocence Movement*, 103 J. CRIM. L. & CRIMINOLOGY 279, 282 (2013); Marvin Zalman, *An Integrated Justice Model of Wrongful Convictions*, 74 ALB. L. REV. 1465, 1468 (2010-11); Keith A. Findley, *Toward a New Paradigm of Criminal Justice: How the Innocence Movement Merges Crime Control and Due Process*, 41 TEX. TECH. L. REV. 133 (2008).

<sup>2</sup> See, e.g., Lawrence C. Marshall, *The Innocence Revolution and the Death Penalty*, 1 OHIO ST. J. CRIM. L. 573, 573-74 (2004); Daniel S. Medwed, *Emotionally Charged: The Prosecutorial Charging Decision and the Innocence Revolution*, 31 CARDOZO L. REV. 2187, 2188 (2010); Samuel R. Gross et al., *Exonerations in the United States, 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 523 (2005).

<sup>3</sup> As Marvin Zalman has observed, “In 1990, very few Americans thought of wrongful convictions as a problem. Most would have said that criminal justice was deficient in not catching, convicting, imprisoning, and executing enough criminals.” Zalman, *supra* note 1, at 1479-80 (citing Richard A. Rosen, *Reflections on Innocence*, 2006 WIS. L. REV. 237, 237-38 (2006)). For example, in the death penalty context, two prominent observers wrote in 1988 that the risk of executing an innocent person “is too small to be a significant factor in the debate over the death penalty.” Stephen J. Markman & Paul G. Cassell, Comment, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121, 121 (1988).

<sup>4</sup> Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, WIS. L. REV. 291, 331-32 (2006).

<sup>5</sup> For an example of how a confession led a defense lawyer to suspend any efforts to prove innocence, despite his client’s repeated claims that the confession was false, see the description of Christopher Ochoa’s case in Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 331-32. Twelve years after Ochoa was convicted and sent to prison, DNA testing proved that Ochoa was indeed innocent and the confession was false. *Id.* See also *infra* at notes 27-41 and accompanying text.

potential unreliability of confession evidence,<sup>6</sup> in practice almost no one took the risk in individual cases seriously.

We now know that both the perception of virtual infallibility of the justice system and the intuitive sense that no one would confess to a serious crime he or she did not commit were false. The DNA exonerations of the past few decades and the study of false confessions have demonstrated both that error in criminal cases is real and more common than ever believed and that false confessions are one of the leading contributors to wrongful conviction.<sup>7</sup> As wrongful convictions and false confessions become widely recognized as problems confronting the criminal justice system, courts struggle with mechanisms to prevent such errors. As one appellate court recently declared, “[i]t is this court’s opinion that it is time . . . to tackle the false confession issue.”<sup>8</sup> One response has been increasing attempts to use expert witness testimony in cases with disputed confessions. In these cases, expert testimony is offered by criminal defendants to help jurors understand the phenomenon of false confessions and to help overcome the intuitive misconception that a person would not succumb to pressure and make false admissions of criminal conduct.

The courts’ response to expert testimony on false confessions, however, has not been uniformly welcoming. Some courts have permitted such evidence, but a significant number have rejected it for various reasons. Depending on the legal standards in a given jurisdiction, admissibility of expert testimony is usually governed by some variation on assessment of the reliability of the testimony along with assessment on the degree to which the testimony is helpful to the factfinder (usually understood as some measure of relevance). While some courts have rejected expert testimony on the first issue—reliability—more often when courts reject such expert testimony it is because they believe that juries are fully capable of understanding false confessions without the assistance of an expert. These courts accordingly conclude that expert testimony is unhelpful, or worse, is actually more likely to confuse jurors.

This article examines the need and bases for expert testimony on false confessions in criminal cases. It proceeds in four parts. Following this Introduction, Part II briefly assesses the role of false confessions in wrongful convictions. The assessment draws on social science research to discuss the

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<sup>6</sup> Under what is known as the *corpus delicti* rule, for example, most jurisdictions prohibit admission of an extrajudicial confession into evidence in a criminal case unless the prosecution introduces some independent corroboration from other evidence. The *corpus delicti* rule, however, usually demands little more than proof that the crime was actually committed. See *State v. Morgan*, 61 P.3d 460, 464-67 (Ariz. Ct. App. 2002); David A. Moran, *In Defense of the Corpus Delicti Rule*, 67 OHIO ST. L.J. 817 (2003).

<sup>7</sup> See *False Confessions, Understand the Causes*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/False-Confessions.php> (last visited Aug. 12, 2013) [hereinafter INNOCENCE PROJECT].

<sup>8</sup> *State v. Jerrell C.J.*, 674 N.W.2d 607, ¶ 32 (Wis. Ct. App. 2003), *aff’d*, 699 N.W.2d 110 (Wis. 2005).

nature of the false confession problem and the impact of false confessions in producing false convictions as well as in tainting other evidence and other aspects of police investigations. Part III turns to admissibility standards that govern expert testimony and their application to false confession expert testimony. In particular it sets forth the typical standards used for assessing admissibility of expert evidence and then shows that, when those standards are applied objectively, appropriately framed expert testimony on false confessions should be admissible in most cases. This section first examines generally the question of “reliability” of the expert testimony and then goes on to examine the “helpfulness” of the testimony to factfinders. It concludes that expert testimony on false confessions has a more solid research base, and is at least as reliable, if not more so, than other types of social science evidence that courts routinely admit. It also concludes that, contrary to the assumptions of many courts, expert testimony on false confessions is indeed helpful to juries because it addresses matters beyond the ken of ordinary people or, in many instances, reveals reality to be contrary to “common sense” intuitions. To illustrate that point, Part III discusses the research on false confessions to highlight the types of facts that experts can provide to juries. Part IV then addresses the most prominent systemic response to coerced confessions—the *Miranda* warnings. Part IV examines psychological research to demonstrate that *Miranda* provides very little protection against coerced and false confessions, and, therefore, cannot provide justification for dispensing with expert testimony.

## II. THE ROLE OF FALSE CONFESSIONS IN WRONGFUL CONVICTIONS

False confession has both direct and indirect influences on conviction of the innocent. Research on actual innocence cases reveals that in a substantial percentage of cases in which an innocent person was convicted of a crime, he or she falsely confessed to being a perpetrator. For example, Brandon Garrett’s analysis of the first 200 cases in which a convicted individual was exonerated by DNA evidence found that 16% of the cases had false confessions and another 6.5% involved allegedly self-incriminating statements that came up short of a full confession.<sup>9</sup> The Innocence Project reports that those rates have remained steady as the number of DNA confessions has swelled to more than 300; as of August 2013, in 25% of DNA exoneration cases innocent defendants made incriminating statements, delivered outright confessions, or pled guilty.<sup>10</sup> A recent report from the National Registry of Exonerations summarized 873 exonerations in the U.S. between 1989 and 2012.<sup>11</sup> The cases included homicide, sexual assault, child

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<sup>9</sup> Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 88, n.124 (2008).

<sup>10</sup> INNOCENCE PROJECT, *supra* note 7.

<sup>11</sup> SAMUEL R. GROSS & MICHAEL SHAFFER, NATIONAL REGISTRY OF EXONERATIONS, EXONERATIONS

sexual abuse, robbery, drugs, and other violent and nonviolent crimes. False confession occurred in 135 (15%) of these cases.<sup>12</sup> Of the 135 false confession cases, the confession was clearly coerced in 82 (60%) cases.<sup>13</sup> In 16 (12%) cases, the defendants denied making the reported confessions or denied that their statements were meant as admissions of guilt.<sup>14</sup> In 15 (11%) of the false confession cases, the confessions were voluntary.<sup>15</sup> The false confessions were most likely to occur in homicide cases (102 of 135, or 75% of the confessions cases).<sup>16</sup> In fact, 25% of the homicide cases involved false confessions.<sup>17</sup> Risk factors played a role in false confession as well. Gross and Shaffer reported that in 79 (59%) of the 135 false confession cases, the defendant was a juvenile, mentally disabled, or both.<sup>18</sup> In 35 (26%) of the false confession cases the defendant pled guilty; in the remaining cases the defendants recanted their false confessions and were tried.<sup>19</sup>

The National Registry of Exonerations data suggest that false confessions are a recurring presence in actual innocence cases and that false confessions lead to guilty pleas and convictions.<sup>20</sup> Psychological research further supports the link between false confession and conviction of the innocent. For example, considerable trial simulation research published in peer-reviewed psychology-law journals demonstrates that in randomized experiments mock jurors exposed to confessions are more likely to convict the defendant, even to confessions the mock jurors deemed to be psychologically coerced, than are mock jurors exposed to no confession testimony.<sup>21</sup> Confessions also have a greater impact on mock-juror decisions than do other forms of evidence.<sup>22</sup> When people are told that the confessor experienced acute stress from the interrogation or suffered from mental illness, they do not discount confessions.<sup>23</sup> They also do not discount confessions when they are retracted.<sup>24</sup> In other words, while people

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IN THE UNITED STATES, 1989-2012 1 (June 2012), *available at* [www.law.umich.edu/special/exoneration/Documents/exonerations\\_us\\_1989\\_2012\\_full\\_report.pdf](http://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf).

<sup>12</sup> *Id.* at 57.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 58.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 59.

<sup>19</sup> *Id.* at 61.

<sup>20</sup> *See id.*

<sup>21</sup> S.M. Kassir & H. Sukel, *Coerced Confessions and the Jury: An Experimental Test of the "Harmless Error" Rule*, 21 L. & HUMAN BEHAVIOR 27, 30 (1997); *see generally* A.D. Redlich, S. Ghetti & J.A. Quas, *Perceptions of Children During a Police Interview: A Comparison of Suspects and Alleged Victims*, 38 J. APPLIED SOC. PSYCH. 705-735 (2008) (discussing the effect of age of a witness on mock and actual jurors specifically the effect of children).

<sup>22</sup> S.M. Kassir & K. Neumann, *On the Power of Confession Evidence: An Experimental Test of the "Fundamental Difference" Hypothesis*, 21 L. & HUMAN BEHAVIOR 469, 481 (1997).

<sup>23</sup> L.A. Henkel, *Jurors' Reactions to Recanted Confessions: Do the Defendant's Personal and Dispositional Characteristics Play a Role?* 14 PSYCH., CRIME & L. 565, 567 (2008).

<sup>24</sup> Kassir & Sukel, *supra* note 21.

can understand that people can be coerced into confessing, they do not believe that such coercion produces false confessions.

False confessions are particularly dangerous because confession evidence is a uniquely potent type of evidence. As former Supreme Court Justice William Brennan observed, “no other class of evidence is so profoundly prejudicial” as a confession.<sup>25</sup> Confessions “tend to obscure, contaminate, divert attention from, and overwhelm evidence of coercion and innocence; to promote and maintain perceptions that the confession was voluntary and true; and to result in harsher legal outcomes at all levels as the case proceeds through the justice system.”<sup>26</sup> A confession is viewed as the end of the inquiry for virtually everyone in the criminal justice system—including often defense attorneys, even when their clients insist the confession was false.<sup>27</sup> Importantly, survey data show that potential jurors do not believe false confessions are much of a concern.<sup>28</sup> Even when jurors recognize that a suspect has been subjected to psychologically coercive interrogation tactics, they do not believe such tactics are likely to induce a false confession.<sup>29</sup> “In other words, the popular belief is that people do not falsely confess unless they are tortured or mentally ill.”<sup>30</sup> And when false confessors subsequently retract their confessions, the retractions are rarely credited; to the contrary, retractions are often perceived as further evidence of the defendants’ deceptiveness and hence guilt.<sup>31</sup>

The effect of a confession then compounds at each subsequent stage of the criminal justice process.<sup>32</sup> Police, prosecutors, and even forensic analysts, informed of a confession, tend to seek and interpret all subsequent evidence in light of the confession. Even if other evidence emerges that suggests or proves the confession is false, police and prosecutors tend to disregard or minimize the significance of the new evidence or work hard to interpret it in ways that can be

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<sup>25</sup> *Colorado v. Connelly*, 479 U.S. 157, 182 (1986) (Brennan, J., dissenting).

<sup>26</sup> Deborah Davis & Richard A. Leo, *The Problem of Interrogation-Induced False Confession: Sources of Failure in Prevention and Detection*, in *THE HANDBOOK OF FORENSIC SOCIOLOGY & PSYCHOLOGY* 69 (Stephen Morewitz & Mark Goldstein eds. 2013).

<sup>27</sup> See Findley & Scott, *supra* note 4.

<sup>28</sup> Iris Blandón-Gitlin, Kathryn Sperry & Richard A. Leo, *Jurors Believe Interrogation Tactics are Not Likely to Elicit False Confessions: Will Expert Witness Testimony Inform Them Otherwise?* 3, 27 (June 16, 2009) (unpublished manuscript) (on file with the Psychology, Crime & Law Accepted Paper Series), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1420206](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1420206); see also Danielle E. Chojnacki et al., *An Empirical Basis for the Admission of Expert Testimony on False Confessions*, 40 ARIZ. ST. L.J. 1, 5 (2008).

<sup>29</sup> Blandón-Gitlin, Sperry & Leo, *supra* note 28, at 27.

<sup>30</sup> Keith A. Findley, *Innocence Protection in the Appellate Process*, 93 MARQ. L. REV. 591, 628 (2009) (citing Blandón-Gitlin, Sperry & Leo, *supra* note 28, at 27).

<sup>31</sup> R.J. Ofshe & R.A. Leo, *The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions*, 16 STUDIES IN L., POLITICS & SOC’Y, 189–251 (1997).

<sup>32</sup> Richard A. Leo, *Criminal Law: Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266-303 (1996).

reconciled with the confession.<sup>33</sup> Prosecutors then tend to react more harshly in cases with a confession, charging more numerous and serious offenses, opposing pretrial release more strongly, and making fewer concessions in plea bargaining.<sup>34</sup>

False confession thus has an indirect effect on conviction of the innocent through its corrupting influence on other evidence.<sup>35</sup> For example, knowledge of a confession influences the interpretation of polygraph results. Israeli polygraph examiners were more likely to conclude that an inconclusive polygraph chart was deceptive if they were told the suspect had confessed as compared to examiners who did not know of the confession.<sup>36</sup> Confession evidence has been found to influence the judgments of latent fingerprint analysts<sup>37</sup> and eyewitness identifications by bystander eyewitnesses.<sup>38</sup> As Dr. Saul Kassin, a prominent confessions researcher, pointed out, these various forms of evidence may be presented as independent, confirmatory evidence, but, in reality, they are not independent.<sup>39</sup> The presence of a false confession, therefore, can indirectly influence the strength of other evidence and enhance the likelihood of wrongful conviction.

Recognizing the powerful impact that confessions have in criminal cases, Kassin surmised that defense attorneys may encourage their clients who confessed to plead guilty and devote fewer resources to their defenses.<sup>40</sup> Kassin theorized that defense attorneys would reduce the vigorousness of their representation in these ways regardless of the circumstances of the confession or the risk factors associated with the defendants. To test this idea, Kassin and Kukucka analyzed the first 273 DNA exonerations from the Innocence Project database. They found that false confession cases were more likely to involve bad defense lawyering and government misconduct than were cases that did not contain confessions (though the results were reported as preliminary).<sup>41</sup>

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<sup>33</sup> Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C.L. REV. 891 (2004); Richard A. Leo & Richard J. Ofshe, *Missing the Forest for the Trees: A Response to Paul Cassell's "Balanced Approach" to the False Confession Problem*, 74 DENV. U. L. REV. 1135 (1997).

<sup>34</sup> Davis & Leo, *supra* note 26, at 64-65.

<sup>35</sup> See S.M. Kassin, *Why Confessions Trump Innocence*, 67 AM. PSYCH. 431 (2012).

<sup>36</sup> E. Elaad, A. Ginton & G. Ben-Shakhar, *The Effects of Prior Expectations and Outcome Knowledge on Polygraph Examiners' Decisions*, 7 J. BEHAV. DECISION MAKING 279, 289-90 (1994).

<sup>37</sup> See Itiel E. Dror & David Charlton, *Why Experts Make Errors*, 56 J. FORENSIC IDENTIFICATION 600 (2006).

<sup>38</sup> See Lisa E. Hasel & Saul M. Kassin, *On the Presumption of Evidentiary Independence: Can Confessions Corrupt Eyewitness Identification?*, 20 PSYCH. SCI. 122 (2009).

<sup>39</sup> See Kassin, *supra* note 35.

<sup>40</sup> *Id.*

<sup>41</sup> S.M. KASSIN & J. KUKUCKA, CONFESION ERRORS AS "STRUCTURAL DEFECTS" 1 (2012) (Poster presented at the annual meeting of the American Psychology-Law Society, San Juan, Puerto Rico).

Research shows that, when confession cases go to trial, the confession—whether true or not—tends to trump all else. Mock jurors find confession evidence more incriminating than other extremely potent evidence, like eyewitness identification evidence.<sup>42</sup> Studies of proven false confessors have shown that, even in cases involving confessions later proven to be false, juries convict in 73% to 81% of the cases.<sup>43</sup>

When confessors dispute their confessions judges tend to sentence more harshly, as a sanction for what is perceived as the defendant's brazen lack of remorse.<sup>44</sup> And the power of confession evidence extends to appeals as well. Appellate courts not only routinely cite confession evidence as establishing "overwhelming" evidence of guilt, they also usually fail to recognize false confessions in their cases; while approximately 25% of the DNA exonerations have involved false confessions, Garrett's analysis of the first 200 DNA exoneration cases found that not a single innocent person who had confessed falsely obtained relief from his or her conviction based on a challenge to the confession evidence.<sup>45</sup>

### III. ADMISSIBILITY ISSUES

Because confession evidence is so important and the risk of damage from false confessions is so profound, admissibility of expert testimony has become an increasingly important issue in criminal cases. The burgeoning research literature on interrogations and false confessions, and the established link between false confessions and wrongful conviction, has led to the proffer of expert witnesses in cases of alleged coerced and false confessions. Experts may be psychologists (typically social or clinical psychologists) or from related disciplines. The content of the expert testimony may vary from case to case and from expert to expert. Expert witnesses can serve various purposes. One purpose is to educate the jury about the scientific research on interrogations and confessions, providing jurors with a framework of knowledge to evaluate the facts of the current case. Such testimony may also be useful at a suppression hearing. This general level of testimony does not require an evaluation of the defendant. In addition, an expert may give opinions about the specific

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<sup>42</sup> Hasel & Kassin, *supra* note 38; Kassin & Neumann, *supra* note 22; see G.R. Miller & J.F. Boster, *Three Images of the Trial - Their Implications for Psychological Research*, in *PSYCHOLOGY IN THE LEGAL PROCESS* (B. Sales ed., 1977).

<sup>43</sup> Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 960 (2004); 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, 483 (1998); see Richard A. Leo & Richard J. Ofshe, *The Truth About False Confessions and Advocacy Scholarship*, 37 CRIM. L. BULL. 293 (2001).

<sup>44</sup> See R.A. LEO, *POLICE INTERROGATION AND AMERICAN JUSTICE* (Harvard Univ. Press 2008).

<sup>45</sup> Garrett, *supra* note 9, at 90.

interrogation tactics used in the case, their level of coerciveness, and how they compare to what has been established in the scientific research on interrogations and false confessions. Experts are generally not permitted to give opinions on matters traditionally left for the jury, such as the veracity of the defendant's confession.<sup>46</sup>

### A. Admissibility Standards

Courts in every jurisdiction in America play some role in regulating the admission of expert testimony. Most states are either "*Frye*" jurisdictions or "*Daubert*" jurisdictions. In *Frye* jurisdictions—based on the 1923 D.C. Circuit Court of Appeals decision in *Frye v. United States*<sup>47</sup>—courts defer to the pertinent scientific community for approval of a particular type of scientific evidence; such evidence is admissible if the court can find that it is "generally accepted" in the relevant scientific community.<sup>48</sup> In 1993, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,<sup>49</sup> the Supreme Court replaced the *Frye* test in federal courts with a less deferential standard based on its reading of Federal Rule of Evidence 702. *Daubert*, which has been adopted in a large number of states since then, replaces a test that was deferential to the scientific community with one that requires judges themselves to make determinations about scientific validity. Under *Daubert*, "general acceptance" becomes not the touchstone to admissibility, but one of multiple factors courts are to assess in determining scientific validity; "[u]nder *Daubert*, the agreement of the scientific community is neither necessary nor sufficient."<sup>50</sup>

Regardless of the particular standard at issue, courts in every jurisdiction are increasingly called upon to determine if expert testimony on false confessions will be admitted in criminal cases. Because the *Daubert* standard imposes the most hurdles to admissibility for this type of evidence, and because it subsumes the *Frye* general acceptance test as part of its analysis, we will consider admissibility under the *Daubert* standard in this article.

While the Court in *Daubert* held that there is no "definitive checklist" that could capture the full range of considerations that might be useful assessing scientific validity of every scientific or technical matter, it did suggest a few considerations that will often be pertinent.<sup>51</sup> The Court identified, in particular, four nonexclusive factors: (1) whether the evidence can be and has been tested

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<sup>46</sup> FED. R. EVID. 704(b).

<sup>47</sup> *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

<sup>48</sup> *Id.* at 1014.

<sup>49</sup> 509 U.S. 579, 592-95 (1993).

<sup>50</sup> David L. Faigman, *The Evidentiary Status of Social Science Under Daubert: Is it "Scientific," "Technical," or "Other" Knowledge?* 1 PSYCHOL. PUB. POL'Y & L. 960, 961 (1995).

<sup>51</sup> *Daubert*, 509 U.S. at 592-93.

(that is, whether it is falsifiable);<sup>52</sup> (2) whether the theory or technique has been subjected to peer review and publication;<sup>53</sup> (3) the known or potential error rate for the scientific technique;<sup>54</sup> and (4) “general acceptance.”<sup>55</sup>

### B. Admissibility of Social Science Expert Evidence

Almost 20 years ago, shortly after *Daubert* was decided, David Faigman observed that, “[a]s a very young science with an uncertain and tentative methodology, psychology confronts a significant challenge under *Daubert*.”<sup>56</sup> After the Supreme Court’s subsequent decisions in *Kumho Tire Co., Ltd. v. Carmichael*,<sup>57</sup> however, *Daubert*’s gatekeeping function applies to all expert testimony, not just the hard sciences. Courts have applied *Daubert* to psychological and other social science evidence. But empirical data reveals that courts have continued to struggle with how to apply admissibility standards to expert evidence, especially to technical, experience-based, and social science expert testimony. The result has been that courts have applied *Daubert* inconsistently. Michael Risinger’s analysis of the 1600 written *Daubert* decisions from 1993 when *Daubert* was decided through August 2, 1999, revealed that, in criminal cases, courts almost always excluded defense experts and almost always admitted the testimony of prosecution experts.<sup>58</sup> In civil cases, by contrast, the gatekeeping role was administered more evenly and more rigorously; plaintiff challenges to expert testimony succeeded about two-thirds of the time, and defense challenges to admissibility succeeded a little more than half the time.<sup>59</sup>

More specifically relevant to false confession expert testimony, Risinger concluded: “When it comes to ‘summarizational’ or ‘educational’ expertise, prosecution witnesses almost always are allowed to testify, and defense witnesses are rejected in a majority of cases.”<sup>60</sup> Risinger observed that prosecutors

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<sup>52</sup> *Id.* at 593.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 594.

<sup>55</sup> *Id.*

<sup>56</sup> Faigman, *supra* note 50, at 961.

<sup>57</sup> *Khumo Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 148 (1999).

<sup>58</sup> D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?*, 64 ALB. L. REV. 99, 106-08 (2000). Risinger found, for example, that in criminal cases appellate courts held that defense-proffered expertise was properly excluded 83% of the time and prosecution-proffered expertise was found only once to be so undependable as to require exclusion (and reversal). *Id.* at 108.

<sup>59</sup> *Id.* at 108 (“Examination of a large random sample of court of appeals civil cases shows that nearly 90% of such cases involved challenges by civil defendants of plaintiff-proffered expertise, and that the defendants prevailed nearly two-thirds of the time. In the small number of cases where civil plaintiffs attacked defense-proffered expertise, such plaintiffs were ultimately successful slightly more than half the time . . .”).

<sup>60</sup> *Id.* at 131-32 (citation omitted).

typically introduce modus operandi witnesses—“usually police officers who testify from their experience and study concerning the general way criminal schemes and enterprises operate and the usual meaning of criminal slang and code words.”<sup>61</sup> Despite the serious questions about “reliability” of such untested expertise, courts almost always admit such testimony—certainly more frequently than they admit defense-proffered social psychological evidence such as false confession and eyewitness identification expertise.<sup>62</sup>

Janet Hoeffel, among others, has argued that expert evidence proffered by defendants, such as expert testimony about eyewitness identifications and false confessions, should fare better under a *Daubert* analysis than should other types of social science evidence, such as expert testimony about Battered Woman Syndrome (BWS) and Rape Trauma Syndrome (RTS).<sup>63</sup> But she observes that BWS and RTS testimony is more frequently and routinely admitted than is eyewitness identification, false confession evidence, or other sorts of defense-favored social science expertise.<sup>64</sup> While expert testimony about RTS and especially BWS is sometimes proffered by the defense, more often it is proffered by the prosecution to explain why a victim of violence behaved in manners after the offense that might seem inconsistent with having been a victim.<sup>65</sup> Hoeffel contends that politics, rather than reliability under *Daubert*, explains this differential: BWS and RTS benefit a sympathetic, politically significant portion of the population—women who have been abused.<sup>66</sup> By contrast, Hoeffel notes that other social science syndrome evidence that might be used by criminal defendants that would generally apply to much more politically disfavored and disenfranchised groups (i.e., typical criminal defendants)—inner-city African-American men—gets little play in court.<sup>67</sup>

Hoeffel points out that the *Daubert* factors, if applied rigorously to BWS and RTS testimony, would preclude its admissibility.<sup>68</sup> Both syndromes, for

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<sup>61</sup> *Id.* at 132.

<sup>62</sup> *See id.* at 132. In a related way, Christopher Slobogin has cogently argued that, while defense-proffered social science evidence about matters such as states of mind often encounter difficulty under *Daubert*, there should be more flexibility for such defense-proffered evidence as a matter of necessity and fairness. *See* Christopher Slobogin, *The Structure of Expertise in Criminal Cases*, 34 SETON HALL L. REV. 105, 109 (2003). *See also* CHRISTOPHER SLOBOGIN, PROVING THE UNPROVABLE: THE ROLE OF LAW, SCIENCE, AND SPECULATION IN ADJUDICATING CULPABILITY AND DANGEROUSNESS 39-40 (2007).

<sup>63</sup> Janet C. Hoeffel, *The Gender Gap: Revealing Inequities in Admission of Social Science Evidence in Criminal Cases*, 24 U. ARK. LITTLE ROCK L. REV. 41, 43-56 (2001).

<sup>64</sup> *Id.* at 60-61. BWS is offered by both defense and prosecution alike to explain the behavior of a woman in an abusive relationship, and RTS is offered almost exclusively by prosecutors to explain why alleged rape victims behave in manners that to the lay person often seems inconsistent with what they would expect from a rape victim. *Id.* at 50-52.

<sup>65</sup> *Id.* at 54.

<sup>66</sup> *Id.* at 65.

<sup>67</sup> *Id.* at 41.

<sup>68</sup> *Id.* at 78-79.

example, could be tested by “studying . . . those who have suffered other kinds of trauma or none whatsoever—to compare against the observed traits of battered women [or rape victims].”<sup>69</sup> But such research has never been done. Nor has the literature positing these syndromes been subjected to peer review.<sup>70</sup> Nor has a rate of error ever been assessed. For example, when assessing BWS, Hoeffel noted that “the extent to which the syndrome accurately describes . . . women who have been beaten as the cause of the woman’s behavior.”<sup>71</sup> Hoeffel points out that an error rate cannot be assessed for such syndromes “as long as the existence of the syndrome is in question.”<sup>72</sup> For, “[i]f the syndrome does not exist, there is no predictive value, and the error rate will be intolerably high.”<sup>73</sup> RTS faces the same issue in this regard.<sup>74</sup> And even if such syndromes are real, no research has undertaken the task of comparing victims of other trauma or no trauma with victims of domestic abuse and rape to determine how unique and discerning the syndrome symptoms are.<sup>75</sup> Finally, on the fourth *Daubert* factor—general acceptance in the relevant field—courts have generally accepted the word of the expert witnesses before them, which is limited to that narrow pool of experts who study and believe in the syndromes, rather than social scientists or psychologists more broadly.<sup>76</sup>

Expert testimony on false confessions fares much better under an objective *Daubert* analysis than much of the social science, “observational” or “educational” evidence that is currently admitted routinely. Specifically with regard to false confession evidence, Hoeffel argued in 2001 that “[f]alse confession theory appears to have a reliability level on par with BWS or RTS.”<sup>77</sup> Another commentator, writing in 1999, concluded that, even at that earlier date, the scientific basis for false confession expert testimony had advanced to the point that such testimony “cannot be ruled out.”<sup>78</sup> Since then, the case for admissibility of false confession expert testimony has only grown stronger; as developed more fully below, the research base on false confessions has expanded significantly in recent years.

Courts, however, have been anything but consistent on the admissibility of expert testimony on false confessions.<sup>79</sup> Some courts have held that expert

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<sup>69</sup> *Id.* at 48.

<sup>70</sup> *Id.* at 49.

<sup>71</sup> Hoeffel, *supra* note 63, at 49.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 50.

<sup>77</sup> *Id.* at 66.

<sup>78</sup> James R. Agar II, *The Admissibility of False Confession Expert Testimony*, 321 ARMY LAWYER 26, 43 (1999).

<sup>79</sup> For a comprehensive examination of the case law on admissibility of false confession expert testimony as through 2005, see Nadia Soree, *When the Innocent Speak: False Confessions*,

testimony on false confessions is properly admitted, at least in some circumstances.<sup>80</sup> Indeed, a few courts have found exclusion of such expert testimony to be reversible error under some circumstances.<sup>81</sup> Dr. Richard Leo, one of the leading experts in the field, reports that, as of June 30, 2013, he had been permitted to testify about false confessions in 261 cases in 31 states plus the District of Columbia.<sup>82</sup> Other courts, however, have found no abuse of discretion when trial courts excluded false confession evidence,<sup>83</sup> and, still others have found more broadly that such testimony is inadmissible as a matter of law.<sup>84</sup> When such testimony is excluded, it is sometimes on the basis that the “science” is not sufficiently developed to render it sufficiently reliable.<sup>85</sup> Frequently, however, the testimony is excluded on the basis that the evidence will not “help” the jury because it is within the common experience and knowledge of ordinary people and therefore the testimony invades the province of the jury to decide credibility questions for itself.<sup>86</sup> In the following sections, we analyze both of these claims in light of the existing research data.

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*Constitutional Safeguards, and the Role of Expert Testimony*, 32 AM. J. CRIM. L. 191, 227-255 (2005).

<sup>80</sup> See *United States v. Hall*, 93 F.3d 1337 (7th Cir. 1996); *United States v. Shay*, 57 F.3d 126 (1st Cir. 1995); *United States v. McGinnis*, 2010 CCA LEXIS 96 (A.C.C.A. Aug. 19, 2010); *United States v. Raposos*, 1998 U.S. Dist. LEXIS 19551 (S.D.N.Y. Dec. 14, 1998); *Boyer v. State*, 825 So.2d 418 (Fla. Dist. Ct. App. 1st Dist. 2002); *Terry v. Commonwealth*, 332 S.W.3d 56 (Ky. 2010); *People v. Kowalski*, 492 Mich. 106 (2012) (holding that trial court exercised its discretion appropriately in excluding general false confession information, but remanding to the trial court to reconsider specific evidence based on psychological testing); *State v. Myers*, 359 S.C. 40 (2004).

<sup>81</sup> *E.g.*, *Hall*, 93 F.3d 1337; *Shay*, 57 F.3d 126.

<sup>82</sup> Memorandum from Dr. Richard Leo, *Cases in Which Dr. Richard Leo Has Been Qualified and Testified* (June 30, 2013) (on file with the authors).

<sup>83</sup> See *Vent v. State*, 67 P.3d 661 (Alaska Ct. App. 2003) (no abuse of discretion to exclude expert testimony); *Riley v. State*, 604 S.E.2d 488 (Ga. 2004); *People v. Polk*, 942 N.E.2d 44 (Ill. App. Ct. 2010); *Commonwealth v. Robinson*, 864 N.W.2d 1186 (Mass. 2007); *State v. Ritt*, 599 N.W.2d 802 (Minn. 1999); *Edmonds v. State*, 955 So.2d 787 (Miss. 2007); *State v. Rosales*, 998 A.2d 459 (N.J. 2010); *Kolb v. State*, 930 P.2d 1238 (Wyo. 1996).

<sup>84</sup> See, *e.g.*, *State v. Cobb*, 43 P.3d 855 (Kan. Ct. App. 2002); *People v. Wiggins*, slip Op. 51715(U) [16 Misc. 3d 1136(A)] (N.Y. Sup. Ct. Aug. 24, 2007).

<sup>85</sup> See, *e.g.*, *Riley v. State*, 604 S.E.2d 488 (Ga. 2004); *Commonwealth v. Robinson*, 864 N.E.2d 1186 (Mass. 2007); *Edmonds v. State*, 955 So.2d 787 (Miss. 2007); *State v. Rosales*, 998 A.2d 459 (N.J. 2010); *Kolb v. State*, 930 P.2d 1238 (Wyo. 1996).

<sup>86</sup> See Danielle E. Chojnacki, Michael D. Cicchini, & Lawrence T. White, *An Empirical Basis for the Admission of Expert Testimony on False Confessions*, 40 ARIZ. ST. L. J. 1, 22 (2008); *United States v. Adams*, 271 F.3d 1236 (10th Cir. 2001); *Vent v. State*, 67 P.3d 661, 673 (Alaska Ct. App. 3d 2003) (Mannheimer, J., concurring); *People v. Son*, 93 Cal. Rptr.2d 871, 883 (Ct. App. 2000); *Riley v. State*, 604 S.E.2d 488 (Ga. 2004); *People v. Gilliam*, 670 N.E.2d 606, 619 (Ill. 1996); *People v. Polk*, 942 N.E.2d 44 (Ill. App. Ct. 2010); *State v. Cobb*, 43 P.3d 855 (Kan. Ct. App. 2002); *State v. Ritt*, 599 N.W.2d 802, 806 (Minn. 1999); *State v. Davis*, 32 S.W.3d 603, 608-09 (Mo. Ct. App. 2000); *State v. Free*, 798 A.2d 83, 84 (N.J. Super. Ct. App. Div. 2002).

### C. “Reliability” of False Confession Expert Testimony

#### 1. Assessing Reliability under *Daubert*

While the false confession research field is still comparatively young, significant research has been undertaken and published. *Daubert* makes clear that the task of assessing the reliability of any research field requires a flexible approach that takes into account unique considerations relevant to a particular field or proposition. The Court was careful to warn that “[m]any factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test.”<sup>87</sup> Despite this admonition, lower courts have tended to apply the factors specifically referenced in *Daubert* as if they were indeed a checklist or a definitive test. Because courts so routinely consider those factors, we will address each of them here as well (and in the process, demonstrate that not all of those factors are very informative or applicable here—validating *Daubert*’s care in eschewing a checklist approach to the matter).

On the first *Daubert* factor—whether the theory can and has been tested—the analysis is mixed. There is little room for argument about one thing: the theory at its most basic level—the simple but very counter-intuitive notion that innocent people can be induced to confess to very serious crimes they did not commit—has indeed been tested. Early research attempted to establish that proposition by examining cases in which researchers were convinced that the confessor was very likely or almost certainly innocent.<sup>88</sup> Paul Cassell has disputed whether at least some of the cases were accurately or reliably categorized as false confessions by innocent suspects.<sup>89</sup> With the advent of DNA testing, however, that criticism has all but disappeared. DNA cases provide a significant and growing pool of cases in which it is beyond reasonable dispute that the confessions were false.<sup>90</sup> Other aspects of the expert testimony have similarly been tested, at least to the extent that it posits the conditions under which false confessions can and do occur. By examining the proven false confessions, researchers are able to test and identify the factors that are present in such cases. The research cannot provide a rate of false confessions,<sup>91</sup> and the

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<sup>87</sup> *Daubert*, 509 U.S. at 593.

<sup>88</sup> See, e.g., GISLI H. GUDJONSSON, *THE PSYCHOLOGY OF INTERROGATIONS, CONFESSIONS, AND TESTIMONY* (1992); 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 (1998).

<sup>89</sup> See Paul G. Cassell, *The Guilty and the “Innocent”*: An Examination of Alleged Cases of Wrongful Conviction from False Confessions, 22 HARV. J. L. & PUB. POL’Y 523 (1999). But see Richard A. Leo & Richard J. Ofshe, *The Truth About False Confessions and Advocacy Scholarship*, 37 CRIM. L. BULL. 293 (2011).

<sup>90</sup> See Drizin & Leo, *supra* note 33.

<sup>91</sup> See Agar, *supra* note 78, at 13 (“By ‘reverse engineering’ dozens of cases of alleged false confessions, theorists have a good idea about the cause of false confessions, but not the

theory cannot predict false confessions in individual cases or discern whether a given confession is true or false. But most experts do not attempt to venture into such relatively untested waters; they rather confine themselves to explaining the processes and features of false confessions, sometimes in conjunction with analysis of the psychological features of the alleged confessor and the techniques employed in the interrogation at issue, so that juries can make better informed decisions about the veracity of the confession evidence in the cases presented to them.

On the second *Daubert* factor—peer review—there is now a growing body of peer-reviewed literature, largely in psychology journals.<sup>92</sup> Some of that literature is discussed below.<sup>93</sup> Considerable literature on false confessions also now appears in law journals.<sup>94</sup> While generally not peer-reviewed prior to publication, the expansive legal literature on the topic does expose the theories and principles at work to debate and critique among scholars in the field.<sup>95</sup>

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frequency.”)

<sup>92</sup> See *infra* notes 99-109 and accompanying text.

<sup>93</sup> *Id.*

<sup>94</sup> A sampling of some of the recent law review literature includes: Frances E. Chapman, *Coerced Internalized False Confessions and Police Interrogations: The Power of Coercion*, 37 LAW & PSYCHOL. REV. 159 (2012-2013); Deborah Davis & Richard A. Leo, *To Walk in Their Shoes: The Problem of Missing, Misunderstood, and Misrepresented Context in Judging Criminal Confessions*, 46 NEW ENG. L. REV. 737 (2012); Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891 (2004); Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. CRIM. L. & CRIMINOLOGY 219 (2006); Barry C. Feld, *Real Interrogation: What Actually Happens When Cops Question Kids*, 47 LAW & SOC'Y REV. 1 (2013); Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051 (2010); Gisli H. Gudjonsson, *False Confessions and Correcting Injustices*, 46 NEW ENG. L. REV. 689 (2012); Saul M. Kassin, *False Confessions*, 73 ALB. L. REV. 1227 (2010); Saul M. Kassin, *Inside Interrogation: Why Innocent People Confess*, 32 AM. J. TRIAL ADVOC. 525 (2009); Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3 (2010); Saul M. Kassin et al., *Police-Induced Confessions, Risk Factors, and Recommendations: Looking Ahead*, 34 LAW & HUM. BEHAV. 49 (2010); Cynthia J. Najdowski, *Stereotyping Threat in Criminal Interrogations: Why Innocent Black Suspects are at Risk for Confessing Falsely*, 17 PSYCHOL. PUB. POL'Y & L. 562 (2011); Laura H. Nirider et al., *Combating Contamination in Confession Cases*, 79 U. CHI. L. REV. 837 (2012); Jennifer T. Perillo & Saul M. Kassin, *Inside Interrogation: The Lie, the Bluff, and False Confessions*, 35 LAW & HUM. BEHAV. 327 (2010); Allison D. Redlich et al., *Comparing True and False Confessions Among Persons with Serious Mental Illness*, 17 PSYCHOL. PUB. POL'Y & L. 394 (2011); Allison D. Redlich, *The Susceptibility of Juveniles to False Confessions and False Guilty Pleas*, 62 RUTGERS L. REV. 943 (2010); Sydney Schneider, *When Innocent Defendants Falsely Confess: Analyzing the Ramifications of Entering Alford Pleas in the Context of the Burgeoning Innocence Movement*, 103 J. CRIM. L. & CRIMINOLOGY 279 (2013); Dan Simon, *The Limited Diagnosticity of Criminal Trials*, 64 Vand. L. Rev. 143 (2011).

<sup>95</sup> See Agar, *supra* note 78, at 32 (“the proponents have clearly placed the theory and methodology before their peers, as evidenced by the criticism of Professor Cassell”). *Daubert* itself makes clear that the process of exposing a theory or principle to debate among professionals in a field is the key to this requirement. The Court explained that “submission to the scrutiny of the scientific community is a component of ‘good science,’ in part because it increases the likelihood that substantive flaws in methodology will be detected.” *Daubert*, 509 U.S. at 593.

The third *Daubert* factor—assessment of an error rate—does not apply neatly to this type of expert testimony. The proposition that false confessions occur is one that is demonstrably error-free. If experts were testifying in a manner intended to predict false confessions or assert that a particular confession were likely false, such assertions would be subject to error-rate analysis and would come up short as the error rate is unknown and virtually unknowable. But to the extent that expert testimony on false confessions makes no predictions or draws no conclusions that any particular confession is false, the error rate question is inapplicable. Additionally, most false confession experts avoid opining (or are not permitted to opine) about the truthfulness of the confessions at issue in a case; they typically limit their testimony to describing the dynamics that can produce false confessions and the common features of false confessions, without claiming to divine whether any given confession is false or true. Unlike a “diagnosis” of Battered Woman Syndrome or Rape Trauma Syndrome, the descriptions of the dynamics and factors that can produce false confessions make no attempt to tell the jury that the suspect in a given case is suffering from any particular syndrome (or in this context, that the suspect has in fact given a false confession). If pressed to provide an error rate more broadly related to the research in the field, an expert might explain that research on false confessions typically adopts a statistical error rate of 5%—the norm in most social science research—for determining the statistical significance of the research findings. This means that in about 5 out of 100 experiments in which the investigator concludes that statistically significant differences were observed, the observed differences are due to random variation in the data rather than meaningful differences between conditions. Thus, an expert case can discuss *an* error rate in an effort to satisfy the third *Daubert* factor, but such explanations are really not germane to the assessment of a confession’s veracity in an individual case.

Finally, on the general acceptance question, there is relatively little disagreement among psychologists about the reality and dynamics of false confessions.<sup>96</sup> It is true that Hoefel’s criticism of Battered Woman Syndrome and Rape Trauma Syndrome—that the “relevant scientific community” that has weighed in on this issue is a very narrow one composed primarily of researchers in this limited field—can be applied to the scientific community that produces false confession research.<sup>97</sup> There is, however, no disagreement that false confessions occur. Nor is there disagreement that certain psychological interrogation tactics and certain personality characteristics are associated with those false confessions and that precipitating conditions and individual risk factors help explain why people confess to crimes they did not commit, as discussed below.

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<sup>96</sup> “No scholar on the subject debates whether false confessions exist.” Agar, *supra* note 78, at 32.

<sup>97</sup> Hoefel, *supra* note 63, at 66-67.

*Daubert* makes clear, however, that there is no required list of factors to be considered in every case. To the contrary, the list of factors courts should consider in assessing scientific reliability is variable<sup>98</sup> and must be tailored to the specific demands of each case and each type of evidence. Therefore, to understand fully the scientific reliability of the false confession expert testimony, one needs to understand the nature of the research base. An overview of psychological research adds further support to the notion that experts can provide reliable social-psychological information about false confessions.

## 2. The Research Base

Research on false confession has taken a variety of forms. Some research is archival and focuses on the subset of false confession cases within the larger body of wrongful conviction cases.<sup>99</sup> Other research focuses on interrogation practices in criminal investigations, relying extensively on field data from the real world of investigations and prosecutions.<sup>100</sup> In some research police officers have been surveyed about the interrogation procedures that they use.<sup>101</sup> Various researchers have analyzed juveniles' and other vulnerable persons' accounts of their interrogations.<sup>102</sup>

The value of archival and observational studies of actual cases, such as in the outstanding work of Richard Leo and colleagues, is self-evident. The experimental method may be less familiar and its value less self-evident, and we therefore give it additional attention here. Using the experimental method, participants (usually university students) either do or do not commit

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<sup>98</sup> To scientists, reliability and validity have two different meanings. Reliability typically means that a test is replicable; that is, when conducted multiple times, the same test will produce the same results every time—it reliably produces consistent results. Validity typically means that the test actually measures what it is purports to measure; that is, for example, a test for cancer or Battered Woman Syndrome not only reliably produces the same results, but those results actually do indicate the presence of cancer or Battered Woman Syndrome. See generally, Joseph Sanders et al., 1 MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY § 4-2.3 (David L. Faigman et al. eds., 2002); Paul C. Giannelli, *Polygraph Evidence: Post-Daubert*, 49 HASTINGS L. J. 895, 911 (1998). *Daubert* uses the term “reliability” in the lay sense, which encompasses both scientific reliability and validity. Because that is the legal standard set by the Supreme Court, in this article we use the term “reliability” in the same sense it is used by the Court.

<sup>99</sup> See, e.g., GROSS & SHAFFER, *supra* note 11.

<sup>100</sup> See, e.g., Drizin & Leo, *supra* note 33; Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051 (2010); Leo, *supra* note 32; Ofshe & Leo, *supra* note 31.

<sup>101</sup> See, e.g., Saul M.S. Kassin, et al., *Police Interviewing and Interrogation: A Self-Report Survey on Police Practices and Beliefs*, 31 L. & HUMAN BEHAVIOR 381 (2007).

<sup>102</sup> Gisli G.H. Gudjonsson, et al., *Custodial Interrogation, False Confession, and Individual Differences: A National Study Among Icelandic Youth*, 41 PERSONALITY & INDIVIDUALS DIFFERENCES 49 (2006); Jodi L.J. Viljoen & Ronald Roesch, *Competence to Waive Interrogation Rights and Adjudicative Competence in Adolescent Defendants: Cognitive Development, Attorney Contact, and Psychological Symptoms*, 29 L. & HUMAN BEHAVIOR 723 (2005).

transgressions, are interrogated about their behavior, and the confessions—or denials—are recorded. The experimental method uses random assignment; That is, participants are assigned randomly to the experimental conditions (e.g., transgression v. no transgression; coercive v. non-coercive interrogation) or to a control condition. The purpose behind random assignment is to control for individual differences in the tendency to confess. Due to personality or risk factors, some people are more likely to truly or falsely confess, and researchers try not to “confound” those individual differences with experimental conditions. The use of random assignment enhances confidence that any differences in confessions are due to the experimental conditions and not to pre-existing individual differences in the tendency to confess.

The transgression in which participants may or may not engage is typically pressing a prohibited key on a computer keyboard that will “crash” a computer or cheating on a task. The transgression is mild, of course, because experimenters abide by ethical guidelines for research on human participants. The interrogation conditions, which may be systematically manipulated across conditions, may include a non-coercive condition (e.g., low-pressure questions about whether the participant committed the transgression in question) and one or more coercive conditions (e.g., the presence of evidence, whether real or contrived, that the participant committed the transgression). The experimenters assess various outcomes, such as whether the participant confessed to the transgression, and, if so, whether the participant actually *believed* in his own confession.

The experimental method may be best understood with examples. Kassin and Kiechel had university students (in individual sessions) engage in a typing task, telling them that the task was about reaction time.<sup>103</sup> Students were warned before the typing task not to press a certain key or the computer would crash. At some point during the task, for all participants, the computer crashed and the experimenter accused the participants of pressing the key they were warned to avoid. The computer, however, was programmed to crash, so all participants were actually innocent and falsely accused. All participants were asked to sign a confession. While this procedure was the same for all participants, the researchers systematically manipulated the presence of false witness testimony. In half of the sessions, another participant (who was actually an experimenter posing as a participant—referred to by researchers as a “confederate”) provided false testimony that she witnessed the participant press the computer-crashing key. In the other half of the sessions, the confederate provided no false witness testimony. Participants were randomly assigned to conditions (false testimony v. no false testimony) in order to ensure that any differences observed between the two groups were not attributable to pre-existing

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<sup>103</sup> S.M. Kassin & K.L. Kiechel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 PSYCH. SCI. 125 (1996).

differences in the propensity to confess. The results were enlightening. Of the participants in the no false testimony condition, 48% signed a written confession.<sup>104</sup> By contrast, of the participants in the false testimony condition, 94% signed a written confession—a large and statistically significant difference.<sup>105</sup> This experiment not only demonstrated that false evidence has a powerful effect on false confessions, it also demonstrated that large numbers of well-adjusted, intelligent young adults in both conditions were willing to falsely confess to transgressions of which they were actually innocent. The methodology pioneered by Kassir and Keichel has been used many times since its publication in other experiments designed to improve our understanding of the factors affecting false confessions.

Russano, Meissner, Kassir, and Narchet reported another experiment that has also become influential.<sup>106</sup> In their experiment, pairs of undergraduate students were set to work on a problem-solving task. Students were instructed to work alone on some problem sets and together on others. One member of the pair was the participant while the other was a confederate. Participants were randomly assigned to guilty or innocent conditions. In the guilty condition, the confederate sought help from the participant on a problem-solving task in which the pair was instructed to work alone. Participants who helped, therefore, were guilty of violating the experimental protocol. In the innocent condition, the confederate did not seek help from the participant on the work-alone trials. Eventually, in all conditions, the experimenter reported that she discovered a similarity in the answers to the problem-solving tasks, separated the participant and the confederate, and accused the participant of cheating. In addition to randomly assigning each participant to an innocent or guilty condition, the researchers manipulated the tactics used by the experimenter to solicit a written confession from the participant. Each participant was randomly assigned to one of four interrogation tactic conditions. In one condition, the experimenter explicitly promised leniency of treatment. In another condition, the experimenter made remarks that minimized the importance of the cheating (e.g., “I’m sure you didn’t realize what a big deal it was”). In another condition, the experimenter made the minimizing remarks and promises of leniency. In the fourth condition, the experimenter did not make the minimizing remarks nor promise leniency. Several findings were noteworthy. When no tactics were used, guilty participants (46%) were significantly more likely to confess than were innocent participants (6%).<sup>107</sup> Use of the minimization tactic increased the rate of confessions among both guilty and innocent participants (81% and 18%,

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<sup>104</sup> *Id.* at 127; Saul M. Kassir et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 *LAW & HUM. BEHAV.* 3, 17 (2010).

<sup>105</sup> Kassir & Keichel, *supra* note 103, at 127; Kassir et al., *supra* note 104, at 17.

<sup>106</sup> Melissa B.M. Russano et al., *Investigating True and False Confessions in a Novel Experimental Paradigm*, 16 *PSYCHOL. SCI.* 481 (2005).

<sup>107</sup> *Id.* at Table 1.

respectively).<sup>108</sup> Like Kassin and Kiechel, Russano et al.'s experiment was influential not only because of its interesting results, but because it presented a unique methodology that has since been adopted by other researchers.

The experimental method—like any research method—has strengths and limitations. The limitations include its artificiality. No real crime is committed, and no suspect is facing real consequences. Proponents of the experimental method, however, argue that during the experimental session, the suspect believes she committed a serious transgression and that she is facing serious consequences, and that is what matters. Indeed, given that the pressures of interrogation are likely less in the experiment than they are in actual investigations, the experimental research may underestimate the influence of coercive interrogation on false confessions. The experimental method has important benefits, to wit, the scientist knows with certainty whether or not the confession is true or false, the conditions are controlled, and the variables of interest (e.g., interrogation procedures) are carefully controlled, thus allowing for causal inference.

#### D. “Helpfulness” of Expert Testimony on False Confessions

When courts reject expert testimony on false confessions, they most frequently do so on the basis that the evaluation of confessions and interrogations is a matter of common sense and that juries do not need expert testimony to assist them with this task.<sup>109</sup> But is this the case? As reviewed above, false confession has been a common feature of wrongful conviction. We can presume that juries heard these cases, that confessions were challenged in some portion of them, and the juries nevertheless convicted the defendants despite the fact that their confessions were false. That record suggests, at least to some extent, that jurors could use help in understanding the difference between true and false confessions.<sup>110</sup> In this section, we identify more precisely what researchers can teach jurors about false confessions, and then assess, based on empirical research, whether jurors actually do possess common knowledge about these matters.

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<sup>108</sup> *Id.*

<sup>109</sup> See *supra* note 86, and accompanying text.

<sup>110</sup> As one commentator has written, false confession expert testimony satisfies the “requirement that the expert’s testimony must assist the jury ... because [such experts] provide the jury with the tools, based on knowledge and research outside the average juror’s understanding, with which they can best judge the credibility of a confession. Further, it is still the jury that makes the ultimate decision as to whether or not the defendant confessed falsely or whether reasonable doubt exists that he committed the crime.” Soree, *supra* note 79, at 262.

### 1. Coerciveness of Interrogation

Confessions—both true and false—are more likely to occur under coercive interrogation conditions than under non-coercive conditions. What constitutes coercion during interrogation? Researchers have identified maximization and minimization techniques as critical for effecting false confessions. Investigators are taught these techniques through workshops and manuals produced by John Reid and Associates, which claims to train thousands of investigators per year.<sup>111</sup> In the Reid Technique there is an important distinction between an interview and an interrogation.<sup>112</sup> The interview is used to determine the level of certainty in the suspect's guilt. Once the determination is made that the suspect is guilty, the interrogation phase is used to secure a confession. While the interview phase is intended to obtain information and assess its veracity, the interrogation phase is designed simply to induce an admission statement.

It is critical to reiterate that interrogation is, accordingly, a guilt-presumptive process. In the words of Inbau, “[a]n interrogation is conducted only when the investigator is reasonably certain of the suspect's guilt. . . . Interrogation should not be used as a primary means to evaluate a suspect's truthfulness; in most cases, that can be accomplished during a non-accusatory interview.”<sup>113</sup> Thus, with reasonable certainty of the suspect's guilt having been established, interrogation is designed to elicit confessions from the guilty suspect.

Maximization refers to a cluster of techniques that have the purpose of persuading the suspect that the investigator already has ample proof of his guilt and that this belief will not waiver. Maximization is also designed to heighten the suspect's sense of the dire consequences that he will face if he does not own up to his responsibility for the offense. These techniques include repeated and forceful accusations of guilt, interruption and refusal of the suspect's denials, the claim of real (or phony) evidence of the suspect's guilt, the bluff that inculpatory evidence is forthcoming, and the implicit or explicit threat of more serious consequences if the suspect continues to deny his guilt. These maximization techniques are designed to make a suspect feel trapped, hopeless, and convinced that owning up to his role in the crime is in his best interest.

While maximization techniques provide the pressure to confess, minimization techniques ease the way toward confession. Minimization techniques help the suspect morally justify his actions. An investigator using minimization may convey to the suspect that the crime is less serious than it actually is, thus increasing the likelihood that the suspect will confess to his role. Minimization techniques include sympathizing and empathizing with the

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<sup>111</sup> *Interviewing & Interrogation*, JOHN E. REID & ASSOC. INC, <http://www.reid.com>.

<sup>112</sup> *Id.*

<sup>113</sup> FRED E. INBAU, JOHN E. REID, JOSEPH P. BUCKLEY & BRIAN C. JAYNE, *CRIMINAL INTERROGATION AND CONFESSIONS* 5-6 (Jones & Bartlett Learning, 5th ed. 2013).

suspect's situation. They include conveying the belief that the crime was a normal reaction, something anyone, including the investigator, would have done. The investigator might offer the suspect alternative, more socially acceptable explanations for his role in the crime, with an implicit assurance that if the suspect offers such an explanation the consequences he faces will be less dire.

A full review of the Reid Technique is beyond the scope of this article. Our summary is cursory and leaves out a good deal of detail. But our purpose is to highlight the social influence tactics that make the technique highly effective in eliciting confessions from guilty suspects. The problem is that any techniques that enhance the likelihood that a guilty suspect would confess will almost certainly also enhance the likelihood that an innocent suspect would confess. Experimental research on false confessions supports this perspective. In the sample experiment discussed above, the use of false evidence increased the risk of false confessions.<sup>114</sup> Relatedly, the "bluff" that inculpatory evidence will soon be obtained also increased the risk of false confession.<sup>115</sup> Interviews with prison inmates who admitted to having made false confessions revealed that the single most common reason given for the false confession was to escape police pressure.<sup>116</sup> Likewise, use of minimization tactics has been found to increase the risk of false confession.<sup>117</sup> Minimization can create the impression that the confession will be treated with leniency even in the absence of explicit offers of leniency, which are prohibited.<sup>118</sup>

## 2. Psychological Processes in Interrogation and False Confession

As mentioned earlier, the Reid Technique involves two stages. In the interview stage the investigator interviews the suspect and determines whether the suspect is likely to be the perpetrator. When the investigator decides the suspect is guilty, the process moves to the interrogation phase. In the interrogation phase, the interrogator presumes the suspect's guilt and enacts a set of techniques to secure a confession. When the suspect is correctly identified as guilty, a confession is, of course, truthful. When the suspect is innocent, however, the confession is false. The central problem is that the Reid techniques

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<sup>114</sup> Kassin & Kiechel, *supra* note 103; see also Robert Horselenberg et al., *Individual Differences and False Confessions: A Conceptual Replication of Kassin and Kiechel (1996)*, 9 PSYCHOL., CRIME AND LAW 1 (2003).

<sup>115</sup> Jennifer T. Perillo & Saul M. Kassin, *Inside Interrogation: The Lie, the Bluff, and False Confessions*, 35 L. & HUMAN BEHAVIOR 327 (2011).

<sup>116</sup> Jon F. Sigurdsson & Gisli H. Gudjonsson, *Alcohol and Drug Intoxication During Police Interrogation and the Reasons Why Suspects Confess to the Police*, 89 ADDICTION 985 (1994).

<sup>117</sup> Russano et al., *supra* note 106.

<sup>118</sup> Saul M. Kassin & Karlyn McNall, *Police Interrogations and Confessions: Communicating Promises and Threats by Pragmatic Implication*, 15 L. & HUMAN BEHAVIOR 233 (1991).

are sufficiently powerful that they can elicit confessions from both guilty and innocent suspects.

The two-stage procedure is a psychology based process involving both the interrogator and the suspect, with psychological factors creating the risk of a false confession. Decades of research on peoples' abilities to tell truth from lies shows lay people and professionals perform, at best, only slightly better than they would flipping a coin.<sup>119</sup> Research specifically comparing police officers', students', and trained students' abilities to discriminate between true and false confessions shows that none of the groups performed well above chance, and police officers had an accuracy rate of 50%.<sup>120</sup> Despite this, police officers were more likely to label a suspect as deceptive and were more confident in their judgments than the student groups. Kassin, Meissner, and Norwick also found that police officers were no better than students at detecting the accuracy of confessions from inmates, and the police officers were more confident in their abilities.<sup>121</sup> Thus, the investigator's early determination that a suspect is the perpetrator—the foundation upon which the interrogation is built—may be of questionable accuracy and puts innocent suspects at high risk.

Considerable psychological research on expectancy effects, self-fulfilling prophecies, and confirmation bias shows that when people harbor beliefs, they act in accordance with those beliefs and thereby influence others in a way that the behavior of the others confirms the harbored beliefs.<sup>122</sup> To investigate these phenomena in the context of investigation, Kassin, Goldstein, and Savitsky conducted a laboratory experiment with 52 interrogators.<sup>123</sup> Their findings showed that investigators who were led to believe a suspect was guilty asked more guilt-presumptive questions, used more coercive techniques, and made suspects more anxious than did investigators who were led to believe the suspect was innocent. Confirmation biases have also been demonstrated in case studies.<sup>124</sup> More generally, Leo and Davis noted that police officers are trained to believe that effective interrogation techniques do not lead to false confessions.<sup>125</sup> They further noted that investigators who harbor these beliefs are prone to misinterpret the suspect's behavior as evidence of guilt. For example,

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<sup>119</sup> Charles F. Bond & Bella M. DePaulo, *Accuracy of Deception Judgments*, 10 PERSONALITY & SOC. PSYCHOL. REV. 214 (2006).

<sup>120</sup> Christian A. Meissner and Saul M. Kassin, "He's Guilty!": Investigator Bias in Judgments of Truth and Deception, 26 LAW & HUM. BEHAV. 469, 475 (2002).

<sup>121</sup> 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 L. & HUM. BEHAV. 211 (2005).

<sup>122</sup> Saul M. Kassin, *On the Psychology of Confessions: Does Innocence Put Innocents at Risk?*, 60 AM. PSYCH. 215 (2005).

<sup>123</sup> Saul M. Kassin et al., *Behavioral Confirmation in the Interrogation Room: On the Dangers of Presuming Guilt*, 27 L. & HUM. BEHAV. 187, 187 (2003).

<sup>124</sup> Drizin & Leo, *supra* note 33, at 1003.

<sup>125</sup> See Davis & Leo, *supra* note 26.

interpreting the anxiety experienced by an innocent suspect in the face of confrontations of guilt as the anxiety that accompanies deception.

In sum, investigators have no demonstrable ability to detect deception or discriminate true from false confessions at levels above chance, yet they are biased toward labeling a suspect as deceptive, and they show unwarranted confidence in their judgments. They begin the interrogation process by presuming the suspect guilty. This presumption creates expectancies that guide the investigator's behavior. Armed with a belief in the suspect's guilt, a high level of confidence, and the Reid Technique toolbox of coercive techniques, the investigator engages coercive techniques, discounts and manages the suspect's denials, increases the suspect's anxiety, and, in the case of an innocent suspect, fulfills the prophecy by securing a false confession from the suspect.

The preceding paragraphs focus on the psychological processes experienced by the investigator. We turn now to the psychological processes experienced by the suspect in the face of coercion in an attempt to explain why an innocent person would confess to a crime he did not commit. One of the first tenets of the Reid Technique is to isolate the suspect. The interrogation takes place in a small room. The suspect is kept alone with one or more investigators. Isolation is stressful and naturally leads one to want to escape.<sup>126</sup> Stress may be exacerbated by fatigue and, in the case of prolonged interrogation, sleep deprivation. Prolonged isolation leads to impairment in complex decision-making abilities and heightened susceptibility to influence.<sup>127</sup> Speaking directly to the point of extent of isolation, Drizin and Leo found the average length of interrogation to be over 16 hours in a sample of false confession cases.<sup>128</sup>

The interrogation itself draws upon a variety of psychological principles, including reward and punishment, and social influence. With respect to the former, confronting the suspect with accusations of guilt, interrupting the suspect's denials, and overcoming the suspect's objections are punishing experiences. In some cases the investigator's accusations of guilt are accompanied by claims of evidence of guilt. The investigator may inform the suspect that he has highly incriminating false evidence, such as an eyewitness, hair, or fingerprints left by the suspect at the scene of the crime. The investigator may invite the suspect to take a polygraph test, and an innocent suspect may naively comply because he has nothing to hide. The investigator may then lie about the results of the polygraph test and inform the suspect that the results showed that he lied about his innocence. The investigator may stop short of asserting or manufacturing false evidence, but may bluff. The investigator may tell the suspect that the investigators have located an eyewitness who will testify

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<sup>126</sup> Kassin, *supra* note 35.

<sup>127</sup> *Id.* at 432.

<sup>128</sup> Drizin & Leo, *supra* note 33, at 949.

to the suspect's role or that items found at the scene of the crime have been sent to the crime lab for forensic tests that will surely implicate the suspect.

These techniques are meant to create feelings of hopelessness and despair in the suspect, extinguish his denials, and move him toward acquiescing to the demand for a confession. Offering the suspect themes or excuses that help justify the crime, showing sympathy and understanding for the suspect's predicament, and offering the suspect face-saving explanations for committing the crime positively reinforce admissions. Put simply, the interrogator shapes the suspect's behavior from denial to confession through reward and punishment. A long history of psychological research on learning behavior shows that people are responsive to reward and punishment. Social psychological research also shows that people are susceptible to social influence in the form of compliance to persuasion, conformity to peer and group pressure, and obedience to authority, all of which come to play in the interrogation scenario.

Leo and Davis explained other psychological processes at play in the interrogation room and in the investigation writ large.<sup>129</sup> Appealing to the research on motivated cognition, Leo and Davis observed that goal-directed behavior directs attention, information processing, and behavior. They further noted that an explicit goal of the Reid Technique is to control the role of the interrogation and to shift the suspect's goal from establishing innocence to minimizing consequences.<sup>130</sup> Given unwavering assertions of guilt and implied—though not explicit—treatment of leniency in exchange for confession through minimization techniques, the suspect eventually concludes that establishing innocence is no longer a viable goal. More favorable treatment is the next best option and one achieved through cooperation and confession.

Leo and Davis further discuss the role of emotions in the interrogation process. The Reid Technique is designed to heighten the suspect's stress. They refer to "stress-induced confessions" as "those in which the suspect has become so distressed (tired, fearful, anxious, or distressed by the aversiveness of the interrogation) that he becomes willing to do or say anything—including giving a false confession—to escape the interrogation".<sup>131</sup>

Stress can induce confession through the narrowing of attention, which may cause peripheral information to be ignored and decisions to be adversely affected. We have learned that the stress of accusation undermines peoples' understanding of their *Miranda* rights.<sup>132</sup> The narrowing of attention can cause a suspect to focus on the short-term goal of escaping an aversive interrogation rather than the long-term goal of obtaining the best possible position to minimize legal consequences. Stress can have alternative effects as well. A recent

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<sup>129</sup> See Davis & Leo, *supra* note 26.

<sup>130</sup> *Id.* at 58.

<sup>131</sup> See *id.* at 39.

<sup>132</sup> K. Scherr & S. Madon, *You Have the Right to Understand: The Deleterious Effect of Stress on Suspects' Ability to Comprehend Miranda*, 36 L. & HUM. BEHAV. 275, 276 (2012).

laboratory experiment found that innocent suspects experienced less stress in response to interrogation than did guilty suspects.<sup>133</sup> The authors reasoned that the reduced stress experienced by innocent suspects may cause them to underestimate the threat of interrogation and not take protective action. Consistent with this view, Kassin theorized that innocence itself creates a mental state that heightens the risk of false confession.<sup>134</sup> He noted that innocent people are more likely to waive their *Miranda* rights, to be open and cooperative with investigators, to generate alibis (without attention of the risks of doing so), and to maintain high confidence that their innocence will eventually be obvious to everyone.<sup>135</sup>

In sum, the investigator's and the innocent suspect's cognitions, emotions, and behaviors are affected by the psychological process of interrogation. These factors may then culminate in false confession. These cognitive and social psychological processes have been under the psychologist's microscope for decades but have recently been applied to the problem of interrogations and false confessions.

### 3. Risk Factors for False Confession

The research on false confessions demonstrates that a significant portion of well-adjusted, intelligent adults (i.e., university students) will succumb to the influence of coercive interrogation techniques and confess to transgressions that they did not commit. What happens, then, when we deviate from the profile of well-adjusted, intelligent adults? Are less well-adjusted or less intelligent adults more willing to falsely confess? Are youth more likely than adults to falsely confess? Considerable research has been devoted to identifying the risk factors associated with false confession.

Intellectual disability or cognitive impairment turns out to be one important risk factor. The relation between cognitive impairment and false confession comes as no surprise to individuals who follow the research on cognitive impairments and cognitive and social functioning. People with cognitive impairments have a high need for social approval from authority figures.<sup>136</sup> They are less able to foresee the long-term consequences of their decisions.<sup>137</sup> People with cognitive impairments, as compared to their less

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<sup>133</sup> M. Gyll, et al., *Innocence and Resisting Confession During Interrogation: Effects on Physiologic Activity*, 37 L. & HUM. BEHAV. 366, 371 (2013).

<sup>134</sup> Kassin, *supra* note 35, at 433.

<sup>135</sup> *Id.* at 434.

<sup>136</sup> W. Finlay & E. Lyons, *Acquiescence in Interviews With People Who Have Mental Retardation*, 40 MENTAL RETARDATION 14 (2002).

<sup>137</sup> S. Fulero & C. Everington, *Assessing Competency to Waive Miranda Rights in Defendants With Mental Retardation*, 19 L. & HUM. BEHAV. 533, 533 (1995).

impaired counterparts, are more susceptible to leading questions.<sup>138</sup> As a result, people who are intellectually impaired are over-represented in cases of wrongful conviction.<sup>139</sup> In related research, *Miranda* comprehension studies have found that people with intellectual impairments are less likely to comprehend their rights and understand how to apply them.<sup>140</sup>

A second important factor is mental disorder.<sup>141</sup> In a recent study of 1,249 offenders with serious mental illness in the U.S., nearly a quarter of these individuals reported having falsely confessed to crimes that they did not commit.<sup>142</sup> People with mental disorders are less likely than those without such disorders to understand their *Miranda* rights, particularly versions of *Miranda* rights that require higher levels of reading comprehension.<sup>143</sup> Mental disorders may contribute to the risk of false confession because of their associations with poor reality monitoring, impaired judgments, anxiety, mood disturbances, a lack of self-control, feelings of guilt, rash and impulsive behavior, delusions, disorganized thought patterns, hopelessness, and despair.<sup>144</sup>

Youthfulness is a third important risk factor for false confession.<sup>145</sup> Research shows that youth under age 15 are more likely than older youth and adults to believe that they should waive their rights and disclose their actions to authorities.<sup>146</sup> In a case study of proven false confessions, Drizin and Leo found that 71 out of 113 (63%) came from people under the age of 25.<sup>147</sup> Juveniles are impulsive, are not able to fully understand the gravity of their situations, and

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<sup>138</sup> N.B. Perlman, et al., *The Developmentally Handicapped Witness: Competency as a Function of Question Format*, 18 L. & HUM. BEHAV. 171, 184 (1994).

<sup>139</sup> Drizin & Leo, *supra* note 33, at 973.

<sup>140</sup> C. Everington & S. Fulero, *Competence to Confess: Measuring Understanding and Suggestibility of Defendants With Mental Retardation*, 37 MENTAL RETARDATION 212, 212 (1999); Fulero & Everington, *supra* note 137; M.J. O'Connell, et al., *Miranda Comprehension in Adults With Mental Retardation and the Effects of Feedback Style on Suggestibility*, 29 L. & HUM. BEHAV. 359, 360 (2005).

<sup>141</sup> V.G. Cooper & P.A. Zapf, *Psychiatric Patients' Comprehension of Miranda Rights*, 32 L. & HUM. BEHAV. 390, 391-92 (2008).

<sup>142</sup> A.D. Redlich, Alicia Summers, & Steven Hoover, *Self-reported False Confessions on False Guilty Pleas Among Offenders With Mental Illness*, 34 LAW & HUM. BEHAV. 79, 79.

<sup>143</sup> Richard Rogers, et al., *Spanish Translations of Miranda Warnings and the Totality of the Circumstances*, 33 L. & HUM. BEHAV. 61, 68 (2009).

<sup>144</sup> R. Norris & A. Redlich, *At-Risk Populations Under Investigation and at Trial*, in CONVICTION OF THE INNOCENT: LESSONS FROM PSYCHOLOGICAL RESEARCH 13-32 (B.L. Cutler ed.) (2012); see Richard Rogers, et al., *Knowing and Intelligent: A Study of Miranda Warnings in Mentally Disordered Defendants*, 31 L. & HUM. BEHAV. 401 (2007).

<sup>145</sup> J. Owen-Kostelnik, et al., *Testimony and Interrogation of Minors: Assumptions About Maturity and Morality*, 61 AM. PSYCH. 286, 287 (2006).

<sup>146</sup> S.M. Kassin, et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 L. & HUM. BEHAV. 3, 8 (2009).

<sup>147</sup> Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C.L. REV. 891, 945 (2004).

make decisions that are not in their best interests.<sup>148</sup> Youths are more likely to be emotionally volatile and susceptible to pressure and influence, particularly from authority figures.<sup>149</sup> Juveniles are less able than adults to assist attorneys in their own defense.<sup>150</sup> In the first 200 exoneration cases from the Innocence Project, approximately 50 cases involved false confession, 35% of which involved juveniles or individuals with mental impairments.<sup>151</sup>

Ironically, innocence itself turns out to be a fourth important risk factor.<sup>152</sup> Research shows that innocent people are more likely to waive their rights to counsel and silence<sup>153</sup> and to attempt to cooperate with the police.<sup>154</sup> Innocent people are more likely to offer alibis,<sup>155</sup> which of course can be mined for inaccuracies and inconsistencies. Additionally, innocent people are overconfident in the likelihood of their exoneration and less likely than guilty people to accept guilty pleas.<sup>156</sup> Based on research, Kassin concludes that innocence is a state of mind that leads people to trust investigators during interrogation.<sup>157</sup> When confronted in interrogation with a claim that forthcoming evidence will prove their guilt, innocent people are more likely to confess, due to the naïve belief that the forthcoming evidence will prove their innocence and negate their confessions.<sup>158</sup> At the same time, Kassin's research shows that when interrogators believe a suspect is guilty, they engage in more pressure-filled interrogation tactics when the suspect is in fact innocent than when the suspect is guilty.<sup>159</sup>

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<sup>148</sup> Owen-Kostelnik, *supra* note 142.

<sup>149</sup> See A. Redlich & S. Kassin, *Police Interrogation and False Confessions: The Inherent Risk of Youth*, in CHILDREN AS VICTIMS, WITNESSES AND OFFENDERS, (B. Bottoms ed., Guilford Press 2009).

<sup>150</sup> Thomas Grisso, et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 L. & HUMAN BEHAVIOR 333 (2003).

<sup>151</sup> INNOCENCE PROJECT, 200 EXONERATED: TOO MANY WRONGFULLY CONVICTED 26-28, available at [http://www.innocenceproject.org/200/ip\\_200.pdf](http://www.innocenceproject.org/200/ip_200.pdf) (last visited May 5, 2014).

<sup>152</sup> See Kassin, *supra* note 122.

<sup>153</sup> Saul M. Kassin & Rebecca J. Norwick, *Why People Waive Their Miranda Rights: The Power of Innocence*, 28 L. & HUMAN BEHAVIOR 211-221 (2004); Timothy E. Moore & Karina Gagnier, "You Can Talk If You Want To": Is the Police Caution on the 'Right to Silence' Understandable?, 51 CRIMINAL REPORTS 233 (2008).

<sup>154</sup> Maria Hartwig, et al., *Guilty and Innocent Suspects' Strategies During Police Interrogations*, 13 PSYCH., CRIME & L. 213 (2007).

<sup>155</sup> Elizabeth A. Olson & Steve D. Charman, "But Can You Prove It?" - Examining the Quality of Innocent Suspects' Alibis, 18 PSYCH., CRIME & L. 453 (2012).

<sup>156</sup> Avshalom Tor et al., *Fairness and the Willingness to Accept Plea Bargain Offers*, 7 J. EMPIRICAL L. STUDIES 97 (2010).

<sup>157</sup> Kassin, *supra* note 35, at 433.

<sup>158</sup> Jennifer T. Perillo & Saul M. Kassin, *Inside Interrogation: The Lie, the Bluff, and False Confessions*, 35 LAW & HUM. BEHAV. 327, 327 (2010).

<sup>159</sup> Saul M. Kassin, Christine C. Goldstein, & Kenneth Savitsky, *Behavioral Confirmation in the Interrogation Room: On the Dangers of Presuming Guilt*, 27 L. & HUM. BEHAV. 187, 187 (2003).

#### 4. Empirical Research on Juror Knowledge

Empirical research on jury decision making in cases of interrogation and confession also sheds light on the jury's ability to evaluate interrogations and confessions. We review these empirical studies in this section.

First, one might reasonably ask whether jurors find confession evidence compelling. In a direct test of this question, Kassin and Neumann conducted three experiments in which they asked university students to read summaries of trials (*e.g.*, murder, assault, theft) involving various types of charges and containing various forms of evidence (*e.g.*, confession, eyewitness identification, character evidence).<sup>160</sup> The three experiments consistently demonstrated that confession evidence was perceived as the most incriminating form of evidence. Confessions—including false confessions—have been found to be made more compelling by virtue of their detail. Appleby, Hasel, and Kassin's content analysis of 20 proven false confession revealed that the false confessions were rich with detail and included visual and auditory details and statements about jealousy, rage, revenge, sexual frustration, intoxication, peer pressure, other motives, face-saving excuses, moral justifications, assurances of voluntariness, apologies, and expressions of remorse.<sup>161</sup> Garrett's analysis of the first 250 DNA exoneration cases similarly found that, in the 40 cases in which the wrongly convicted individual allegedly provided a full confession,<sup>162</sup> police claimed that 38 (95%) of the false confessions included "key details about the crime, including facts that matched the crime scene evidence, or scientific evidence, or accounts by the victim" that the suspect could not have known unless he was guilty.<sup>163</sup> In short, the false confessions were not mere admissions but rather complex and compelling narratives, coaxed through the process of interrogation. The complexity of the narrative made the confessions more compelling to mock jurors,<sup>164</sup> even though the complexity of the narrative was undoubtedly the product of police contamination.<sup>165</sup>

In an attempt to gain an understanding of what the public knows about interrogation and confession, Chojnacki, Cicchini, and White surveyed 502 jury-

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<sup>160</sup> S.M. Kassin & K. Neumann, *On the Power of Confession Evidence: An Experimental Test of the "Fundamental Difference" Hypothesis*, 21 L. & HUMAN BEHAVIOR 469, 469 (1997).

<sup>161</sup> S. Appleby, et al., *Police-Induced Confessions: An Empirical Analysis of Their Content and Impact*, 19 PSYCH., CRIME & L. 111 (2013).

<sup>162</sup> In many of the cases, the only evidence of a confession was police testimony claiming that the suspect confessed.

<sup>163</sup> BRANDON GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* 20 (2011). Interestingly, police in these cases "went farther and also claimed they assiduously avoided contaminating the confession by not asking leading questions, but rather allowing the suspect to volunteer each of the crucial facts." *Id.* See also, Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, (2010).

<sup>164</sup> Appleby, *supra* note 161.

<sup>165</sup> GARRETT, *supra* note 163, at 23-31.

eligible citizens from 38 states about their knowledge of interrogations, confessions, and related topics.<sup>166</sup> Their results showed that substantial portions of the sample do not understand the role of *Miranda* rights<sup>167</sup> and thought that police officers are better at detecting deception than the average person, despite empirical evidence to the contrary.<sup>168</sup> Many participants under-estimated the prevalence of false confessions and the role that coercion plays in false confessions.<sup>169</sup> The authors concluded that, “at best, most individuals do not know what experts know about false confessions and, at worst, hold serious misconceptions that might infringe on a defendant’s rights to receive a fair trial.”<sup>170</sup> Significantly, most participants thought that an expert witness would be helpful to a jury faced with evaluating an interrogation and confession.<sup>171</sup> Costanzo, Shaked-Schroer, and Vinson’s survey of jurors from five states also reported that most participants indicated that they would find expert testimony on interrogations and confessions to be helpful.<sup>172</sup> Considering that a large number of jury-eligible people in multiple studies suggested expert testimony on the subject would be helpful, one can infer that many jurors likely feel the same way.

Leo and Liu also assessed public opinion about interrogations and confessions.<sup>173</sup> They surveyed 264 jury-eligible students from Southern California. The survey included questions assessing perceptions of interrogation and the importance of confessions. Participants rated most of the 18 interrogation techniques included in the survey as coercive, with each technique being rated between 2.38 and 4.44 on a 1-5 scale. Thus, the authors concluded that participants recognized that accusations, challenging denials, and implicit and explicit offers of leniency are at least somewhat coercive.<sup>174</sup> Participants, however, over-estimated the typical length of interrogation, estimating an average length of about eight hours when in reality the average length is closer to two hours.<sup>175</sup> Participants opined that an interrogation should be permitted to last up to about 14 hours, which is close to the average of 16 hours of interrogation observed in 125 cases of proven false confession.<sup>176</sup> Leo and Liu also found that although participants recognized that coercive interrogation techniques were likely to lead to true confessions, they opined that the same coercive techniques

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<sup>166</sup> Chojnacki et al., *supra* note 28.

<sup>167</sup> *Id.* at 30.

<sup>168</sup> *Id.* at 31.

<sup>169</sup> *Id.* at 32-33.

<sup>170</sup> *Id.* at 39.

<sup>171</sup> *Id.* at 38-39.

<sup>172</sup> M. Costanzo, N. Shaked-Schroer, K. Vinson, *Juror Beliefs About Police Interrogations, False Confessions, and Expert Testimony*, 7 J. EMPIRICAL L. STUDIES 231, 240 (2010).

<sup>173</sup> Richard A. Leo & Brittany Liu, *What do Potential Jurors Know About Police Interrogation Techniques and False Confessions?*, 27 BEHAV. SCI. L. 381 (2009).

<sup>174</sup> *Id.* at 389.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 394.

were less likely to elicit to false confessions, possibly under-estimating the risk to innocent suspects. Leo and Liu conclude that their study provides evidence that typical jury-eligible citizens do not fully appreciate the link between coercive interrogation practices and false confession and points to the need for expert testimony on this topic to educate jurors.<sup>177</sup>

Blandon-Gitlin, Sperry, and Leo replicated the findings of Leo and Liu in a sample of 126 jurors from Orange County, CA, showing that Leo and Liu's findings are not idiosyncratic to students but rather reflect jurors' beliefs.<sup>178</sup> Their second study was one of the first to examine the impact of expert testimony on interrogation and confessions on juror decision-making. They found that prior to expert testimony, jurors perceived a coercive interrogation to be relatively fair despite also observing a great deal of pressure and implied promises of leniency. The expert testimony, however, had the effect of increasing perceptiveness of the interrogation's coerciveness and reducing the percent of guilty verdicts. Blandon-Gitlin et al. concluded that when left to their own devices, jurors underestimate the influence of situational pressures on confessions and overestimate the role of the suspect's disposition but that expert testimony helps to correct this bias.

While the studies reviewed above focus on assessment of public knowledge and opinion, Kassin and Wrightsman authored the first study we know of that examined the jury's ability to evaluate confessions.<sup>179</sup> In their first study, each of 64 students read one of four transcripts of a criminal trial in which there was confession elicited with no constraints, a confession elicited with a promise of leniency, a confession elicited with a threat of punishment, or no confession.<sup>180</sup> The defendant was perceived as more likely to have committed the crime when the confession was offered freely or when he confessed in response to a promise of leniency than when there was no confession.<sup>181</sup> Their second study confirmed the results of the first study even when the prosecution's case was strengthened.<sup>182</sup> Participants relied on the confessions to convict the defendant, even though they judged the confessions to be coerced. In a second pair of studies, Kassin and Wrightsman again found that confessions, even when coerced, influenced mock-jurors verdicts but that these effects were relatively impervious to judicial warnings concerning coerced confessions.<sup>183</sup> The authors concluded that "the Supreme Court's presumption that jurors can accurately

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<sup>177</sup> *Id.* at 383.

<sup>178</sup> *Id.* at 387-90; Blandon-Gitlin et al., *supra* note 28, at 8-10.

<sup>179</sup> Saul M. Kassin & Lawrence S. Wrightsman, *Prior Confessions and Mock Juror Verdicts*, 10 J. APPLIED SOC. PSYCHOL. 133 (1980).

<sup>180</sup> *Id.* at 136-40.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 140-44.

<sup>183</sup> Saul M. Kassin & Lawrence S. Wrightsman, *Coerced Confessions, Judicial Instruction, and Mock Juror Verdicts*, 11 J. APPLIED SOC. PSYCHOL. 489 (1981).

assess the truthfulness of confessions is challenged” by the research findings.<sup>184</sup> Kassin and Sukel examined the effectiveness of instructions to disregard coerced confessions.<sup>185</sup> Their study showed that a coerced confession, even when recognized as coercive, influenced convictions at the same rate as a non-coerced confession and was influential even when participants were instructed by the judge to disregard the coerced confession.<sup>186</sup>

In the Kassin, Meissner, and Norwick study previously mentioned involving students’ and police officers’ abilities to distinguish between true and false confessions, the investigators, in the first study, made videotapes of true and false confessions from 17 prison inmates.<sup>187</sup> They then showed the videotapes to a group of students and to a group of federal, state, and local investigators from Texas and Florida.<sup>188</sup> All participants attempted to judge the accuracy of the true and false confessions.<sup>189</sup> Overall accuracy was 54%—slightly above chance performance.<sup>190</sup> Ironically, students were overall more accurate than investigators (59% v. 48%), but investigators were more confident in their judgments than were students.<sup>191</sup> Investigators were overall more likely than students to view the confessions as true, regardless of their accuracy.

As the review of the research discussed above suggests, there is indeed considerable information that experts can reliably impart to jurors about false confessions that is beyond their common knowledge. Expert evidence regarding false confessions is not only sufficiently reliable under *Daubert*, but it indeed can be quite helpful to jurors when confronted with disputed confession evidence.

## V. PSYCHOLOGICAL EVIDENCE ABOUT *MIRANDA*

One of the reasons for not admitting expert testimony on false confessions is that existing safeguards—in particular, the use of *Miranda* warnings prior to interrogation and cross-examination at trial—serve as adequate safeguards against wrongful conviction. In this concluding section, we review the psychological research on the effectiveness of *Miranda* safeguards.

Rogers, Harrison, Shuman, Sewell, and Hazelwood sampled 560 *Miranda* warnings and waivers from throughout the U.S. (including federal, state, and county jurisdictions) and analyzed their content for comprehensibility.<sup>192</sup> The authors concluded that the warnings and waivers

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<sup>184</sup> *Id.* at 153.

<sup>185</sup> Kassin & Sukel, *supra* note 21.

<sup>186</sup> *Id.* at 30.

<sup>187</sup> Kassin, et al., *supra* note 121, at 214.

<sup>188</sup> *Id.* at 216.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> Rogers, et al., *supra* note 143, at 405.

varied remarkably with respect to length (60 to 300+ words), complexity, and comprehensibility.<sup>193</sup> They suggested that more complex warning and waivers “run a considerable risk of obscuring rather than clarifying *Miranda* rights.”<sup>194</sup> Using an estimate of 70% of inmates operating at the level below sixth grade, Rogers et al. concluded that only 54.3% of the *Miranda* waivers and warnings would be appropriate for most inmates.<sup>195</sup> In a replication and extension of this research, Rogers, Hazelwood, Sewell, Harrison, and Shuman found that the sentence structure complexity in two-thirds of the *Miranda* warnings exceeded the sentence structure complexity of the Internal Revenue Service’s 1040-EZ instructions and in 10% exceeded the sentence complexity of the U.S. Supreme Court’s decision in *U.S. v. Miranda*.<sup>196</sup> Their analysis of vocabulary revealed that complex words, such as admission, alleged, appointed, revoked, terminate, waive and waiver, all of which are vocabulary expected of students in grade 13 or higher, are commonplace in the warnings.<sup>197</sup> The authors concluded that “[m]any *Miranda* warnings fall short of the Court’s basic requirement for clarity.”<sup>198</sup>

Thus, the content of *Miranda* rights and warnings are inherently challenging to comprehend. Some factors further inhibit peoples’ comprehension of *Miranda* warnings. Spanish translations of *Miranda* warnings contain inferior content to the English versions.<sup>199</sup> *Miranda* warnings are particularly difficult to understand for youth,<sup>200</sup> individuals with intellectual disabilities,<sup>201</sup> and people with mental illness.<sup>202</sup> Situational stress also impairs comprehension of *Miranda* warnings.<sup>203</sup>

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<sup>193</sup> *Id.* at 402.

<sup>194</sup> Rogers, et al., *An Analysis of Miranda Warnings and Waivers: Comprehension and Coverage*, 31 L. & HUM. BEHAV. 177, 189 (2007).

<sup>195</sup> *Id.* at 189

<sup>196</sup> Rogers, et al., *The Language of Miranda Warnings in American Jurisdictions: A Replication and Vocabulary Analysis*, 32 L. & HUM. BEHAV. 124, 129 (2008).

<sup>197</sup> *Id.* at 130.

<sup>198</sup> *Id.* at 135.

<sup>199</sup> Rogers, et al., *supra* note 144, at 65.

<sup>200</sup> T. Grisso, *Juveniles’ Waiver of Rights: Legal and Psychological Competence*, in PERSPECTIVES IN LAW & PSYCHOLOGY (1981); K. McLachlan, et al., *Examining the Roles of Interrogative Suggestibility in Miranda Rights Comprehension in Adolescents*, 35 L. & HUM. BEHAV. 165 (2011); J. Viljoen & R. Roesch, *Competence to Waive Interrogation Rights and Adjudicative Competence in Adolescent Defendants: Cognitive Development, Attorney Contact, and Psychological Symptoms*, 29 L. & HUM. BEHAV. 723 (2005); R. Rogers, et al., *Mired in Miranda Misconceptions: A Study of Legally Involved Juveniles at Different Levels of Psychosocial Maturity* (2013) (unpublished manuscript).

<sup>201</sup> Fulero & Everington, *supra* note 137; O’Connell, et al., *supra* note 140.

<sup>202</sup> Cooper & Zapf, *supra* note 141; Rogers, et al., *supra* note 144; J. Viljoen, et al., *An Examination of the Relationship Between Competency to Stand Trial, Competency to Waive Interrogation Rights, and Psychopathology*, 26 L. & HUM. BEHAV. 481 (2002).

<sup>203</sup> R. Rogers, et al., *Decrements in Miranda Abilities: An Investigation of Situational Effects Via a Mock-Crime Paradigm*, 35 L. & HUM. BEHAV. 392 (2011); Scherr & Madon, *supra* note 132.

In sum, the psychological research confirms that *Miranda* does little to protect individuals from coercive interrogation and false confession. *Miranda* may serve its intended purpose for well-adjusted, intelligent adults who can focus at the time at which the *Miranda* warning is delivered, but deviations from this profile erode the effectiveness of *Miranda*.

## VI. CONCLUSION

The innocence movement has led to the realization that false confession is a major contributor to miscarriages of justice. False confessions may be uncommon, but they undoubtedly occur, and, when they do occur, they may be indistinguishable from true confessions in both their etiology and impact. Scientific psychological research has illuminated the powerful impact of commonly used, coercive interrogation procedures on effecting false confessions as well as the factors that enhance suspects' risk for falsely confessing under interrogation pressures. Traditional safeguards, such as those encompassed in *Miranda*, provide inadequate protection against false confession.

Of course, defendants may implicate themselves, but they do not convict themselves; rather, defendants are convicted by judges and juries (even in plea cases, where judges must review and accept the factual basis for the plea and enter judgment). Were judges and juries able to fully account for the influence of coercive interrogation procedures, and understand the role of individual risk factors, they would be better equipped to distinguish between true and false confessions. So equipped, the system would be better able to break the link between false confession and conviction of the innocent.

Unfortunately, however, the common sense belief that a confession must be true, and that the confessor must indeed be guilty, is a powerful one. Even in the current era of general awareness of the problem of wrongful convictions, confessions are still generally treated as the gold standard in evidence, sometimes even trumping DNA evidence of innocence.<sup>204</sup> But ample research has now demonstrated that common sense beliefs about false confessions are often wrong, and that undue reliance on "common sense" about false confessions can lead to miscarriages of justice. Social science research into false confessions has now developed sufficiently that experts in the field can provide valid and useful research insights about false confessions. Expert testimony about such matters, because it is often so counter-intuitive and otherwise beyond the ken of ordinary

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<sup>204</sup> Based on his analysis of confessions ultimately proven false by DNA evidence, Brandon Garrett has observed that, "[e]ven after DNA testing excluded these people, judges sometimes initially denied relief, relying on the seeming reliability of these confessions. These false confessions were so persuasive, detailed, and believable that judges repeatedly upheld the convictions during appeals and habeas review." GARRETT, *supra* note 163, at 20-21.

individuals, can be not only helpful to juries, but often essential to a full and accurate assessment of the evidence in criminal cases.<sup>205</sup>

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<sup>205</sup> At least one commentator has argued that, “provided the expert is properly qualified, the admissibility of such testimony is constitutionally required as part of a defendant’s right to present a complete defense.” Soree, *supra*, note 79, at 196. See also Major Peter Kageleiry, Jr., *Psychological Police Interrogation Methods: Pseudoscience in the Interrogation Room Obscures Justice in the Courtroom*, 193 MIL. L. REV. 1, 5 (2007) (“A more informed justice system would recognize the underlying necessity for expert assistance when law enforcement obtains a confession through the use of psychological interrogation methods.”).