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## THE (IN)ADMISSIBILITY OF FALSE CONFESSION EXPERT TESTIMONY

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### INTRODUCTION

In the early morning on April 20, 1989, two construction workers were walking through New York City's Central Park when they stumbled across the writhing body of Trisha Meili, who had been left for dead in a shallow ravine near 102nd Street.<sup>1</sup> The crime set off a firestorm in the District Attorney's office and soon enough the police did not just have one suspect, they had five: a group of teenagers from Harlem, all of whom were either Black or Hispanic.<sup>2</sup> They were accused of beating and raping the twenty-eight year old investment banker.<sup>3</sup> On April 21, after the suspects had been awake for about two days, one by one they began confessing on videotape to the vicious assault.<sup>4</sup> During the trials the confessions were particularly important since no physical evidence linked any of the suspects to the crime.<sup>5</sup> Nevertheless, each was convicted and sentenced to

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<sup>1</sup> Chris Smith, *Central Park Revisited*, N.Y. MAG., Oct. 14, 2002, [http://nymag.com/ny-metro/news/crimelaw/features/n\\_7836](http://nymag.com/ny-metro/news/crimelaw/features/n_7836).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

[T]he confessions grew in importance as forensic evidence failed to materialize. No blood or DNA tests tied the five to the jogger. Hairs found on Richardson's clothes were said to be "consistent" with those of the jogger, but it was precious little residue considering that five people were accused of beating and raping a woman in a muddy ravine.

prison terms ranging from five to thirteen years.<sup>6</sup> The only problem was that the suspects were innocent, and the real perpetrator was Matias Reyes, who pled guilty in 1991 to four other rapes, and in 2002 confirmed that it was he who attacked Ms. Meili in Central Park that night.<sup>7</sup> The detailed and sordid statements that the teenagers provided to police officers must have been false.<sup>8</sup>

This Comment discusses the relationship between police interrogation tactics and false confessions in order to address the admissibility of false confession expert testimony, a question that has traditionally been left to the discretion of the trial judge.<sup>9</sup> The current literature—indeed, the prevailing consensus—argues for drastic changes to police interrogation practices to prevent false confessions and, in combination with such changes, demands that expert testimony on false confessions be admitted in criminal trials. Despite the relative unanimity in the literature, state and federal courts remain bitterly divided on the question of admissibility of false confession expert testimony. Each decision in this judicial split has gone one of four ways: some courts only admit expert testimony that discusses a particular defendant's mental condition;<sup>10</sup> others limit the discussion to a general description of the phenomenon;<sup>11</sup> still others permit a

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*Id.*

<sup>6</sup> Smith, *supra* note 1.

<sup>7</sup> *Id.*

<sup>8</sup> See Elaine Cassel, *The False Confessions in the Central Park Jogger Case: How They Happened and How to Stop Similar Injustices in the Future*, COUNTERPUNCH, Dec. 21, 2002, <http://www.counterpunch.org/cassel1221.html>.

<sup>9</sup> Nadia Soree, *When the Innocent Speak: False Confessions, Constitutional Safeguards, and the Role of Expert Testimony*, 32 AM. J. CRIM. L. 191, 196 (2005).

<sup>10</sup> See *United States v. Shay*, 57 F.3d 126, 131 (1st Cir. 1995) (permitting appropriate expert testimony pertaining to truthful character); *United States v. Raposo*, No. 98 CR. 185 (DAB), 1998 WL 879723, at \*6 (S.D.N.Y. Dec. 16, 1998) (permitting a false confession expert to broadly testify on “both the falsity and the voluntariness of Defendant’s statement”); *State v. Caulley*, No. 97AP-1590, 2002 WL 392191, at \*4 (Ohio Ct. App. Mar. 14, 2002) (allowing Dr. Ofshe to testify about the strong likelihood of a false confession); *State v. Stackhouse*, No. 18984-8-III, 2001 WL 1497217, at \*4 (Wash. Ct. App. Nov. 27, 2001) (permitting expert testimony regarding false confessions only if “ ‘reasonable medical certainty’ ” exists).

<sup>11</sup> See *United States v. Belyea*, 159 F. App’x 525, 530 (4th Cir. 2005) (holding that expert testimony stating that false confessions exist and explaining what techniques can induce them would be helpful clarification); *United States v. Hall*, 93 F.3d 1337, 1344-45 (7th Cir. 1996) (permitting Dr. Ofshe to testify about false confessions and their relevance to provide the jury with relevant information); *People v. Page*, 2 Cal. Rptr. 2d 898 (Cal. Ct. App. 1991) (permitting expert testimony to educate the jury on false confessions and the factors that might influence them); *Boyer v. State*, 825 So. 2d 418, 420 (Fla. Dist. Ct. App. 2002) (hold-

particularized discussion of the elements of a false confession present in the suspect's confession;<sup>12</sup> and finally, many other courts at the state and federal level simply exclude this kind of testimony, whether or not it discusses a cognizable mental condition, the false confession phenomenon in general, or a particularized application of the false confession theory.<sup>13</sup>

This Comment begins by conceding that there are proven and documented cases where false confessions have led to wrongful convictions of innocent persons. However, a review of the empirical research demonstrates that false confessions are exceedingly rare and that the evidence upon which the leading false confession scholars rely on is very unreliable.<sup>14</sup> The rarity of false confessions undermines the attack on current police interrogation practices, while the unreliability of the empirical research suggests that expert testimony on false confessions should not be admissible. Therefore, this Comment rejects the argument that, in light of the false confession phenomenon, we must overhaul our criminal justice system and admit false confession expert testimony. Part I provides a brief exposition

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ing that Dr. Ofshe's testimony about false confessions was improperly excluded on the issue of voluntariness).

<sup>12</sup> See *Miller v. State*, 770 N.E.2d 763, 774 (Ind. 2002) (holding that the Dr. Ofshe's testimony would have been helpful to the jury, barring any opinion regarding truth or falsity); *People v. Hamilton*, 415 N.W.2d 653, 668-69 (Mich. Ct. App. 1987) (condoning expert psychological testimony, but holding that expert opinions regarding truthfulness are inadmissible); *State v. Buechler*, 572 N.W.2d 65, 73 (Neb. 1998) (holding that expert testimony that does not tell the jury how to decide, but rather explains the situation, is admissible in order to educate the jury); *Pritchett v. Commonwealth*, 557 S.E.2d 205, 208 (Va. 2002) (ruling that expert testimony is admissible, but that an expert cannot express an opinion as to the veracity of the confession).

<sup>13</sup> See *United States v. Adams*, 271 F.3d 1236, 1246 (10th Cir. 2001) (holding that expert testimony regarding credibility should be excluded because it is prejudicial and unduly influences the jury); *Bachman v. Leapley*, 953 F.2d 440, 441 (8th Cir. 1992) ("It is the exclusive province of the jury to determine the believability of the witness. (citations omitted) An expert is not permitted to offer an opinion as to the believability or truthfulness of a victim's story."); *Vent v. State*, 67 P.3d 661, 670 (Alaska Ct. App. 2003) (holding that expert testimony on the subject of false confessions can be unreliable and therefore inadmissible); *State v. Cobb*, 43 P.3d 855, 869 (Kan. Ct. App. 2002) (finding that expert testimony of false confessions "invades the province of the jury"); *State v. Davis*, 32 S.W.3d 603, 609 (Mo. Ct. App. 2000) (holding that the common knowledge of the jury regarding false confessions was reasonable and unaided by expert opinions); *People v. Philips*, 692 N.Y.S.2d 915, 939-940 (Sup. Ct. 1999) (finding that a "voluntariness" expert witness was not accepted by the scientific community and too novel to be admissible).

<sup>14</sup> See generally Richard A. Leo, *False Confessions: Causes, Consequences, and Implications*, J. AM. ACAD. PSYCHIATRY L. 332, 333 (2009) (explaining the defects and difficulties of false confessions research).

on the phenomenon of false confessions. Part II discusses the current jurisprudence on the admissibility of expert testimony in general, and false confession expert testimony in particular. Part III then addresses the theoretical and practical problems of admitting false confession expert testimony. Part IV discusses the false confession critique of police interrogation, and offers a defense of certain police interrogation tactics that false confession theorists indict.

## I. THE FALSE CONFESSION PHENOMENON

Although the concept of a false confession dates back centuries, major academic research on the topic began in earnest during the 1980s when Saul Kassin and Lawrence Wrightsman began their pioneering research.<sup>15</sup> Kassin and Wrightsman identify three categories of false confessions: voluntary, coerced-compliant, and coerced internalized.<sup>16</sup> A voluntary false confession involves a suspect who “confesses in the absence of external pressure.”<sup>17</sup> A coerced-compliant false confession is given by a suspect in order to escape from a particularly onerous and adverse interrogation, to secure a promised benefit (e.g. a favorable plea), or [to] avoid a threatened harm (e.g. violence, intimidation, jail time).<sup>18</sup> A coerced-internalized false confession, the rarest form of false self-inculpation, involves an innocent suspect who actually believes that he or she is guilty.<sup>19</sup>

Since the mid-1990s, Richard Ofshe and Richard Leo have been the leading false confession researchers. While generally accepting Kassin and Wrightsman’s triple-pronged framework, Ofshe and Leo have created their own four-part false confession typology: stress-complaint, coerced-compliant, non-coerced persuaded, and coerced persuaded.<sup>20</sup> Stress-complaint false confessions are the result

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<sup>15</sup> See, e.g., Saul M. Kassin & Lawrence S. Wrightsman, *Prior Confessions and Mock Juror Verdicts*, 10 J. APPLIED SOC. PSYCHOL. 133 (1980) (testing the Supreme Court’s assumption that jurors discount a coerced confession as unreliable); Saul M. Kassin & Lawrence S. Wrightsman, *THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE* 67-94 (1985).

<sup>16</sup> Saul M. Kassin & Katherine L. Keichel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 PSYCHOL. SCI. 125, 125 (1996).

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

<sup>18</sup> *Id.* See also Soree, *supra* note 9, at 198 (explaining that such a response is usually prompted by threats or promises).

<sup>19</sup> Kassin & Keichel, *supra*, note 16, at 125; see also RICHARD A. LEO, *POLICE INTERROGATION AND AMERICAN JUSTICE* 199 (2008) (discussing Kassin’s typology).

<sup>20</sup> Richard A. Leo & Richard J. Ofshe, *The Decision to Confess Falsely: Rational Choice*

of the “inherent stressors” in a normal interrogation, which include an unfamiliar setting, a loss of control, emotional distress, and an accusatorial atmosphere.<sup>21</sup> As a result, the suspect may become confused, exhausted, and emotionally unstable, and to escape from these rather unavoidable stressors, he will confess to a crime he did not commit.<sup>22</sup> In this way stress-compliant false confessions mirror a subset of Kassin and Wrightsman’s coerced-compliant false confessions.

Leo and Ofshe’s version of coerced-complaint false confessions results from classically coercive police interrogation tactics such as the use of threats, promises of leniency, as well as other forms of physical and psychological manipulation.<sup>23</sup> Like Kassin’s rendering of coerced-compliant false confessions, Ofshe and Leo’s version postulates that an otherwise innocent suspect, in order to secure a promise or to avoid a threat, will confess.

Finally, Ofshe and Leo argue that the “underlying psychological process” causing Kassin’s *coerced-internalized* false confessions is persuasion rather than internalization, “and have thus renamed this category *coerced-persuaded* false confessions.”<sup>24</sup> Persuaded false confessions occur when an interrogator persuades an innocent suspect that he committed the crime of which he is accused.<sup>25</sup> “Both types of ‘persuaded’ false confessions . . . are given after a person has become convinced that it is more likely than not that he committed the crime, despite possessing no memory of having done so.”<sup>26</sup> The non-coerced version results from a relatively normal police interrogation, while the coerced version results from the same tactics used to procure a coerced-compliant false confession, namely threats and promises of leniency.<sup>27</sup> Persuaded false confessions—whether they are coerced or non-coerced—are extremely rare and difficult to detect because they are usually unintended and unrecognized by the interrogators.<sup>28</sup>

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*and Irrational Action*, 74 DENV. U. L. Rev. 979, 997 (1997).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 998.

<sup>23</sup> *Id.* at 998-99.

<sup>24</sup> Leo, *supra* note 19, at 200.

<sup>25</sup> *Id.* at 210.

<sup>26</sup> Leo & Ofshe, *supra* note 20, at 999.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

There are three stages to a persuaded false confession. First, the interrogator plants the seeds of doubt in the suspect's belief that he is innocent, causing the suspect to second-guess himself.<sup>29</sup> In contrast to a coerced-compliant confession, the confusion generated by this tactic places the suspect in a state of memory limbo, making the suspect unsure about whether he committed the crime or not. Second, the interrogator explains away the memory loss either by claiming it was repressed, or by suggesting the suspect must have experienced some sort of blackout.<sup>30</sup> Finally, the interrogator attempts to craft a post-admission narrative to corroborate the confession.<sup>31</sup> Typically he does this by supplying the suspect with details consistent with the crime scene and subsequent investigation.<sup>32</sup> Like Kassin, Ofshe and Leo emphasize that this is an extremely uncommon phenomenon that tends to occur only after a series of unusually lengthy and psychologically intense interrogations.<sup>33</sup>

Two additional observations should be mentioned. First, false confession theorists note that the reactions of a guilty person differ from that of an innocent suspect when confronted with the allegation of a crime.<sup>34</sup> A guilty party is "insulated from shock because he has always been aware of possible detection," while an innocent person remains confused that he is a suspect.<sup>35</sup> Second, they emphasize the importance of a post-admission narrative, which consists of the corroborating details given after a suspect has confessed.<sup>36</sup> A simple admission of "I did it" is worth relatively little if it is neither supported by external evidence nor buttressed by a post-admission narrative that is consistent with the facts of the case. Assuming the interrogators do not craft the post-admission narrative for the suspect, Professors Leo and Ofshe claim that by comparing the post-admission narrative to the facts of the case, one might determine the veracity of a particular confession.<sup>37</sup> It is self-evident that a guilty person can prove his accurate knowledge of the crime; however, an

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<sup>29</sup> *Id.* at 1107.

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

<sup>31</sup> Leo & Ofshe, *supra* note 20, at 990-91.

<sup>32</sup> *Id.* at 991-92.

<sup>33</sup> *Id.* at 1117.

<sup>34</sup> *Id.* at 989.

<sup>35</sup> *Id.*

<sup>36</sup> Leo & Ofshe, *supra* note 20, at 991-92.

<sup>37</sup> *Id.* at 993.

innocent person cannot prove his ignorance. A good fit between the post-admission narrative and the crime is strong evidence of guilt. A poor fit is, at best, *consistent* with innocence, but does not dispose of the inquiry. Nevertheless, the post-admission narrative test is a critical component of the false confession theorists' claims that their methodology can help detect false confessions.

Courts have been terribly divided over the admissibility of this typology as expert testimony for over two decades. Part II begins with an overview of the admissibility of confessions, and of expert testimony in general. Part III then shifts to a discussion about the lower courts' divide over the admissibility of false confession expert testimony.

## II. CURRENT JURISPRUDENCE

### A. Historic Safeguards Against Unreliable Confessions

Historically, confessions were excluded only when they were deemed unreliable,<sup>38</sup> a rule that stretches back to eighteenth century common law.<sup>39</sup> By the end of the nineteenth century, the Supreme Court began challenging the notion that innocent people never incriminate themselves.<sup>40</sup> Confessions extracted from particularly abusive interrogations began to forfeit some of their presumptive weight in court.<sup>41</sup> In 1936, the Supreme Court turned to the Due Process Clause of the Fourteenth Amendment and ruled for the first time that a confession was involuntary, and therefore inadmissible, when police use violence during an interrogation.<sup>42</sup> The key question was whether the confession was trustworthy—a concept that has since become synonymous with reliability. This common law standard remained relatively untouched until the mid-1960s, when *Massiah v. United States*<sup>43</sup> and *Miranda v. Arizona*<sup>44</sup> provided a constitutional

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<sup>38</sup> Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 111-12 (1997).

<sup>39</sup> *The King v. Warickshall*, (1783) 168 Eng. Rep. 234, 234-236 (K.B.).

<sup>40</sup> *Hopt v. Utah*, 110 U.S. 574, 585 (1884).

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

<sup>42</sup> *Brown v. Mississippi*, 297 U.S. 278, 286 (1936).

<sup>43</sup> 377 U.S. 201 (1964).

basis to exclude confessions based upon certain police interrogation tactics.<sup>45</sup> The first question to determine whether a confession is admissible under *Miranda* is whether a suspect was informed of his specific rights—was he *Mirandized*?<sup>46</sup> The next inquiry is whether the suspect invoked his right to not speak at all, or the right to speak only with an attorney present.<sup>47</sup> Finally, the court must ask whether the defendant voluntarily waived those rights.<sup>48</sup> Although *Miranda* is seemingly under a perpetual siege by legal scholars who believe it is too weak, it nevertheless protects suspects by employing a strong exclusionary rule that bars the admission of confessions given during a police interrogation that fails to meet *Miranda*'s precepts.<sup>49</sup>

In *Massiah*, the Court held that the Sixth Amendment's right to counsel is violated if, after suspects have been indicted, the police solicit inculpatory statements from them without their attorney present.<sup>50</sup> *Massiah* was later expanded in *Brewer v. Williams*<sup>51</sup> to apply once adversarial proceedings have been initiated against the suspect, but not during the custodial interrogations that take place before an indictment is secured.<sup>52</sup> *Miranda*, however, applies to all interroga-

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<sup>44</sup> 384 U.S. 436 (1966).

<sup>45</sup> White, *supra* note 38, at 113 (“[D]uring the mid-1960s, *Messiah* . . . and . . . *Miranda* . . . provided new constitutional bases for excluding confessions obtained as a result of police interrogation.”).

<sup>46</sup> *Edwards v. Arizona*, 451 U.S. 477, 481-82 (1981) (determining that in order for an interrogation to be constitutional, the putative defendant must be told of his “right to remain silent” and his right to an attorney before the interrogation begins (citing *Miranda*, 384 U.S. at 473-74)).

<sup>47</sup> *Id.* at 481 (citing *Miranda*, 384 U.S. at 473-74).

<sup>48</sup> White, *supra* note 38, at 114 (citing *Miranda*, 384 U.S. at 444); see also *North Carolina v. Butler*, 441 U.S. 369, 371-72 (1979) (discussing a suspect's voluntary and intelligent waiver of his *Miranda* rights).

<sup>49</sup> See Nathan L. Burrow, *A Patane in the Neck: Should Mississippi Suppress Physical Evidence Discovered Pursuant to Miranda Violations As Fruits of the Poisonous Tree?*, 77 *Miss. L.J.* 1141, 1157 (2008) (“The exclusionary remedy is triggered whenever a suspect is subjected to coercive interrogation methods, and *Miranda* furthers this end by affording a presumption of coercion where a suspect is questioned without being advised of his rights.” (citing *United States v. Patane*, 542 U.S. 630, 639-40 (2004))). In fact, the *Miranda* Court spends a considerable amount of time discussing a variety of police tactics that could take a heavy toll on individual liberty. *Miranda*, 384 U.S. at 448-58.

<sup>50</sup> *Massiah*, 377 U.S. at 206.

<sup>51</sup> 430 U.S. 387, 398, 404 (1977).

<sup>52</sup> *Rothgery v. Gillespie County*, 128 S. Ct. 2578, 2579 (2008) (ruling that for purposes of attaching the right to counsel, adversarial proceedings begin when the criminal defendant initially appears before a magistrate judge, where he learns of the charges against him and his liberty is subject to restriction).

tions, whether adversarial proceedings have begun or not.<sup>53</sup> After *Brown v. Mississippi*,<sup>54</sup> the most important factor upon which the Court focused when determining the admissibility of a confession was its reliability.<sup>55</sup> Confessions became less reliable in those instances where inhumane interrogation procedures were used—including violence and the “third degree.”<sup>56</sup>

After more than twenty years, the Supreme Court applied *Miranda* to false confessions in *Colorado v. Connelly*.<sup>57</sup> Connelly approached a Denver police officer and confessed to a murder.<sup>58</sup> Both the officer and the detective called to the scene informed Connelly of his *Miranda* rights, and he insisted that he understood them.<sup>59</sup> After providing grisly details of the murder of Mary Ann Junta, a young girl whom he claimed he had killed a year earlier, Connelly took the officers to the exact scene of the crime.<sup>60</sup> The entire time he was providing these statements Connelly appeared normal and lucid, and was under little to no pressure from the policemen accompanying him.<sup>61</sup> The next day however, he became “visibly disoriented” during an interview with the public defender assigned to his case.<sup>62</sup> After an evaluation in the state hospital, Dr. Jeffrey Metzner, a psychiatrist, determined that Connelly was suffering from chronic schizophrenia and was in a psychotic state, at least as of the day before he confessed.<sup>63</sup> Connelly claimed that the voice of God had given him a choice: confess to the murder or commit suicide.<sup>64</sup> Accordingly, the defense moved to suppress all of his statements.<sup>65</sup> Dr. Metzner testified at the suppression hearing that the psychosis motivated his confession, and therefore, impaired his cognitive abili-

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<sup>53</sup> *Miranda*, 384 U.S. at 444-45.

<sup>54</sup> 297 U.S. 278 (1936).

<sup>55</sup> See YALE KAMISAR, POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY 20 (1980); Laurie Magid, *Deceptive Police Interrogation Practices: How Far Is Too Far?*, 99 MICH. L. REV. 1168, 1173 (2001).

<sup>56</sup> *Brown*, 297 U.S. at 285.

<sup>57</sup> 479 U.S. 157 (1986).

<sup>58</sup> *Id.* at 160.

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

<sup>60</sup> *Id.* at 160-61.

<sup>61</sup> *Id.* at 161.

<sup>62</sup> *Connelly*, 479 U.S. at 161.

<sup>63</sup> *Id.* at 161.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 162.

ties to understand his *Miranda* waiver.<sup>66</sup> Although concluding that the police interrogators had done nothing wrong, the Colorado courts ruled that the confession was involuntary and suppressed Connolly's statements.<sup>67</sup> The United States Supreme Court reversed, holding that voluntariness, under the Fifth Amendment, depends upon "the absence of police overreaching, not on 'free choice' in any broader sense of the" term.<sup>68</sup> While noting that a defendant's mental condition may be relevant, the Court rejected the notion that a particular mental condition—absent police misconduct—could be dispositive when determining a confession's voluntariness.<sup>69</sup> Indeed, this was hardly surprising since the Court has consistently focused on police misconduct when determining voluntariness since the 1940s.<sup>70</sup>

Although *Connolly* was a natural extension of the Court's historical focus on police misconduct, for the first time the Court separated the analytically distinct concepts of voluntariness and reliability.<sup>71</sup> The former, from that point forward, remained a matter of law to be determined by a judge, while the latter remained a matter of fact to be considered by a jury. This becomes a critical distinction when determining the admissibility of expert testimony on false confessions. For example, in some cases the testimony may touch upon issues of voluntariness and may only be properly introduced during a

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

<sup>67</sup> *Connolly*, 479 U.S. at 162.

<sup>68</sup> *Id.* at 169-70.

<sup>69</sup> *Id.* at 170-71.

<sup>70</sup> *See, e.g.*, *Mincey v. Arizona*, 437 U.S. 385, 399-402 (1978) (holding that a confession is excludable where the defendant is subjected to a long interrogation while incapacitated and sedated in an intensive-care unit); *Greenwald v. Wisconsin*, 390 U.S. 519, 519-21 (1968) (observing that defendant had been interrogated for over eighteen hours without food or sleep); *Beecher v. Alabama*, 389 U.S. 35, 36 (1967) (excluding a confession obtained after a police officer held a gun to defendant's head); *Davis v. North Carolina*, 384 U.S. 737, 743, 745-46 (1966) (subjecting the defendant to sixteen days of incommunicado isolation within a windowless cell, repeated interrogations, and limited food); *Culombe v. Connecticut*, 367 U.S. 568, 625 (1961) (labeling police tactic of interrogating defendant nonstop for five days as "coercive"); *Reck v. Pate*, 367 U.S. 433, 441-42 (1961) (excluding confession where defendant was held for four days with inadequate food and medical attention); *Payne v. Arkansas*, 356 U.S. 560, 567 (1958) (rejecting confession where defendant had been held incommunicado for three days with little food and where police threatened defendant with a lynch mob); *Ashcraft v. Tennessee*, 322 U.S. 143, 149-50 (1944) (noting that defendant had been kept awake for thirty-six hours during interrogations).

<sup>71</sup> *Crane v. Kentucky*, 476 U.S. 683, 687 (1986) (holding that "evidence bearing on the voluntariness of a confession and evidence bearing on its credibility fall in conceptually distinct and mutually exclusive categories").

suppression hearing as a question of law for a judge or judicial panel.<sup>72</sup> In other cases, however, the testimony may question the reliability of the confession and is properly an issue for the trial itself.<sup>73</sup> This Comment concerns itself with the latter, the admissibility of expert testimony during trial, and therefore focuses on that testimony which necessarily implicates the reliability of a particular confession.

### B. The Admissibility of Expert Testimony

Rule 702 of the Federal Rules of Evidence governs the admissibility of expert testimony, and is based on the Supreme Court's ruling in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>74</sup> Rule 702 places limits on the admissibility of expert testimony purportedly based upon scientific, technical, or other specialized knowledge.<sup>75</sup> The judge's task is to ensure that the testimony is both reliable and assists "the trier of fact to understand the evidence or to determine a fact in issue."<sup>76</sup> The reliability of an expert's testimony can be revealed through his methodology, while the relevance is made known by determining whether the testimony will assist the jury as the trier of fact. The testimony will fall under the definition of "scientific" if it has grounding in the methods and procedures of science.<sup>77</sup> This requirement relates to the testimony's relevance by requiring a valid and topical connection to the issue in question. Put differently, the testimony must "fit" the case at hand, a consideration that is not always obvious.<sup>78</sup> Additionally, the subject of the expert's testimony must be "scientific . . . knowledge."<sup>79</sup> To be "scientific" implies that the testimony is grounded in scientific methods and procedures, while "knowledge" connotes more than simply subjective belief or unsupported speculation, but rather a body of known facts or ideas accepted as true.<sup>80</sup> The *Daubert* Court adopted a method-based ap-

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

<sup>73</sup> *Id.* See, e.g., *Commonwealth v. Jackson*, 855 N.E.2d 1097, 1102 (Mass. 2006) (evaluating the reliability of the confession).

<sup>74</sup> 509 U.S. 579 (1993).

<sup>75</sup> *Id.* at 589-90.

<sup>76</sup> *United States v. Shay*, 57 F.3d 126, 132 (1st Cir. 1995) (quoting FED. R. EVID. 702).

<sup>77</sup> *Daubert*, 509 U.S. at 590.

<sup>78</sup> *Id.* at 591.

<sup>79</sup> *Id.* at 589-90.

<sup>80</sup> *Id.* at 590.

proach to determine whether particular testimony qualified as “scientific knowledge,” but also pointed out that Rule 702 applies equally to “technical, or other specialized knowledge” as well.<sup>81</sup>

Rule 104(a),<sup>82</sup> also mandates that once a party has proffered expert testimony, the trial judge must determine whether (1) the testimony is based upon scientific knowledge, and (2) whether it will assist the jury in the trier of fact.<sup>83</sup> To do so, the trial judge first makes a preliminary assessment of the testimony’s scientific qualities—or lack thereof—and whether it can properly be applied to the facts at issue. A court may exclude or limit testimony if it is prejudicial, misleading, wasteful, confusing, or its cumulative negative impacts outweigh its probative values.<sup>84</sup> There are a number of assessments that will influence the judge’s decision calculus, including: (1) whether the theory can be empirically tested; (2) whether this testing has revealed the known or potential error rate of the theory; (3) whether the theory has been subjected to peer review and publication; and (4) whether the theory has been widely accepted within its respective field or community.<sup>85</sup>

The key is not the *conclusions* generated by the theory, but rather the *methodology* and *principles* upon which they rest. To find out whether an expert’s testimony will assist the trier of fact, a court must decide whether an untrained layperson would be qualified to determine intelligently a resolution to the particular issue without the help from those having more specialized knowledge of the matter.<sup>86</sup>

Ultimately, *Daubert* had two main holdings. First, that the “general acceptance test” articulated in *Frye v. United States* is not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence.<sup>87</sup> Second, that the rules give the

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<sup>81</sup> *Id.* at 590, n.8.

<sup>82</sup> FED. R. EVID. 104(a) (“Preliminary questions concerning the qualification of . . . a witness . . . shall be determined by the court . . .”); *see also* *Bourjaily v. United States*, 483 U.S. 171, 175 (1987) (determining that admission may be established by a preponderance of proof).

<sup>83</sup> *Daubert*, 509 U.S. at 592.

<sup>84</sup> *Shay*, 57 F.3d at 134.

<sup>85</sup> *Daubert*, 509 U.S. at 593-94.

<sup>86</sup> *Shay*, 57 F.3d at 132.

<sup>87</sup> *Daubert*, 509 U.S. at 588-89; *but see* *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923) (excluding expert testimony because the scientific procedure upon which the testimony relied was not “sufficiently established to have gained general acceptance in the particular field in which it belongs.”).

trial judge the responsibility of determining whether the expert's testimony is both reliable and relevant before allowing it to enter the record.<sup>88</sup> In *Kumho Tire Co., Ltd. v. Carmichael*, the Supreme Court extended the *Daubert* standards to include all expert testimony, whether it is "scientific knowledge," "technical knowledge," or "specialized knowledge."<sup>89</sup> A preliminary assessment must then be made by the trial court to determine whether the reasoning and methodology are valid and whether they can be properly applied to the facts in issue.<sup>90</sup> A similar analysis is to be done when the testimony is proffered as "technical" knowledge. That said, even if the general field itself has qualified for expert testimony, the specific testimony proffered might not be based on an expert's special skills:

An expert's opinion is helpful only to the extent the expert draws on some special skill, knowledge, or experience to formulate [his] opinion; the opinion must be an *expert* opinion (that is, an opinion informed by the witness's expertise) rather than simply an opinion broached by a purported expert.<sup>91</sup>

Four years after *Daubert*, the Supreme Court clarified that the decision of a trial judge to exclude or admit expert testimony under Rule 702 can only be reviewed for an abuse of discretion.<sup>92</sup>

### C. A Nation Divided: The Admissibility of False Confession Expert Testimony in State and Federal Court

The admissibility of false confession expert testimony has not been addressed by the Supreme Court, despite the contentious debate being played out on all levels of state and federal courts.<sup>93</sup> One reason the Court has explicitly avoided this issue might involve the relative infancy of serious false confession research. The Court may

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<sup>88</sup> *Daubert*, 509 U.S. at 589.

<sup>89</sup> 526 U.S. 137, 147 (1999).

<sup>90</sup> *Daubert*, 509 U.S. at 592-93.

<sup>91</sup> *United States v. Benson*, 941 F.2d 598, 604 (7th Cir. 1991).

<sup>92</sup> *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141 (1997).

<sup>93</sup> See James R. Agar, II, *The Admissibility of False Confession Expert Testimony*, ARMY LAW., Aug. 1999, at 26, 35-37, 42 (1999).

want to avoid tainting the admissibility debate one way or another by ruling on the matter before definitive methodologies are constructed. The Court may also recognize the muddled nature of the debate and how difficult it would be to craft an admissibility rule that could effectively cater to widely divergent fact patterns. Finally, the Court might be satisfied with the ad hoc approach taken thus far by the lower courts when applying *Daubert* to the admissibility of false confession expert testimony. Whatever the reason for the Supreme Court's avoidance of this question, there is no doubt that federal courts and state courts alike vigorously disagree on the question of admissibility of false confession expert testimony.<sup>94</sup>

Each decision in this judicial split has gone one of four ways. Some courts admit expert testimony that discusses a particular defendant's mental condition at the time the confession was given as a way to discredit its reliability.<sup>95</sup> Others admit the testimony, but limit the discussion to a general description of the phenomenon.<sup>96</sup> Still others permit not only a general discussion of the phenomenon, but also a particularized discussion of the elements present in the suspect's confession, stopping short of allowing the expert witness to pass judgment on the veracity of the confession.<sup>97</sup> Finally, for each example of admission, there are equally powerful examples of courts at the state and federal level excluding the testimony—whether or not it discusses a cognizable mental condition, the false confession phenomenon in general, or the false confession theory as applied to the specific contours of the investigation. The discussion below briefly describes this rather strenuous judicial divide.<sup>98</sup>

The First Circuit launched one of the first volleys of this debate in *United States v. Shay*, where the defendant had proffered psychiatric testimony that he was suffering from “pseudologia fantastica,” a condition that causes a person to create an increasingly

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<sup>94</sup> See *id.*; Soree, *supra* note 9, at 227-54.

<sup>95</sup> See *Shay*, 57 F.3d at 131; *Raposo*, 1998 WL 879723 at \*6; *Caulley*, 2002 WL 392191, at \*4; *Stackhouse*, 2001 WL 1497217, at \*4.

<sup>96</sup> See *Belyea*, 159 F. App'x at 530; *Hall*, 93 F.3d at 1344-45; *Page*, 2 Cal. Rptr. 2d 898; *Boyer*, 825 So. 2d at 418-19; *State v. Miller*, No. 15279-1-III, 1997 WL 328740, at \*7 (Wash. Ct. App. 1997).

<sup>97</sup> See *Miller*, 770 N.E.2d at 773-74; *Hamilton*, 415 N.W.2d at 668-69; *Buechler*, 572 N.W.2d at 73; *Pritchett*, 557 S.E.2d at 208.

<sup>98</sup> See *Adams*, 271 F.3d at 1245; *Bachman*, 953 F.2d at 441; *Vent*, 67 P.3d at 670; *Cobb*, 43 P.3d at 869; *Davis*, 32 S.W.3d at 609; *Philips*, 692 N.Y.S.2d at 918-19.

complex web of lies in order to place himself at the center of attention.<sup>99</sup> The First Circuit, although reversing the district court, agreed that the testimony touches upon the credibility of a particular witness—in this case the defendant himself.<sup>100</sup> Noting that Rule 702 prohibits an expert from testifying about the veracity of a particular witness “because the opinion exceeds the scope of the expert’s specialized knowledge and therefore merely informs the jury that it should reach a particular conclusion,” the *Shay* court nevertheless admitted the expert.<sup>101</sup> However, the court limited his testimony to a discussion within his expertise, namely the psychiatric diagnosis, and not whether he thought the defendant’s confession was a lie.<sup>102</sup> While acknowledging that the jury has the general capacity to “assess the reliability” of the defendant’s statements without the assistance of an expert, the court decided that it was plainly erroneous for the district court to assume that the jurors could understand the implications of a specific mental disorder without the assistance of the psychiatrist.<sup>103</sup>

Even though the testimony was ruled admissible under Rule 702, the court cautioned that the testimony might still be “disallowed pursuant to Federal Rule of Evidence 403 if its prejudicial, misleading, wasteful, confusing, or cumulative nature substantially outweighs its probative value.”<sup>104</sup> Since experts base their testimony on science, jurors tend to find the testimony more convincing, and therefore the risk of misleading and confusing them increases.<sup>105</sup>

*Shay*, although considered a victory of sorts for proponents of expert testimony for false confessions, is more accurately characterized as a victory for expert testimony on mental disorders. The testimony in question did not involve an expert of false confessions, but rather a psychiatrist who had studied and analyzed the defendant

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<sup>99</sup> *Shay*, 57 F.3d at 129-30.

<sup>100</sup> *Id.* at 131.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 133-34.

<sup>104</sup> *Shay*, 57 F.3d at 134.

<sup>105</sup> *Id.*; see also Soree, *supra* note 9, at 230 (“The court suggested that the trial judge may need to exercise more caution in applying Rule 403 to experts than to lay testimony, because the jury may find scientific evidence more convincing and, thus, the potential for the jury to be misled is increased.”).

carefully and diagnosed him with a cognizable mental illness.<sup>106</sup> The court's decision was based more on the jury's inability to diagnose and understand the contours of this particular illness, than on its inability to determine the credibility of a particular witness's testimony, or the circumstances that brought about the confession. Other federal cases have admitted expert testimony on false confessions, but have qualified their admission with various limitations.<sup>107</sup>

For example, in *United States v. Hall*, the Seventh Circuit found that the district court had erred in excluding the testimony of Professor Ofshe and Dr. Traugott, a psychiatrist.<sup>108</sup> Since Dr. Traugott would have testified about Hall's personality disorder and its effect on one's statements, and Professor Ofshe would have "let the jury know that a phenomenon known as false confessions exists, how to recognize it, and how to decide whether it fit the facts of the case being tried," the court ruled that there was a link connecting each man's testimony to the other, making both relevant to a complete defense.<sup>109</sup> On remand, the district court reconsidered the State's motion to exclude Professor Ofshe's testimony and he was given the opportunity to testify about the existence of false confessions and the methodology of his studies,<sup>110</sup> but he was "reluctant to state whether the given confession was in fact true or false."<sup>111</sup> Professor Ofshe instead used the opportunity to announce and explain his theory from the platform of the witness stand, refusing to actually apply it to the case at hand.<sup>112</sup>

Ignoring for the moment the fact that the jury is ultimately the arbiter of credibility, and the final fact finder during a criminal trial, Professor Ofshe's inability to conclude whether Hall's confession was true or false raises an important question about the theory's credibility: if the theory can rarely be applied by its own proponents/experts to specific cases, how is a jury supposed to grapple with its implications and properly apply it given their relative inexperience? That one of the leading scholars in this field is unwilling to

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<sup>106</sup> *Shay*, 57 F.3d at 129.

<sup>107</sup> *See Hall*, 93 F.3d at 1344-45.

<sup>108</sup> *Id.* at 1339, 1341.

<sup>109</sup> *Id.* at 1344-45.

<sup>110</sup> *United States v. Hall (Hall II)*, 974 F. Supp. 1198, 1203-04 (C.D. Ill. 1997).

<sup>111</sup> Soree, *supra* note 9, at 235.

<sup>112</sup> *Hall II*, 974 F. Supp. at 1205.

go on the record and opine about the veracity of a particular confession after applying his own analytical framework reveals a deep structural problem with admitting this type of testimony. Nevertheless, the district court placed three restrictions on his testimony: first, he was not allowed to say that Hall's confession was false; second, he was not allowed to testify about the discrepancies between the post-admission narrative and the evidence, since doing so would trample over the jury's role; and finally, the district court did not allow Professor Ofshe to give testimony regarding the defendant's mental condition since "Ofshe [was] not a clinical psychologist nor a psychiatrist and ha[d] no expertise in this area."<sup>113</sup>

Steven B. Duke argues that the "strongest case for admissibility of expert confession testimony would appear to be the psychiatrist or psychologist who treated the confessor before he was interrogated."<sup>114</sup> This argument seems analytically sound: a mental expert would have the most insight into a particular suspect's mental state and could, in theory, opine about his susceptibility to confess falsely and why any particular confession might be false. However, this is an argument in support of mental health expert testimony, which is distinct from false confession expert testimony. Indeed, voluntary confessions usually result "from an underlying psychological disturbance or psychiatric disorder."<sup>115</sup> Presumably, a psychiatrist would have more insight into a mentally disturbed suspect than a professor of criminal law. Yet false confession experts, when opining about voluntary false confessions, are also opining about a medical condition about which they may have no expertise. As a result, many federal cases admitting expert testimony on false confessions apply only to clinical psychiatrists rather than scholars of the phenomenon of false confessions.<sup>116</sup> For example, the Southern District of New York admitted expert testimony from a clinical psychologist who opined that the defendant's mental conditions made him suggestible and prone to shift his answers in response to negative feedback.<sup>117</sup>

However, other federal cases have been far less forgiving

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<sup>113</sup> *Id.*

<sup>114</sup> Steven B. Duke, *Does Miranda Protect the Innocent or the Guilty?*, 10 CHAP. L. REV. 551, 573 (2007).

<sup>115</sup> Leo, *supra* note 14, at 16.

<sup>116</sup> See *United States v. Mamah*, No. 00 CR 396, 2002 WL 34358182, at \*1 (N.D. Ill. Feb. 4, 2002), *aff'd*, 332 F.3d 475 (7th Cir. 2003); *Raposo*, 1998 WL 879723, at \*5.

<sup>117</sup> *Raposo*, 1998 WL 879723, at \*3.

when determining the admissibility of expert testimony that touches upon the credibility of the defendant's confession, even when such testimony is proffered by a mental health specialist. In *United States v. Adams*, the Tenth Circuit heard an appeal from the district court's exclusion of a psychologist's testimony that challenged the credibility of the defendant's statements to police.<sup>118</sup> The psychologist was prepared to testify about the defendant's "low neurocognitive function[s]," its effects on his personality, and how it increased his propensity to lie to police.<sup>119</sup> Relying on Rule 702, the court decided that such expert testimony, which necessarily touches upon witness credibility, invades the province of the jury and exceeds the scope of the witness's expertise.<sup>120</sup> The psychologist was presented as nothing more than a professionally trained human lie detector.<sup>121</sup> The court also applied Rule 403 and found that such testimony is overly prejudicial for the same reasons the First Circuit cautioned about in *Shay*, namely that jurors tend to give such expert testimony a disproportionate amount of credence.<sup>122</sup>

The Seventh Circuit again addressed the question of admissibility in *United States v. Mamah*,<sup>123</sup> but this time chose to exclude the testimony, which not only demonstrates an inter-Circuit split across the nation, but also an intra-Circuit split on this question. In *Mamah*, the defendant claimed that he falsely confessed as a result of his experience living under a military junta in Ghana and the police's interrogation techniques.<sup>124</sup> To this end, the defense proffered testimony from an anthropologist who was an expert on Ghanaian culture, and Professor Ofshe.<sup>125</sup> The court took issue with the testimony's reliability, pointing out that neither expert was a psychiatrist.<sup>126</sup> The Seventh Circuit also had problems with the relevancy of each expert's testimony, noting "the absence of an empirical link between [the experts'] research and the opinion that Mamah likely gave a

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<sup>118</sup> *Adams*, 271 F.3d at 1240.

<sup>119</sup> *Id.* at 1246.

<sup>120</sup> *Id.* at 1245.

<sup>121</sup> *Id.* at 1246 (noting that the expert was "little more than a professionally-trained witness testifying that, based upon his history, . . . 'Adams . . . would have lied.'").

<sup>122</sup> *Id.* at 1245.

<sup>123</sup> *Mamah*, 332 F.3d at 476.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

false confession.”<sup>127</sup> Although Ofshe was qualified to discuss the existence of false confessions, since he “could not connect his research to [the defendant’s] case” in any meaningful way, the court excluded his testimony.<sup>128</sup>

The state courts are also divided on this question. State-level decisions that ultimately admit false confession expert testimony have followed a similar pattern of qualified admission with a bias toward experts with degrees in psychology or psychiatry.<sup>129</sup> Again, these decisions should not be interpreted as wholesale endorsements of expert testimony on false confessions, but rather admissions of expert testimony on psychological disorders, and psychiatric opinions. While false confession researchers typically focus on those defendants who suffer from mental ailments, psychological and psychiatric testimony is analytically distinct from any testimony that false confession theorists might offer. Nevertheless, in some instances false confession scholars are allowed to testify in state court,<sup>130</sup> although their testimony is usually limited to a discussion of false confessions in general.<sup>131</sup> Many other state courts exclude false confession expert testimony at trial, either because it does not meet the *Frye* standard,<sup>132</sup> it is unhelpful to or usurps the power of the jury,<sup>133</sup> or be-

<sup>127</sup> *Id.* at 478.

<sup>128</sup> *Mamah*, 332 F.3d at 478.

<sup>129</sup> See *State v. Burns*, 691 P.2d 297, 302 (Ariz. 1984) (finding that the trial court erred in excluding expert testimony regarding the effect of hallucinogenic drugs on the defendant’s confession); *People v. Lopez*, 946 P.2d 478, 484 (Colo. App. 1997) (admitting expert testimony by a psychologist who could opine on the psychological environment surrounding the interrogation); *People v. Rivera*, 777 N.E.2d 360, 361, 364 (Ill. App. Ct. 2001) (excluding the testimony of Professor Ofshe, but admitting the testimony of a clinical psychologist); *Kleypas*, 40 P.3d at 175, 178 (admitting the testimony of two clinical psychiatrists about the defendant’s mental state during the confession); *Hamilton*, 415 N.W.2d at 656 (admitting the testimony of a clinical psychologist, but limiting the testimony so that the expert does not become a “human lie detector”); *Beuchler*, 572 N.W.2d at 73 (allowing a clinical psychologist’s testimony regarding four psychological disorders afflicting the defendant); *Stackhouse*, 2001 WL 1497217, at \*2 (permitting the testimony of a psychologist whose analysis revealed a psychological profile which indicated that the defendant was susceptible to giving a false confession).

<sup>130</sup> *Boyer*, 825 So. 2d at 420 (admitting Professor Ofshe’s testimony).

<sup>131</sup> See *Page*, 2 Cal. Rptr. 2d at 912 (permitting a psychologist to testify about the general factors that might lead to a false confession); *State v. Miller*, No. 15279-1-III, 1997 WL 328740, at \*5-7 (Wash. Ct. App. 1997) (granting public funds so that Professor Ofshe could testify about false confessions generally).

<sup>132</sup> *State v. Free*, 798 A.2d 83, 92, 96 (N.J. Super. Ct. App. Div. 2002) (excluding Professor Kassin’s testimony because it did not pass the *Frye* test).

<sup>133</sup> *Vent v. State*, 67 P.3d 661, 669-70 (Alaska Ct. App. 2003) (excluding the testimony of

cause the testimony is unreliable or irrelevant.<sup>134</sup>

Clearly there is no consensus on either the federal or state level regarding the admissibility of false confession expert testimony. The debate rages on, in part, because both sides have plenty of case law on the federal and state levels to support either admissibility or exclusion. Despite the judicial split on the question, the literature written on this topic has a clear favorite—admissibility. The next section challenges the prevailing notion that false confession expert testimony should be admitted during a criminal trial.

### III. FALSE CONFESSION EXPERT TESTIMONY FAILS THE *DAUBERT* TEST

The *Daubert* decision, standing alone, addressed scientific expert testimony, not just expert testimony generally.<sup>135</sup> However, since false confession expert testimony is not simply generic expert testimony, but rather based—at least ostensibly—on empirical research, testing, and data collection, courts have consistently held that *Daubert* applies to its admission or exclusion.<sup>136</sup> Put differently, *Daubert* articulates a legal regime that governs the admissibility of scientific expert testimony;<sup>137</sup> since false confession expert testimony is a type of scientific expert testimony,<sup>138</sup> it is also governed by the *Daubert* regime and its antecedents.<sup>139</sup> Moreover, as mentioned

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Professor Leo because his conclusions were unquantifiable, and unhelpful to the jury); *People v. Wood* 793 N.E.2d 91, 100 (Ill. App. Ct. 2003) (citing *People v. Gilliam*, 670 N.E.2d 606, 619 (Ill. 1996)) (holding that juries can comprehend the effects of coercion and intimidation without the assistance of an expert witness); *Cobb*, 43 P.3d at 869 (reversing the trial court's admission of Professor Leo's testimony, reasoning that argument and cross examination can make the same point); *State v. Ritt*, 599 N.W.2d 802, 812 (Minn. 1999) (excluding the testimony on the grounds that juries are capable of assessing whether a police interrogation can elicit false confessions); *Bixler v. State*, 582 N.W.2d 252, 256 (Minn. 1998) (reinstating a trial court's exclusion of psychological testimony that was "nothing more than a composite of personal characteristics that might render an individual more susceptible" to giving a false confession).

<sup>134</sup> *People v. Son*, 93 Cal. Rptr. 2d 871, 883 (Ct. App. 2000) (excluding Professor Ofshe's testimony because there was no evidence that the interrogation was coercive).

<sup>135</sup> *Daubert*, 509 U.S. at 582.

<sup>136</sup> *See, e.g., Hall*, 93 F.3d at 1342 (reversing the district court's exclusion of false confession expert testimony because the district judge "never mentioned *Daubert* specifically.").

<sup>137</sup> *Daubert*, 509 U.S. at 589-90.

<sup>138</sup> *See Hall*, 93 F.3d at 1341-42 (citing *Daubert*, 509 U.S. at 593-94) (asking whether there is scientific validity to false confession theorists' methodology).

<sup>139</sup> *See, e.g., Shay*, 57 F.3d at 132 (applying *Daubert* and Rule 702 to the admissibility of

above, even when false confession expert testimony is proffered as nonscientific testimony, the same regime applies because *Kumho Tire* extended the *Daubert* decision to apply to all expert testimony, whether it is “scientific knowledge,” “technical knowledge,” or “specialized knowledge.”<sup>140</sup> Therefore, false confession expert testimony falls squarely under the *Daubert* regime governing the admissibility of scientific expert testimony.

Reliability remains the *sine qua non* of expert testimony. Although there are some courts that have chosen not to strictly apply *Daubert* to “technical” and “other specialized knowledge” testimony,<sup>141</sup> even these decisions have emphasized that if at least one thing “remains constant for all forms of expert testimony [it] is that there must be some degree of reliability of the expert and [his] methods.”<sup>142</sup> In *Daubert* the Supreme Court held that scientific testimony must be accompanied by evidentiary reliability.<sup>143</sup> This evidentiary reliability parallels scientific reliability.<sup>144</sup> A court may properly exclude expert testimony on false confessions based on its finding that the testimony is unreliable.<sup>145</sup> A similar exclusion was affirmed in *Kumho Tire*, where the Supreme Court reasoned that although the witness was an expert on tires, his methodology was unreliable.<sup>146</sup>

Reliability is a critical litmus test since an expert witness is an individual who is not otherwise related to the case, but is nevertheless allowed wide latitude to present opinions wrapped in scientific prestige. Admitting such testimony must be premised on a finding that the expert’s opinion meets a strict and rigorous standard of reliability.<sup>147</sup> Simply because a potential witness is considered an expert in the traditional sense does not mean that particular witness should be considered an expert for purposes of expert testimony.<sup>148</sup> The standards to become an “expert” within a particular field may be much

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false confession expert testimony).

<sup>140</sup> *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999).

<sup>141</sup> See, e.g., *United States v. Jones*, 107 F.3d 1147, 1157-58 (6th Cir. 1997) (examining handwriting analysis without applying *Daubert*); *Hall*, 974 F. Supp. at 1200.

<sup>142</sup> *Hall*, 974 F. Supp. at 1202.

<sup>143</sup> *Daubert*, 509 U.S. at 590.

<sup>144</sup> FED. R. EVID. 702.

<sup>145</sup> See *Shay*, 57 F.3d at 133.

<sup>146</sup> *Kumho Tire*, 526 U.S. at 153.

<sup>147</sup> See *Daubert*, 509 U.S. at 592-93.

<sup>148</sup> *Id.* at 597.

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lower than the standards the law demands of an expert witness.<sup>149</sup> Likewise, even if one is regarded as an expert on the subject of false confessions the field's notoriously unreliable analysis should disqualify experts like these from testifying in front of a jury. In other words, false confession theorists may be experts on false confessions in the traditional sense, but their analysis is too unreliable to be admitted as expert testimony during a criminal trial.

When determining whether to admit false confession expert testimony, a court should consider two factors: (i) whether the conclusions generated by the experts are supported by sufficient empirical data and tests; and (ii) whether the data reveals a known or potential rate of error.<sup>150</sup> Based on the research and evidence currently available, it seems clear that the testimony fails to meet either of these requirements (i.e. there is not enough empirical data on the subject, and as a result the theory has an unacceptably high rate of error). False confession scholars want to crown this type of testimony with "expert" status, but if the proffered expert's testimony is not sufficiently based upon scientific evidence, "at best [he] is offering a gratuitous opinion, and at worst is [exercising] undue influence on the jury."<sup>151</sup>

This section outlines five reasons why expert testimony on false confessions should not be admitted: (1) the evidence is based almost entirely upon anecdotal accounts of police-induced false confessions rather than empirical research; (2) the methodology suffers from an unacceptably high rate of error; (3) the phenomenon is not nearly as widespread as false confession scholars claim; (4) the testimony would invade the province of the jury; and (5) juries can protect against both false confessions and police coercion. The combination of these five issues presents serious doubts about the admissibility of false confession expert testimony.

### A. Insufficient Empirical Data

Another key component of expert qualification is whether the

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<sup>149</sup> See *Kumho Tire*, 526 U.S. at 152 (explaining that the court must determine whether the expert employs the same standards in the courtroom which "characterizes the practice of an expert in the relevant field").

<sup>150</sup> *Daubert*, 509 U.S. at 593-94.

<sup>151</sup> *Hall*, 93 F.3d at 1343.

theory or technique has been or can be empirically tested.<sup>152</sup> To that end, a critical mass of empirical research must be collected and analyzed in order to test the hypothesis that certain police interrogation tactics cause false confessions. At this point, however, no evidence exists that adequately addresses the question of how often certain interrogation tactics lead to false confessions.<sup>153</sup> In fact, very little evidence exists that even answers the more general question of how often the phenomenon of false confessions occurs—regardless of the police tactic used.<sup>154</sup> This rather gaping hole in the empirical research presents not only serious problems for those advocating an overhaul of police interrogation tactics, but also for those who seek to proffer false confession expert testimony.

At best, the existing research has shown: 1) that certain interrogation techniques are more likely than other techniques to result in false confessions; and 2) that certain types of people—such as juveniles and the mentally impaired—appear somewhat more likely than the average suspect to give a false confession. The research has not demonstrated, however, how often the techniques in question result in false confessions, nor what number of suspects in these more vulnerable groups give false confessions . . . . [The research] does not demonstrate that persons in these groups give false confessions at a substantial rate.<sup>155</sup>

However, some scholars have conducted empirical research. For example, Professor Leo and Professor Ofshe conducted a study in 1998 involving sixty alleged cases of false confessions selected from a pool of millions of interrogations, which they both acknowledge does not represent a “statistically adequate sample.”<sup>156</sup> On top of its statistical drawbacks, several more analytical weaknesses of the

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<sup>152</sup> *Daubert*, 509 U.S. at 593.

<sup>153</sup> LAWRENCE S. WRIGHTSMAN & SAUL M. KASSIN, *CONFESSIONS IN THE COURTROOM* 75 (1993) (noting the impossibility of determining the frequency at which innocent suspects confess falsely).

<sup>154</sup> *Id.* at 85.

<sup>155</sup> Magid, *supra* note 55, at 1192.

<sup>156</sup> 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, 435-36 (1998).

study are revealed upon closer scrutiny. First, of the sixty cases cited, only twenty-nine involved suspects who were brought to trial and convicted, at least in part, due to the confession.<sup>157</sup> Assuming the inculpatory statements made in the remaining thirty-one cases were all false, the fact that they were not taken to trial and convicted demonstrates that the system's screening devices worked more often than not. A miscarriage of justice has not occurred if an innocent suspect does not get convicted. In fact, it is quite likely the inculpatory statements made by the innocent suspects did not even rise to the level of a confession.<sup>158</sup>

Second, regarding the twenty-nine cases that involved a conviction, there is a serious question about whether Professors Leo and Ofshe are actually correct when they claim that the suspects were innocent, and that therefore their confessions were false. Their assertions that the suspects' confessions were false are hardly indisputable, since the methodology used to make these determinations, at times, is tenuous, which raises corollary concerns about their methodology's empirical legitimacy; a portion of their research is based upon secondary sources and old press accounts of the crime and the subsequent trial.<sup>159</sup> For one case, Leo and Ofshe rely primarily on a segment of ABC's 20/20,<sup>160</sup> to conclude that a defendant was wrongfully executed based upon his false confession.<sup>161</sup> Perhaps the most peculiar instance where Leo and Ofshe claim that a false confession led to a miscarriage of justice involves the case of Paul Ingram, where the only supporting citation is an article written by Ofshe himself.<sup>162</sup>

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<sup>157</sup> See *id.* at 477.

<sup>158</sup> This observation raises the question of what makes a confession a confession. Although this is an important issue, this discussion would exceed the scope of this Comment. Suffice it to say that of the thirty-one cases that did not go to trial, we do not know how many involved suspects that uttered the phrase, "I did it," or simply some phrase that could have been considered inculpatory, but only partially so.

<sup>159</sup> Leo & Ofshe, *supra* note 156, at 435 n.15.

<sup>160</sup> Leo & Ofshe, *supra* note 156, at 496 n.10. See also *20/20: Confession at Gunpoint?* (ABC television broadcast May 29, 1991) (suggesting that the defendant's confession was coerced).

<sup>161</sup> Leo & Ofshe, *supra* note 156, at 467-68; see also *id.* at 455-57 (citing *Eye to Eye with Connie Chung: Confession* (CBS television broadcast Jan. 13, 1994)) (providing further support of an assertion that a convicted murderer's confession was false).

<sup>162</sup> Karen A. Olio & William F. Cornell, *The Ingram Case: Pseudomemory or Pseudoscience?*, VIOLENCE UPDATE, June 1994, at 5 (1994) (criticizing Ofshe's article as "speculative").

Another study, conducted by Hugo Bedau and Michael Radelet, involving 350 alleged cases of false confessions, also heavily relies on questionable sources in deciding whether the suspect was innocent or not.<sup>163</sup> In many of the cases in their study, a court of law had not determined the innocence of the suspect, but Bedau and Radelet nevertheless made that conclusion themselves.<sup>164</sup> Often, their conclusions are belied by the fact that the suspects remain in jail because a court, after having reviewed the evidence, could not make a finding of innocence.<sup>165</sup> At times Bedau and Radelet's conclusions are so subjective they even concede that some are "borderline" and perhaps even "incorrect."<sup>166</sup>

One critic argues that the "primary method for determining guilt or innocence in these cases (not to mention the accuracy of the confessions) seems both unscientific and highly subjective."<sup>167</sup> Simply put, false confession theorists make empirical claims without having conducted sufficient empirical research. The best sample involves a few dozen cherry-picked interrogations from a sample size of over twenty-three million confessions, or roughly 0.00000152% of the total.<sup>168</sup> This sample size is hardly significant, much less reliable. These shortcuts in research methods fundamentally undercut the corresponding claims regarding the frequency of false confessions and the applicability of their research to particular cases when proffering false confession expert testimony. Right now, the numbers above roughly indicate that one out of every million police interrogations produces a false confession.<sup>169</sup> The argument that the witness's conclusion—presumably that the confession was false, or could have

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<sup>163</sup> Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 23-24 (1987).

<sup>164</sup> See *id.* at 47-48 (explaining that the study's determination of a suspect's innocence may not be universally accepted).

<sup>165</sup> *Id.* at 47.

<sup>166</sup> *Id.*

<sup>167</sup> Agar, *supra* note 93, at 29.

<sup>168</sup> See Paul G. Cassell, *Balanced Approaches to the False Confession Problem: A Brief Comment on Ofshe, Leo, and Alschuler*, 74 DENV. U. L. REV. 1123, 1127 (1997) (calculating that twenty-three million suspects were interrogated between 1987 and 1997 for index crimes).

<sup>169</sup> See Paul G. Cassell, *Protecting the Innocent from False Confessions and Lost Confessions and from Miranda*, 88 J. CRIM. L. & CRIMINOLOGY 497, 516-17 (1998) (discussing that a rate of wrongful convictions of 0.5% is inflated and an actual estimate of less than 1% can include 0.0001%).

been false—is a critical and relevant finding, even if true, misses the point. The focus here is “not on the conclusion[,]” which in theory can be vitally important, but rather on the methodology and principles behind the conclusion.<sup>170</sup> In this case, the conclusion and the principles behind the conclusion are both logical and coherent: some people confess to crimes they did not commit during the course of a police interrogation. That being said, the methodology is too unreliable to admit as expert testimony.

For example, Saul Kassin and Katherine Keichel conducted an experiment using undergraduates who were led to believe they were participating in a typing study.<sup>171</sup> Before beginning, each student was told that pressing the ALT key “would cause the program to crash.”<sup>172</sup> Of course the computers in the experiment were programmed to shut down in instances where the ALT key was not pressed.<sup>173</sup> Of those participants whose computer shut down nearly seventy-percent signed a confession stating they had hit ALT, nearly thirty-percent “internalized” the admission, and nearly ten-percent provided collaborating details.<sup>174</sup> Kassin and Keicher’s conclusion was that the experiment supported the “provocative notion that the presentation of false incriminating evidence—an interrogation ploy that is common among the police and sanctioned by many courts—can induce people to internalize blame for outcomes they did not produce.”<sup>175</sup>

The problem with false confession experts’ reliance upon these experiments to illustrate the dynamics of false confession production is that they are unrealistic when compared to an act involving criminal intent. The built-in limitations of this experiment are obvious: none of the subjects were accused of an actual crime, and no suspect faced anything close to the high stakes a criminal suspect faces. Kassin concedes that the subjects themselves are not the typical false confession victims, given that they were relatively intelligent college students under very little pressure to defend themselves

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<sup>170</sup> *Daubert*, 509 U.S. at 595.

<sup>171</sup> Kassin & Keichel, *supra* note 16, at 126.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 127; *see also* Soree, *supra* note 3, at 198 (describing the Kassin & Keicher experiment).

<sup>175</sup> Kassin & Keichel, *supra* note 16, at 127.

against a relatively trivial allegation.<sup>176</sup> The entire experiment might as well have been for naught since the most important empirical question remained unanswered: to what extent did the students' behavior generalize to criminal suspects under interrogation?

In fact, Professor Leo also rejects any parallel between these experimental laboratory tests and the notion that suspects sometimes falsely confess.<sup>177</sup> For both ethical and practical constraints, there is no data that conclusively demonstrates that officers can manufacture false memories during even the most rigorous of interrogations, and no evidence actually indicates that an interrogation can cause suspects to *create* memories.<sup>178</sup> If a suspect begins citing memories of the crime that are consistent with the investigation, and without being force-fed any details from interrogators, it is more likely than not that these memories are legitimate rather than false creations of memory. The "experimental studies specifically demonstrating the distortion and creation of false memories in the laboratory are not directly relevant to and thus misconceive the psychology of persuaded false confessions."<sup>179</sup> There is no substitute for a real interrogation where the interrogating party is pulling all the stops, and the suspect has far more riding on its outcome than simply taking the fall for a mistaken keystroke. Without valid parallels with real interrogations, the empirical research will always be fatally limited to unrealistic experiments that prove very little. This is perhaps the biggest reason why false confession researchers rely so heavily upon anecdotal evidence and secondary sources.

False confession theorists have heard the oft-repeated critique that their research is missing an empirical anchor, and have responded in several ways.<sup>180</sup> First, they argue that since no government or private organization keeps track of how frequently false con-

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

<sup>177</sup> Leo, *supra* note 19, at 223.

<sup>178</sup> See Agar, *supra* note 93, at 28-29.

The emotional and psychological damage inflicted on test subjects to falsely confess to a murder or rape they did not commit exceeds the tolerance of most people. . . . Therefore, adopting Kassin's experiment to more closely approximate the conditions faced by the typical criminal suspect may not be possible.

*Id.*

<sup>179</sup> Leo, *supra* note 19, at 224.

<sup>180</sup> See Saul M. Kassin et al., *Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs*, 31 LAW & HUM. BEHAV. 381, 395 (2007).

fessions occur, a meaningful incidence rate cannot be determined, and therefore should not be expected.<sup>181</sup> Second, researchers trying to identify a possible false confession are usually denied “primary case materials” such as police reports, transcripts, and electronic recordings of interrogations.<sup>182</sup> Finally, even when primary materials are available, it is almost always impossible to determine with certainty that the confession was false.<sup>183</sup> Given these hurdles, false confession researchers argue that they should not be expected to produce the same level of empirical data as other scientific scholars.<sup>184</sup> Indeed, false confession theorists bring up a reasonable concern: why should their policy recommendations be ignored simply because the harm they discuss is difficult to measure?<sup>185</sup>

However, this counterargument ultimately misses the point. *Daubert* and Rule 702 both place limits on the admissibility of expert testimony purportedly based upon scientific, technical, or other specialized knowledge.<sup>186</sup> False confession expert testimony falls under the definition of “scientific” expert testimony;<sup>187</sup> as such, this testimony must be grounded “in the methods and procedures of science.”<sup>188</sup> When scientific expert testimony is proffered, the judge’s task is to ensure that the testimony is reliable, a requirement that can be revealed through the expert’s methodology.<sup>189</sup> This counterargument amounts to a concession that false confession theorists cannot meet the same empirical standards applied to other scientific expert testimony – which reveals two things. The first is that presently there is no methodology that could ensure the reliability of false confession expert testimony. And second, this counterargument also reveals that we cannot with certainty draw any causal links between particular police interrogation tactics and false confessions. Without any long-

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<sup>181</sup> Leo, *supra* note 14, at 4.

<sup>182</sup> *Id.* at 4-5.

<sup>183</sup> *Id.* at 5 (“In the vast majority of alleged false confession cases, it is therefore impossible to completely remove any possible doubts about the confessor’s innocence.”).

<sup>184</sup> See, e.g., Welsh S. White, *Miranda’s Failure to Restrain Pernicious Interrogation Practices*, 99 MICH. L. REV. 1211, 1228-29 (2001).

<sup>185</sup> See, e.g., 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, 1139 (1997).

<sup>186</sup> *Daubert*, 509 U.S. at 589-90; FED. R. EVID. 702.

<sup>187</sup> *Hall*, 93 F.3d at 1342.

<sup>188</sup> *Daubert*, 509 U.S. at 590.

<sup>189</sup> *Id.* at 589.

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term empirical data, we cannot determine any patterns; and without a pattern we are left only with a phenomenon that happens to occur about once every million confessions.

Given this dredge in empirical research, one might argue that currently no false confession “expert” can legally provide expert testimony pursuant to the mandates of *Daubert*, since it is impossible to gauge the reliability of their evidence. As Welsh White notes,

Although the empirical data can identify factors that are conducive to eliciting false confessions, they cannot tell us how often standard interrogation methods produce false confessions . . . . Thus, estimates as to the number or percentage of cases . . . seem likely to be based on little more than speculation.<sup>190</sup>

Again, false confession theorists admit that their theory is nearly impossible to test, and equally impossible to measure.<sup>191</sup> This shortcoming becomes a crucial factor for a court when deciding the merits of a witness’s qualifications to give expert testimony: if an expert’s theory is virtually untestable, he functionally concedes that a jury is just as qualified as he to evaluate the evidence without him. The empirical data is simply too meager to allow this kind of testimony to enter as expert scientific, technical, or other specialized knowledge.

### **B. A High Potential Rate of Error**

The relative superficiality of the empirical data directly leads to another problem with false confession expert testimony: the lack of a known or potential rate of error when detecting a false confession. One important question is how often are these experts wrong when they label a particular confession as false? Known as the “rate of error” or the “potential rate of error,” this ratio quantifies the accuracy of an expert’s analysis when applied to particular cases. This is an especially important statistic for expert testimony since experts are rarely involved intimately with a case, but rather brought in to opine about a specific aspect during trial. If the proffered testimony is

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<sup>190</sup> White, *supra* note 38, at 131-32.

<sup>191</sup> Richard A. Leo & Richard J. Ofshe, *Using the Innocent to Scapegoat Miranda: Another Reply to Paul Cassell*, 88 J. CRIM. L. & CRIMINOLOGY 557, 560-61 (1998).

based on a theory or test that has a relatively high rate of error, the testimony should either be excluded under *Daubert*, or presented without its “expert” status. Those theories that cannot demonstrate a rate of error present problems for courts: if the trial court cannot determine whether the theory is scientifically valid, there is no reason to grant the testimony evidentiary reliability or relevance—two key factors under Rule 702 of the Federal Rules of Evidence.<sup>192</sup>

For example, the 1998 study of sixty cases of false confessions can be broken down as follows: thirty-four were “proven” false confessions; eighteen were “highly probable false confessions[;]” and eight were “probable false confessions.”<sup>193</sup> However, of the twenty-nine cases in the Leo/Ofshe study that resulted in conviction, only nine involved instances of undisputed false confessions.<sup>194</sup> In fact, one scholar found that of the remaining twenty cases, nine were in fact guilty, meaning false confession theorists were wrong forty-five percent of the time.<sup>195</sup> As one critic puts it, a “coin toss would almost prove as accurate.”<sup>196</sup> Such a high rate of error suggests two problems with the theory. First, it is highly subjective, leading “well-educated, and legally savvy persons [to] find such dissimilar results.”<sup>197</sup> Accordingly, this level of subjectivity should be left to the jury—not to expert testimony. The second problem is that the foundation of the theory itself is questionable since not even its most faithful advocates can accurately identify false confessions.<sup>198</sup>

False confession theorists propose that false confessions occur regularly, a claim that will be challenged in the next section. However, if false confessions were as endemic as these scholars claim, then the barriers to measuring the frequency of false confessions by conducting an empirical study based upon random samples would be negligible, because researchers would have a significant quantity of false confessions to survey. Indeed, a good reason to subject this kind of testimony to the rigors of *Daubert*, even if it means

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<sup>192</sup> See *Daubert*, 509 U.S. at 592-94.

<sup>193</sup> Leo & Ofshe, *supra* note 156, at 436-38.

<sup>194</sup> *Id.* at 478.

<sup>195</sup> 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, 587-88 (1999).

<sup>196</sup> Agar, *supra* note 93, at 32.

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

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

excluding it, is to encourage scholars to conduct the research necessary to determine a potential rate of error, especially if the phenomenon is as rampant as they claim. As it stands, the only rate of error available indicates that the theory is not yet ready to be admitted as expert testimony.

### C. The Rarity of False Confessions Precludes Empirical Testing and a Known Rate of Error

False confession theorists have a very logical sequence of arguments: certain defendants are prone to give false confessions as a result of certain police interrogation tactics; because of this, false confession theorists should be allowed to testify as expert witnesses to inform the jury of this phenomenon and explain why it might apply in a particular case; and, finally, police interrogation tactics should be overhauled in order to prevent the production of false confessions.<sup>199</sup> While this sequence flows freely and coherently, ultimately the most important strand in the argument is that false confessions actually occur, and that they are prevalent. The burden of proof is not on those who would defend the status quo, but rather on those who would change it based upon a known or unknown problem.<sup>200</sup> Put differently, if false confession theorists cannot prove that normal innocent suspects can give false confessions, and that their methodology can accurately detect these occurrences, then any critique based upon their findings can be nothing more than a Potemkin village. That false confessions occur is a matter of fact; however, it is also true that false confessions are rare. As mentioned above, the best sample involves a few dozen instances of false confessions from a total sample size of over twenty-three million confessions, or roughly one out of every million.<sup>201</sup>

The main reason why false confession theorists cannot provide either a potential rate of error or solid empirical evidence is because false confessions are extraordinarily rare, and almost always

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<sup>199</sup> See *infra* Part III.

<sup>200</sup> See, e.g., Major Joshua E. Kastenberg, *A Three-Dimensional Model for the Use of Expert Psychiatric and Psychological Evidence in False Confession Defenses Before the Trier of Fact*, 26 SEATTLE U. L. REV. 783, 813 (2003).

<sup>201</sup> Paul G. Cassell, *Balanced Approaches to the False Confession Problem: A Brief Comment on Ofshe, Leo, and Alschuler*, 74 DENV. U. L. REV. 1123, 1127 n.35 (1997).

involve a mentally challenged suspect.<sup>202</sup> The statistical insignificance may be the reason false confessions cannot be quantified, examined, or empirically tested.<sup>203</sup> Despite the repeated warnings that incidences of false confessions are widespread and endemic, so far the evidence establishes that the incidences of false confessions are few and far between. As a result, the existing research suffers from a myopic focus on the causes rather than the prevalence of false confessions.

The implications of incident-rarity cannot be overstated; for it is at this point that the theory begins to go awry. Incidence-rarity becomes an almost insurmountable barrier to conducting more empirical research. Without more instances of proven and indisputable false confessions to study, a cogent detection method with a respectable rate of error cannot be established. Without a workable theory, complete with a known rate of error and backed by empirical research, false confession theorists cannot seriously advocate fundamental changes to the criminal justice system.

Given the abject rarity of false confessions, allowing a self-proclaimed false confession expert to testify in a trial where the prosecution relies upon a confession would, more often than not, be unreasonable. The expert's testimony may plant the seeds of doubt in a jury's mind regarding the veracity of an otherwise truthful confession, and may lead to the exoneration of a guilty person. Aggressive *ex ante* preventive measures, combined with a spirited cross-examination, persuasive opening and closing arguments, and possibly even cautionary instructions during those rare occurrences where a possible false confession may lead to wrongful conviction, can help keep guilty persons behind bars, while keeping innocent suspects out of jail.<sup>204</sup>

#### **D. False Confession Expert Testimony Invades the Province of the Jury**

False confession expert testimony should not be admitted be-

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<sup>202</sup> See, e.g., *Shay*, 57 F.3d at 129-30 (defendant suffered from "pseudologia fantastica," a condition that causes a person seek attention by creating an increasingly complex web of lies).

<sup>203</sup> Leo, *supra* note 14, at 4.

<sup>204</sup> See *infra* Part II.B.5.

cause it invariably robs the jury of its exclusive role as the arbiter of witness credibility.<sup>205</sup> As mentioned, the presentation of false confession expert testimony can take multiple forms. At times the expert is a mental health specialist, either a psychologist or a psychiatrist, who has examined the suspect and opines about the effects that a certain mental affliction might have on the veracity of the confession.<sup>206</sup> These cases should be distinguished from other forms of false confession expert testimony, since these opinions present medical testimony, rather than social scientific testimony. The most hotly contested forms of false confession expert testimony involve experts outside of the medical field, such as law professors.<sup>207</sup> Since these witnesses are typically unqualified to testify about a particular defendant's mental health, they often discuss, or offer to discuss: (1) the phenomenon of false confessions generally; (2) certain aspects of a confession, especially the interrogation and the post-admission narrative, explicitly linking the facts of the case with the false confession phenomenon; and (3) the expert's conclusion, implicit or explicit, regarding the veracity of the defendant's confession.<sup>208</sup>

Admitting expert testimony on false confessions presents a Catch-22 for courts and juries. While some false confession scholars are certainly qualified to testify in a given trial that false confessions occur, without discussing or presenting evidence that the defendant experienced coercive police interrogation, or was susceptible to giv-

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<sup>205</sup> See, e.g., *Bachman*, 953 F.2d at 441 ("It is the exclusive province of the jury to determine the believability of the witness . . . . An expert is not permitted to offer an opinion as to the believability or truthfulness of a [witness's] story."); *Benson*, 941 F.2d at 604 ("Credibility is not a proper subject for expert testimony; the jury does not need an expert to tell it whom to believe . . . ."); *State v. Boston*, 545 N.E.2d 1220, 1240 (Ohio 1989) (rejecting expert testimony regarding the veracity of a witness).

<sup>206</sup> See, e.g., *Lopez*, 946 P.2d at 484 (admitting expert testimony by a psychologist who could opine on the psychological environment surrounding the interrogation); *Beuchler*, 572 N.W.2d at 73 (allowing a clinical psychologist's testimony regarding four psychological disorders afflicting the defendant).

<sup>207</sup> See, e.g., *Agar*, *supra* note 93, at 26.

<sup>208</sup> See Henry F. Fradella et al., *The Impact of Daubert on the Admissibility of Behavioral Science Testimony*, 30 PEPP. L. REV. 403, 441 (2003) ("[T]estimony regarding empirical research into the phenomenon of false confessions is permitted if the expert offers only generalized information."); see also *Soree*, *supra* note 9, at 235 ("Dr. Ofshe was reluctant to state whether the given confession was in fact true or false, but indicated his preference to illuminate the jury as to the possibility of its falsity given the risk factors present in the interrogation."); Juliet Gee, *Anatomy of a False Confession*, CRIM. JUST., Summer 2009, at 52 ("[A]n expert testified that the veracity of the confession was unreliable because of the interrogation techniques and Clarence's desire to say anything to end the interrogation.").

ing a false confession, the witness would not be able to make his testimony relevant to the particulars of the case.<sup>209</sup> If there is no link between the testimony and the case, the testimony must be excluded pursuant to Rule 702.<sup>210</sup> However, as the testimony becomes more relevant, it also begins to invade the jury's role to make determinations of credibility about the defendant's statements.<sup>211</sup> For example, comparing the post admission narrative with the facts of the case is a determination of credibility, and is therefore a clear invasion of the jury's province.

False confession theorists respond to this critique by pointing out that jurors typically do not believe that false confessions occur.<sup>212</sup> If most jurors do not believe that sometimes an innocent person confesses to a crime that they did not commit, expert testimony on the subject does not invade the province of the jury, but actually helps the average juror understand that this phenomenon does in fact occur. In this way, false confession expert testimony helps combat against the "myth of psychological interrogation," that is, the myth that false confessions do not occur.<sup>213</sup> However, the numbers simply do not support the notion that this myth exists. For instance, one statistic used to demonstrate this myth is that sixty eight percent of potential jurors in the District of Columbia believe that suspects falsely confess "not very often" or "almost never."<sup>214</sup> Implying that these answers foreclose even the possibility of false confessions within the minds of jurors is simply wordplay: "not very often" and "almost never" do not mean "never." In fact, the data clearly corroborates most jurors' beliefs that concede the possibility of a false confession in a given case, while also noting its statistical improbability.<sup>215</sup> The

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<sup>209</sup> See, e.g., *Mamah*, 332 F.3d at 478 (rejecting false confession testimony because it was not shown to be relevant to the case).

<sup>210</sup> *Daubert*, 509 U.S. at 588-90.

<sup>211</sup> See, e.g., *Cobb*, 43 P.3d at 868-69 (Kan. Ct. App. 2002) (noting that as the testimony became more "particularized to the circumstances of the case" it began to invade "the jury's province to make a credibility determination about the defendant's statement").

<sup>212</sup> See, e.g., L. Davies, *The Reality of False Confessions—Lessons of the Central Park Jogger Case*, 30 N.Y.U REV. L. & SOC. CHANGE 209, 250 (2006).

<sup>213</sup> Richard A. Leo, *The Problem of False Confession in America*, CHAMPION, Dec. 31, 2007, at 31.

<sup>214</sup> Leo, *supra* note 19, at 196.

<sup>215</sup> If judges were instructed to suppress as unreliable those confessions whose post-admission narratives did not align with the facts of the case, many truthful confessions would also be lost, since many suspects fail to give full or completely accurate confessions

notion that some suspects might confess to something they did not do is within the common knowledge of jurors.<sup>216</sup>

The jury has a monopoly on determining witness credibility.<sup>217</sup> Putting aside concerns that this testimony would supplant the jury's role to measure witness credibility, the testimony would also convert the expert witness into a human lie detector.<sup>218</sup> No trial judge, expert witness, or polygraph technician may take the job of lie detecting away from the jury.<sup>219</sup> Juries must sit through an entire trial

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to interrogators. See Ofshe & Leo, *supra* note 20, at 1118:

Rather, consistent with the judge's role as a gatekeeper responsible for excluding untrustworthy evidence that has a strong tendency to mislead the jury, the judge should not admit confessions without finding that the confession meets minimal standards of reliability . . . . Interrogations that fail to produce a good fit between the post-admission narrative and the crime facts are highly suspect because they may have been induced from an innocent party.

*Id.* See also Cassell, *supra* note 195, at 524 ("They accordingly recommend that judges should be empowered to review confessions for 'reliability' through close scrutiny of the 'post-admission narrative' of suspects").

<sup>216</sup> State v. Lawhorn, 762 S.W.2d 820, 577 (Mo. 1988) (determining that the proffered false confession expert testimony was within the jury's common knowledge).

<sup>217</sup> George Fisher cites the following examples:

Fifth Circuit Criminal Jury Instructions § 1.09 (1990) ("You are the sole judges of the credibility or 'believability' of each witness and the weight to be given the witness's testimony."); California Jury Instructions, Criminal § 2.20 (West 1993) ("You are the sole judges of the believability of a witness . . . ."); 17 Louisiana Civil Law Treatise: Criminal Jury Instructions § 3.04 (Cheney C. Joseph, Jr. & P. Raymond Lamonica eds., 1994) ("[You are] the sole judges of the credibility of witnesses . . . ."); Wisconsin Jury Instructions, Criminal § 300 (1962 & Supp. 1976) ("You are the sole judges of the credibility of the several witnesses . . . ."); United States v. Barnard, 490 F.2d 907, 912 (9th Cir. 1973) ("[T]he jury is the lie detector in the courtroom.").

George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 575, 713 n.1 (1997). See also *Kumho Tire*, 526 U.S. at 152 (explaining the standards used to evaluate expert witness credibility).

<sup>218</sup> *Adams*, 271 F.3d at 1244-45.

<sup>219</sup> Fisher, *supra* note 217, at 577-78.

All hierarchies of rank, learning, and technical prowess give way in the face of this asserted power of common jurors to spot a lie: In most jurisdictions today, no trial judge may advise the jury that a witness has lied. No psychiatric expert may comment on a witness's credibility. Rarely may a polygraph technician lecture to jurors about a witness's pulse and pressure, tension or temperature. The job of lie detecting belongs to the jurors alone. Nor may we later, once the jurors have done their job of sifting truth from falsehood, review how they did it.

*Id.*

and grapple with the gamut of evidence presented before they are asked to determine the suspect's credibility. False confession expert witnesses are rarely involved with the case, and are merely asked to analyze the confession from the prism of the post-admission narrative and the context surrounding the interrogation. Courts should be as wary of admitting human lie detectors as they are of admitting the results of a polygraph test.

One critical observation is that different forms of false confession expert testimony affect the jury in different ways. Indeed, as stated, false confession expert testimony can take at least three forms: first, a potential expert witness might simply testify that the phenomenon of false confessions exists, and perhaps provide some examples or explanations; second, an expert witness might testify about the interrogative techniques that produce false confessions, and whether they exist in the present case; or third, the expert might go even further and opine about the reliability of the particular confession the jury is considering.<sup>220</sup>

The first option simply states a well-established fact: that people sometimes, albeit very rarely, confess falsely. The admissibility question here would be whether this observation, standing alone, "assist[s] the trier of fact."<sup>221</sup> Whether it would or not depends on whether a jury can be expected to understand that false confessions occur.<sup>222</sup> If so, there is no need for expert testimony that tells the jury what it already knows. If not, there is a need, but perhaps that need can be met during opening and closing argument, cross-examination, and jury instructions. To determine whether an expert's testimony will assist the trier of fact, a court must decide whether an untrained layperson would be qualified to determine intelligently a resolution to the particular issue *without* the help from those having more specialized knowledge of the matter.<sup>223</sup> As it stands, most jurors have a nuanced understanding that false confessions occur, but only

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<sup>220</sup> Harry F. Fradella et al., *The Impact of Daubert on the Admissibility of Behavioral Science Testimony*, 30 PEPP. L. REV. 403, 416-17 (2003).

<sup>221</sup> *Daubert*, 509 U.S. at 593.

<sup>222</sup> *Benson*, 941 F.2d at 604 ("An expert's opinion is helpful only to the extent the expert draws on some special skill, knowledge, or experience to formulate [his] opinion; the opinion must be an *expert* opinion (that is, an opinion informed by the witness' expertise) rather than simply an opinion broached by a purported expert.").

<sup>223</sup> *Shay*, 57 F.3d at 132-33.

rarely.<sup>224</sup> An expert witness that simply repeats this fact is not “assisting the trier of fact.”

The second option, explaining what interrogative techniques tend to produce false confessions and whether they exist in the present case, runs into three problems. First, as noted throughout Part III, false confession theorists have very little empirical evidence for these conclusions, and their methodologies have failed to produce a known rate of error; therefore, they would not qualify as experts.<sup>225</sup> Second, as we will see in Part IV, there is also very little evidence that certain police interrogation tactics actually produce false confessions.<sup>226</sup> On the one hand, false confession theorists cannot detect a false confession any better than a layperson; on the other hand, any potential discussion of police interrogation tactics is fraught with ambiguity. Third, any testimony that explains the contours of false confessions, the police interrogation techniques that produce them, and then points out that those conditions exist in the present case, comes perilously close to drawing conclusions for the jury.<sup>227</sup>

If the second option approaches the jury’s province, the third option launches a full-scale invasion by opining about the veracity and credibility of a particular confession. The expert witness cannot opine about the credibility of another witness’s statement, even if that witness is the defendant and the statement is a confession.<sup>228</sup> Addi-

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<sup>224</sup> Leo, *supra* note 213, at 31 (reporting that nearly seventy percent of jurors believe that false confessions occur, but rarely).

<sup>225</sup> *Daubert*, 509 U.S. at 593-94 (listing four requirements to qualify as expert testimony: (1) whether the theory can be empirically tested; (2) whether this testing has revealed the known or potential error rate of the theory; (3) whether the theory has been subjected to peer review and publication; and (4) whether the theory has been widely accepted within its respective field or community).

<sup>226</sup> Magid, *supra* note 55, at 1190-91.

<sup>227</sup> See, e.g., *Cobb*, 43 P.3d at 868 (noting that as the testimony became more “particularized to the circumstances of the case” it began to invade “the jury’s province to make a credibility determination about the defendant’s statement”).

<sup>228</sup> See *Shay*, 57 F.3d at 133 (stating that the jury has the general capacity to “assess the reliability” of the defendant’s statements without the assistance of an expert); *Hall II*, 974 F. Supp. at 1204-5 (disallowing a false confession expert witness to testify about the discrepancies between the post-admission narrative and the evidence, since he was not only unqualified to assess the defendant’s credibility, but doing so would trample over the jury’s role); *Adams*, 271 F.3d at 1244-45 (deciding that such expert testimony, which necessarily touches upon witness credibility, invades the province of the jury and exceeds the scope of the witness’s expertise); see also *id.* at 1246 (describing the proffered expert as “little more than a professionally-trained witness testifying that, based upon his history, [defendant] . . . would have lied.”).

tionally, the same empirical questions that apply to the second option apply here: there is simply not enough data to admit this kind of expert testimony.

The next section discusses the false confession theorists' critique of police interrogations, and argues that these empirical problems, combined with the rarity of false confessions, should temper any attempt to drastically change our criminal justice system.

### **E. Juries Can Protect Against False Confessions and Police Coercion**

Excluding false confession expert testimony would not leave defendants defenseless against coercive police interrogation, or against the risk of a wrongful conviction based upon a false confession. In particular, those who criticize false confession theorists have generally focused on the shortcomings of the research, while ignoring the false confession theorists' argument that juries cannot comprehend the phenomenon without expert testimony.<sup>229</sup> This Section argues that juries provide adequate protection against the use of false confessions.

It has already been noted that most jurors actually acknowledge the existence of the false confession phenomenon—despite its infrequency.<sup>230</sup> Given that reality, cross-examination is an adequate tool to not only expose police coerciveness, but also to question the credibility of a particular confession. The defendant can choose to cross-examine the police interrogators to expose their techniques, including the length of the interrogation, the conditions the defendant faced, and the content of the questions asked. Opening and closing arguments are another venue where the defendant, in the jury's presence, could develop the theory that the confession is false, and was induced by coercive tactics. Finally, cautionary instructions given to the jury by the trial judge can also have the desired effect of acknowledging the existence of false confessions without superfluously minting such testimony with scientific validity. A well-constructed cautionary instruction would encourage a jury to consider other evidence, including that which points to innocence, rather than simply

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<sup>229</sup> Talia Fisher & Issachar Rosen-Zvi, *The Confessional Penalty*, 30 *CARDOZO L. REV.* 871, 872-73 (2008).

<sup>230</sup> Leo, *supra* note 213, at 31.

focusing on the confession. All in all, forceful cross-examination, combined with persuasive opening and closing arguments, and carefully worded cautionary instructions, are adequate safeguards to protect defendants against police coercion and false confessions.<sup>231</sup>

One powerful rebuttal against allowing a jury to decide for itself the veracity of a particular confession—that is, in the absence of a false confession expert—is that certain confessions arrive in the jury’s lap having already been wrongly molded by deceptive police coercion.<sup>232</sup> Therefore, in certain cases, expert testimony can help the jury as the trier of fact by describing how certain interrogation tactics might cause a person to falsely confess. This argument is very powerful: how is the jury expected to adjudicate between competing interpretations of a given confession if the most straight-forward interpretation—that the confession is true—has been tainted by police interference that is often difficult, if not impossible, for a jury to detect on its own? When seen against this backdrop, the call for admission of false confession expert testimony is hardly irrational, and in fact a very logical response to what amounts to an apparent breakdown in the jury system. Nevertheless, there are several reasons why juries should still be allowed to draw their own conclusions when it comes to the veracity of a particular confession.

There are other safeguards in place that prevent exceptionally untrustworthy confessions from reaching a jury. In 1884, the Supreme Court challenged the notion that only guilty persons confess by observing that particularly abusive interrogations, known as the “third degree,” could be used to extract confessions involuntarily.<sup>233</sup> Involuntariness became an indictment of reliability, which was later used as a reason to suppress a confession before it even reached the jury.<sup>234</sup> Additionally, in *Spano v. New York*, the Court suppressed a confession after the police interrogator used his relationship with the suspect to extract a confession.<sup>235</sup> But recall that in *Colorado v. Connelly*, the Supreme Court ruled that the defendant’s confession was admissible, despite his apparent mental illness, because it was *voluntary*; that is, it was given in the absence of particularly abusive police

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<sup>231</sup> State v. Warren, 635 P.2d 1236, 1243 (Kan. 1981).

<sup>232</sup> Leo, *supra* note 213, at 31.

<sup>233</sup> *Hopt*, 110 U.S. at 585.

<sup>234</sup> *Brown*, 297 U.S. at 286-87, 317.

<sup>235</sup> *Spano v. New York*, 360 U.S. 315, 321-23 (1959).

overreaching.<sup>236</sup> Time and again, the Supreme Court has ruled that a confession is inadmissible when particularly onerous police misconduct was used to extract it.<sup>237</sup> Therefore, the argument that juries need false confession expert testimony in order to hedge against confessions extracted under abusive conditions, while very logical on face, seems less pressing when one considers the safeguards already in place that target abusive interrogations.

However, false confession theorists also point out that jurors are not psychiatrists, and therefore should not be expected to know about certain mental illnesses.<sup>238</sup> To be sure, there are instances where juries are patently unqualified to analyze certain evidence by themselves, namely when a cognizable mental illness or condition is involved. Indeed, at first blush, one of the best arguments in favor of false confession expert testimony appears to involve the suspect's psychiatrist, who can then testify about his or her mental state.<sup>239</sup> Even so, there are several reasons why the admission of psychiatric expert testimony should not be used as a way to displace the jury.

First, even when expert psychiatric testimony is proffered and admitted, juries still have a role to play in this process. For example, juries may not be able to diagnose a suspect with post-traumatic stress disorder ("PTSD"), but after having heard from a trained psychiatrist that a suspect suffers from PTSD, the jury should then be allowed to draw its own conclusions about the effect of this testimony

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<sup>236</sup> *Connolly*, 479 U.S. at 163-64.

<sup>237</sup> *See, e.g., Ashcraft*, 322 U.S. at 151 (noting that defendant had been kept awake for thirty-six hours during interrogations); *Payne*, 356 U.S. at 566-67 (rejecting confession where defendant had been held incommunicado for three days with little food and where police threatened defendant with a lynch mob); *Culombe*, 367 U.S. at 605 (labeling police tactics of interrogating defendant nonstop for five days as "coercive"); *Reck*, 367 U.S. at 441-42 (excluding confession where defendant was held for four days with inadequate food and medical attention); *Davis*, 384 U.S. at 739-46 (subjecting defendant to sixteen days of incommunicado isolation within a windowless cell, repeated interrogations, and limited food); *Beecher*, 389 U.S. at 38 (excluding a confession obtained after a police officer held a gun to defendant's head); *Greenwald*, 390 U.S. at 521 (observing that defendant had been interrogated for over eighteen hours without food or sleep); *Mincey*, 437 U.S. at 397-99 (holding that confession is excludable where defendant is subjected a long interrogation while incapacitated and sedated in an intensive-care unit).

<sup>238</sup> *Shay*, 57 F.3d at 133-34.

<sup>239</sup> *See, e.g., id.* (acknowledging that the jury has the general capacity to "assess the reliability" of the defendant's statements, but deciding that it was plainly erroneous for the district court to assume that the jurors could understand the implications of a specific mental disorder without the assistance of the psychiatrist); *Rivera*, 777 N.E.2d at 364 (excluding the testimony of Professor Ofshe, but admitting the testimony of a clinical psychologist).

on the probative weight of the confession. An expert witness's role is limited to presenting to the jury her specialized knowledge, and should not extend to drawing conclusions about the veracity of a particular confession.<sup>240</sup>

Second, juries are constantly asked to grapple with other, potentially more difficult, issues, such as determining whether a witness is lying on the stand; whether an eyewitness could have identified the suspect from a certain distance; whether a character witness's testimony has any probative value; and even whether a defendant deserves the death penalty.<sup>241</sup> These tasks also involve very difficult questions of fact, but are nevertheless assigned to jurors in the absence of expert witnesses who might otherwise make conclusions for them.<sup>242</sup> Certainly, there are times when a particular witness may lie, or when the testimonies of two separate witnesses directly contradict each other. But an expert cannot be called to testify about which witness is lying and which is telling the truth. Rule 702 explicitly prohibits an expert from testifying about the veracity of a particular witness "because [it] exceeds the scope of the expert's specialized knowledge and therefore merely informs the jury that it should reach a particular conclusion."<sup>243</sup> The Tenth Circuit has also noted that Rule 702 proscribes psychiatrists from drawing conclusions about a witness's credibility since they are not "human lie detector[s]."<sup>244</sup>

Third, as noted above in Part II-C, psychiatric testimony is analytically distinct from false confession expert testimony, since false confession theorists are not psychiatrists and therefore are not qualified to opine about the medical conditions about which they have no expertise.<sup>245</sup> Put differently, admitting psychiatric testimony is not the same as admitting false confession expert testimony: the former informs the jury about a technical topic (i.e., a mental illness), while the latter draws conclusions for the jury regarding the credibil-

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<sup>240</sup> *Shay*, 57 F.3d at 131 (limiting a psychiatrist's testimony to a discussion within his expertise, namely the psychiatric diagnosis, and not whether he thought the defendant's confession was a lie).

<sup>241</sup> *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (holding that a jury, not a judge, must find the presence or absence of aggravating factors required by Arizona law for the imposition of the death penalty).

<sup>242</sup> *Soree*, *supra* note 9, at 262.

<sup>243</sup> *Shay*, 57 F.3d at 131.

<sup>244</sup> *United States v. Birdsall*, 47 M.J. 404, 410 (C.A.A.F. 1998).

<sup>245</sup> *Hall*, 93 F.3d at 1341.

ity of a particular statement. In some cases juries can use the help of a trained psychiatrist to understand the effects a particular mental illness might have had on the defendant, but when it comes to deciding how much weight to assign the confession, that role is reserved—according to Rule 702—for the jury.<sup>246</sup> While a defendant's mental condition may be relevant, the Supreme Court has rejected the notion that a particular mental condition could be dispositive when determining a confession's credibility.<sup>247</sup>

#### IV. THE FALSE CONFESSION THEORISTS' CRITIQUE OF POLICE INTERROGATION: SOUNDING A FALSE ALARM

False confession theorists use the aforementioned typologies, as well as the existing evidence on false confessions, to buttress their claim that police interrogation tactics must be fundamentally changed because their inherently coercive and deceptive nature is far too conducive to the production of false confessions.<sup>248</sup> Indeed, virtually all interrogations involve some form of deception, such as the “good cop, bad cop” routine, exaggerating incriminating evidence, acting kindly and expressing sympathy to create a rapport, convincing the suspect that it is in his best interest to confess, or some combination thereof.<sup>249</sup> Each of these interrogation tactics are indicted under the false confession charge and would need to be changed if the prevailing notion—namely, that false confessions pose a serious and endemic problem for our criminal justice system—were accepted by judges and lawmakers.<sup>250</sup> This criticism, while overstating the problem of false confessions and failing to link police interrogation tactics to the production of false confessions, would nevertheless impose a

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<sup>246</sup> Fisher, *supra* note 217, at 577 n.3.

<sup>247</sup> *Connolly*, 479 U.S. at 164.

<sup>248</sup> See, e.g., Edwin D. Driver, *Confessions and the Social Psychology of Coercion*, 82 HARV. L. REV. 42, 61 (1968) (correcting “the imbalance created by the ‘inherently coercive’ atmosphere might be no less than tantamount to the abolition of the institution”); Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2669-71 (1996) (advocating that standard interrogation be replaced altogether with questioning by a neutral party); White, *supra* note 38, at 111 (arguing that those interrogation methods linked to false confessions “should be prohibited”).

<sup>249</sup> Magid, *supra* note 55, at 1168-69; see also Miriam S. Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 FORDHAM URB. L.J. 791, 793-795 (2006).

<sup>250</sup> Magid, *supra* note 55, at 1175-77.

drastic change to the way suspects are interrogated. Even so, the calls to overhaul our criminal justice system ring louder now more than ever. An unusual asymmetry exists in the literature on this topic, whereby the main critics of false confession theorists have not answered the false confession critique of police interrogation.<sup>251</sup> As a result, the critique of police interrogation tactics has gone virtually unanswered. This section begins to address this imbalance by first breaking down the false confession critique of prevailing interrogation tactics and then, using the evidentiary and reliability arguments outlined Part III, providing a defense of interrogation tactics.

Although Part III discusses the empirical data used by false confession theorists, it is helpful for this discussion to reemphasize that false confessions are rare, a fact that has been lost on those who call for fundamental changes to our investigative procedures in order to prevent their occurrence. Whether “such occurrences are rare tragedies or a widespread epidemic” should condition any response;<sup>252</sup> the more uncommon these miscarriages of justice are, the more cabined our response should be. If a certain interrogative system is producing *X* amount of confessions per year, of which *Y* percent are true confessions, then we should focus on smaller changes that address the *Z* percent of false confessions that result from an otherwise efficient system.

In the first place, protections against egregious police manipulation already exist. For example, in *Spano v. New York*, the Supreme Court ruled that a confession was involuntary in part because the interrogator was a childhood friend who falsely led the defendant to believe that he would face familial and financial problems if he did not confess.<sup>253</sup> The deception, however, was considered as part of a “totality of the circumstances” analysis, and was not, in itself, dispositive of the inquiry.<sup>254</sup> In addition to this deception, the Court noted the defendant’s emotional instability, his physical fatigue during the interrogation, the length of the interrogation, his relative lack of education, and his requests for an attorney and to remain silent.<sup>255</sup> The

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<sup>251</sup> Leo & Ofshe, *supra* note 185, at 1136-38.

<sup>252</sup> Magid, *supra* note 55, at 1172.

<sup>253</sup> *Spano*, 360 U.S. at 323-24.

<sup>254</sup> *Id.* at 321, 323.

<sup>255</sup> *Id.* at 321-24.

Court again had to deal with police deception in *Frazier v. Cupp*,<sup>256</sup> where the police exaggerated the strength of their case against the suspect by telling him that this cousin, who was also a suspect, had confessed for the both of them.<sup>257</sup> Once more the Court found the deception relevant to, but not dispositive of, the inquiry of reliability. However, in *Moran v. Burbine* the Court explicitly found that some deceptive tactics are so “egregious” that they violate due process.<sup>258</sup> In the same breath, the Court went to great lengths to emphasize society’s interest in garnering confessions and the effectiveness of police interrogations to do so.<sup>259</sup> These cases illustrate two things: first, that police interrogators must respect certain boundaries when questioning suspects; and second, that when those boundaries are crossed, defendants have the ability to suppress whatever statements they may have made to the police.

Critics of deceptive police interrogation erroneously argue that it violates the spirit of *Miranda*, a decision that forbids coercion, not strategic deception.<sup>260</sup> *Miranda* cannot offer any protection from these deceptive practices if they occur after a suspect has validly waived his *Miranda* rights. Since the critics can rarely claim that these tactics violate *Miranda*, they have no choice but to couch their arguments in terms of trust and dignity, while pointing out the asymmetries in power between the interrogator and the suspect.<sup>261</sup> Upon closer inspection, these arguments cannot justify a complete overhaul of police interrogation.

Critiques that focus on the power asymmetry between the interrogator and the suspect might be labeled as the “fox-hunter” rationale for limiting police interrogations.<sup>262</sup> Where the suspect is the fox and the interrogator is the hunter, the fox should be given a head

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<sup>256</sup> 394 U.S. 731, 737-38 (1969).

<sup>257</sup> *Id.*

<sup>258</sup> 475 U.S. 412, 432-34 (1986).

<sup>259</sup> *Id.* at 426-28.

<sup>260</sup> *Magid, supra* note 55, at 1176-77; *see also* *Arthur v. Commonwealth*, 480 S.E.2d 749, 752 (Va. Ct. App. 1997) (allowing police to fabricate fingerprint and DNA evidence in order to procure a confession).

<sup>261</sup> *See* R. Kent Greenawalt, *Silence as a Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15, 40-41 (1981) (describing the uneven effects of police deception when comparing experienced criminals against inexperienced ones); Gerald Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417, 1442 (1985) (arguing that relatively disadvantaged suspects should not suffer more than their advantaged counterparts).

<sup>262</sup> *Magid, supra* note 55, at 1179-80.

start to ensure a reasonable chance to survive—or in this case, the criminal must be given a reasonable opportunity to get away without incriminating himself. This argument amounts to a critique of effectiveness: modern interrogations are so effective at eliciting confessions that the field must be balanced in some way.<sup>263</sup> While this view might make sense in the sport of hunting, when justice is our end, it should not sway any minds.<sup>264</sup>

Other critiques focus on certain vulnerabilities of particular defendants in comparison to seasoned or sophisticated suspects who can withstand the “inherent pressure” of a police interrogation.<sup>265</sup> This critique amounts to an expansive view of equal protection, where foolish and ignorant suspects are given the same chance to escape an interrogation unscathed as sophisticated suspects.<sup>266</sup> At first blush, this is a valid concern. Often interrogators use the same deceptive tactics on children and the mentally retarded as they would on normal, emotionally stable adults.<sup>267</sup> To be sure, especially vulnerable suspects such as young children and the mentally infirm should be spared from the use of flagrantly deceptive tactics during an interrogation. However, those who might embrace this criticism as a policy reform should be warned about its steep diminishing returns once the policy is expanded beyond children and the mentally ill.

Neither the Due Process Clause nor any other part of the Constitution should provide cover for foolish criminals who not only break the law, but also confess to their crime. Once expanded, the principle of treating suspects differently based on particular vulnerabilities can get tricky very quickly.<sup>268</sup> It is rather tautological that

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<sup>263</sup> See, e.g., Donald A. Dripps, *Foreword: Against Police Interrogation—And the Privilege Against Self-Incrimination*, 78 J. CRIM. L. & CRIMINOLOGY 699, 702 (1988) (advocating the exclusion of all confessions garnered during interrogations).

<sup>264</sup> Joseph D. Grano, *CONFESSIONS, TRUTH, AND THE LAW* 29 (1993); but see George E. Dix, *Mistake, Ignorance, Expectation of Benefit, and the Modern Law of Confessions*, 1 WASH. U. L.Q. 275, 285 (1975) (making the case for the fox-hunter limit on interrogation so that confessions self-incriminate only after making a calculated and informed decision to do so).

<sup>265</sup> Magid, *supra* note 262, at 1180-81.

<sup>266</sup> *Id.*

<sup>267</sup> Leo, *supra* note 19, at 231-34.

<sup>268</sup> See George C. Thomas III, *An Assault on the Temple of Miranda*, 85 J. CRIM. L. & CRIMINOLOGY 807, 811-12 (1995) (arguing that the fox-hunter view, if introduced, would run contrary to the structure of our criminal justice system).

society benefits when guilty persons confess.<sup>269</sup> Therefore, the notion that there should be a disparate impact analysis conducted for those suspects with slightly below average IQs in comparison to those suspects with exceptionally high IQs runs the risk of sullyng an otherwise valid system of interrogation. The Constitution does not mandate that interrogators cater their tactics to each suspect's overt strengths and weaknesses. Even putting aside the logistical impossibility of doing so, a suspect's foolishness should never be used as a justification to increase the constitutional protections afforded to him.<sup>270</sup> That smart criminals can withstand an interrogation better than foolish ones is consistent with their tendency to leave less evidence and to be more discrete.<sup>271</sup> Yet no one would argue that crime scene investigators should be any less thorough if they know they are dealing with a particularly sloppy criminal.<sup>272</sup>

Others have criticized police interrogation for relying on fabricated trust relationships, which ultimately give the suspect a false sense of security in order to influence his decision calculus about whether or not to confess.<sup>273</sup> This argument holds that police interrogations involve two inherent contradictions. First, although a confession must be voluntary in order to be admissible in court, modern interrogation methods invariably produce involuntary confessions, because if the process works as it is designed, "[the] suspect [is caused] to perceive that he has no choice but to comply," meaning that his statements cannot, by definition, be strictly voluntary.<sup>274</sup> Additionally, since confessing to a crime is almost never in someone's

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<sup>269</sup> See *Columbe*, 367 U.S. at 576-81 (describing the difficulties of obtaining a conviction absent a confession).

<sup>270</sup> Magid, *supra* note 55, at 1181 (arguing that the Constitution "surely does not protect the foolish and unsophisticated criminal from himself"); see also Joseph D. Grano, *supra* note 264, at 32 (arguing against giving guilty suspects a fair chance at acquittal).

<sup>271</sup> Caplan, *supra* note 261, at 1456-57 (noting that inexperienced suspects fare worse than experienced ones because they do not know or assert their rights); Greenawalt, *supra* note 261, at 40-41 (observing that investigations and interrogations have an "uneven" impact on inexperienced criminals); Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 872 (1981).

<sup>272</sup> See Magid, *supra* note 55, at 1180 (observing that society benefits when the prosecution has a strong case, and that "DNA, fingerprint, and videotape evidence can be even more damning than a confession").

<sup>273</sup> See *id.* at 1176-77 (noting that deceptive interrogation tactics are often used and even encouraged); Soree, *supra* note 9, at 199-201 (detailing various controversial techniques used by interrogators that include role-playing and misrepresenting their identities).

<sup>274</sup> Leo, *supra* note 14, at 9.

best interest, police interrogators must elicit a suspect's trust and then manipulate the suspect into embracing the irrational by incriminating himself.<sup>275</sup> By not telling a suspect that, in reality, it is in their best interest not to confess, this critique claims that interrogators violate sacred notions of trust, which should then taint the resultant confession.<sup>276</sup> However, a principle that forbids violations of "trust" between law enforcement and suspects would then forbid countless other police tactics, including undercover investigations, which also rely on manufactured relationships of trust.<sup>277</sup> According to this argument, another standard and relatively benign interrogation practice, building rapport with the suspect by making small talk before asking substantive questions, is a fraudulent attempt to "soften[] up the suspect."<sup>278</sup> Moreover, the same principles that would justify strict limits on, or complete prohibitions of, police deception during interrogations would also justify eliminating other deceptive tactics such as wiretapping and the use of informants.<sup>279</sup> It is therefore unsurprising that courts rarely give constitutional import to critiques of police deception. Unless a proactive suspect approaches the police himself and offers the confession, arguments like these can be used to color any statement, no matter the police tactic used, as unreliable. As a result, the critics have instead tried to prove a causal link between deceptive police interrogations and false confessions.

These commentators, however, might assume too much about a particular confessor's interests. Often police interrogators, who convince guilty persons that it is better to face up to their crimes rather than maintain their innocence, have considerable leverage over the suspect such as an accumulation of evidence, a ready lineup of persons prepared to testify should the matter proceed to trial, and the guilty suspect's own calculus that if the matter were to go to trial he would be found guilty.<sup>280</sup> Nevertheless, many critics still conclude

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<sup>275</sup> See *id.* at 8-9; see also DAVID SIMON, *HOMICIDE: A YEAR ON THE KILLING STREETS* 213 (1991) (calling the notion that it is in a suspect's interest to confess both fraudulent and fictional).

<sup>276</sup> William J. Stuntz, *Lawyers, Deception, and Evidence Gathering*, 79 VA. L. REV. 1903, 1926 (1993) ("If suspects fully comprehended the nature and scope of their legal rights and the likely consequences of relinquishing them, there would be very few police station confessions.").

<sup>277</sup> See Magid, *supra* note 55, at 1182.

<sup>278</sup> Leo, *supra* note 19, at 121-22.

<sup>279</sup> Magid, *supra* note 55, at 1186.

<sup>280</sup> *Minnick v. Mississippi*, 498 U.S. 146, 166-67 (1990) (Scalia, J., dissenting) (arguing

that nothing short of “overhauling American interrogation as it is presently practiced” will cure society of this ill.<sup>281</sup>

However, the false confession theorists’ near unanimous call for a complete overhaul of police interrogation tactics is, at times, inconsistent.<sup>282</sup> For example, one false confessions scholar spends a considerable amount of time explaining how an innocent person will experience anxiety when confronted with allegations of a crime he did not commit, but then describes how a guilty person feels the same anxiety.<sup>283</sup> This anxiety may lead to a false confession, or it might not.<sup>284</sup> Another scholar objects when police officers build a rapport by being friendly with suspects, but also objects when those same officers are “outwardly aggressive.”<sup>285</sup> While critiquing the inherent injustices of police interrogations, these commentators also credit the system for its ability to garner confessions, since virtually all confessions result from an interrogation.<sup>286</sup> In fact, truthful confessions are the result of the very interrogative pressure that they assert is a normatively bad aspect of the criminal justice system, namely: the confessor’s desire to stop the interrogation and escape from the stresses involved; the perception that confessing is his only option; and finally, the calculus that the benefits of confessing outweighs the costs of a false denial.<sup>287</sup> If these tactics produce both truthful and false confessions, an empirical and measurable percentage comparing each would be useful before a system overhaul is proposed.<sup>288</sup>

To aid in the detection of false confessions, false confession theorists describe a sequence of errors during routine police interro-

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that suspects may calculate that confessing is in their best interest because “it advances the goals of both ‘justice and rehabilitation’ ”).

<sup>281</sup> Leo, *supra* note 19, at 120; *see generally* Alschuler, *supra* note 248 (discussing the privilege against self-incrimination and the right to remain silent); Dripps, *supra* note 263 (discussing the reform of confession laws, the effects of police interrogation, and the right to remain silent).

<sup>282</sup> *See* White, *supra* note 38, at 118-20 (explaining that the interrogation process can produce anxiety, causing innocent and guilty suspects to confess).

<sup>283</sup> White, *supra* note 38, at 118-120.

<sup>284</sup> *Id.* at 120 (“But even if a suspect experiences considerable anxiety as [a] result of the interrogation process, it does not follow that he will be likely to confess to a crime he did not commit.”).

<sup>285</sup> Leo, *supra* note 19, at 132-33.

<sup>286</sup> *Id.* at 162 (“Why do suspects confess? The short answer, of course, is police interrogation, since suspects almost never confess spontaneously . . .”).

<sup>287</sup> *Id.*

<sup>288</sup> *See infra* Part II.

gations that can produce false confessions. First, investigators must

[M]isclassify an innocent person as guilty; they next subject him to a guilt-presumptive, accusatory interrogation; and once they have elicited a false admission, they pressure the suspect to provide a postadmission narrative that they actively shape, often supplying the suspect with the (public and nonpublic) facts of the crime.<sup>289</sup>

The first step assumes the conclusion in a rather tautological way: for a person to confess falsely, he must be innocent. Unfortunately, lines are not drawn so easily, and if the question of innocence were that clear, it is highly unlikely the confession would be sought in the first place, and even less likely that the case would proceed to trial.

The second step—an accusatory interrogation—is simply not unique to innocent persons, for it is also the technique used with great success against guilty suspects.<sup>290</sup> This is a crucial observation because it leads one to question the link between wrongful convictions and accusatory interrogations. Indeed, if an accusatory interrogation is standard procedure, and as such may lead to no confession, a true confession, or (rarely) a false confession, the theory's link to the lattermost becomes tenuous at best. The causality argument implicit in this critique—that accusatory interrogations create false confessions—is considerably weak given the relatively few false confessions this tactic produces in comparison to the other two outcomes: the production of either no confession or a truthful confession.<sup>291</sup>

The third sequence commits the error of relying too heavily upon the post-admission narrative. A careful and important distinction should be drawn between a false confession and an untrustworthy confession.<sup>292</sup> The former is characterized by inconsistencies between the facts of the case and the confessional statements made to law enforcement. The latter is defined as a confession that is obtained under circumstances that raise significant doubt as to its accu-

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<sup>289</sup> Leo, *supra* note 19, at 198.

<sup>290</sup> White, *supra* note 26, at 111 (conceding that an accusatorial interrogation is “indispensable to law enforcement”).

<sup>291</sup> See *supra* Part III.A-C.

<sup>292</sup> White, *supra* note 26, at 108.

racy, whether or not the particular confession appears to be accurate on face.<sup>293</sup> Many theorists are too quick to label a confession that is not entirely consistent with the facts, or extracted under stressful conditions, as false.<sup>294</sup> A better paradigm would create a middle ground where post-admission inconsistencies may suggest a certain degree of untrustworthiness, at least as applied to certain aspects of the confession, but not necessarily falsity of the entire inculcation. Introducing evidence or testimony that a confession is *untrustworthy* rather than *false*, may be a reasonable way for the defense to counter a prosecution's presentation of a defendant's confession. Such coloring by the defense can be particularly powerful in those cases where the prosecutor is relying almost entirely on the confession to secure a conviction.<sup>295</sup>

An interrogator's belief that a particular suspect is guilty is generally based upon objective factors, and therefore, police are right far more often than they are wrong, and a confession is true far more often than it is false, regardless of the means used to induce it.<sup>296</sup> The rarity of false confessions should correspondingly temper the calls to overhaul our justice system.

In the absence of unusual circumstances, however, an innocent person would not rationally believe that the police would be able to convict him of a crime he did not commit. Thus, an innocent suspect merely subjected to ordinary interrogation techniques . . . would appear unlikely to conclude that the benefits of relieving anxiety by confession outweigh the detriments of admitting to a crime.<sup>297</sup>

Nevertheless, one critic laments that modern interrogation's genius makes the irrational—admitting to a crime that will likely lead to punishment—appear rational.<sup>298</sup> To the extent that this method is far more likely to persuade a guilty party, rather than an innocent party, to embrace the irrational by confessing to his crime, it has been a

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<sup>293</sup> *Id.* at 109.

<sup>294</sup> *See, e.g., Agar, supra* note 93, at 42.

<sup>295</sup> *Warren*, 635 P2d at 1243-44.

<sup>296</sup> *Id.* at 1240.

<sup>297</sup> *White, supra* note 38, at 120.

<sup>298</sup> *Leo, supra* note 20, at 985.

remarkable coup for law enforcement. While that is not to say the system is perfect, it is unquestionably a long way from total failure, and certainly does not need a complete overhaul. The societal benefits of garnering confessions, combined with the overall effectiveness of police interrogation, are enough to reject the false confessionists' critiques. Until more empirical research is done that can accurately measure the frequency of false confessions, lawmakers and judges should resist extreme demands to reform the system.

### CONCLUSION

There is no doubt that the phenomenon of false confessions is real. Scholars and researchers have worked tirelessly for decades to uncover incidents of wrongful convictions based upon false confessions.<sup>299</sup> Fortunately, the limited data available indicates that false confessions are extraordinarily rare.<sup>300</sup> Moreover, as a result of this infrequency, the data on false confessions has been rather narrow and superficial, which results in two problems. First, to date, no empirical data exists that demonstrates either how often false confessions occur generally, or how often they occur when a suspect is subjected to certain interrogation tactics. The lack of empirical evidence precludes any policy conclusions. We still do not know what police tactics to change, or how to change them. Given the rarity of false confessions, and the unreliability of the evidence proffered by false confession experts, policymakers and courts should resist attempts to overhaul the criminal justice system. Second, false confession experts have an unacceptably high rate of error when using their theory to determine whether a particular confession is false. The experts are no more accurate than a coin toss. These two problems raise serious concerns about the testimony's reliability under Rule 702 of the Federal Rules of Evidence. Finally, false confession expert testimony invades the province of the jury by making the witness a human lie detector tasked with determining the credibility of the defendant's statements.

The exclusion of false confession expert testimony would not leave defendants any more vulnerable to a wrongful conviction based upon a confession extracted through the use of coercive or abusive

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<sup>299</sup> *Id.* at 981-983.

<sup>300</sup> Cassell, *supra* note 195, at 530.

interrogation tactics. As mentioned above, most jurors accept the counter-intuitive notion that innocent persons may sometimes confess to crimes they did not commit. Given this recognizance, juries can still serve as the ultimate fact finder without having their conclusions drawn for them by false confession expert witnesses.<sup>301</sup> Strategic opening and closing statements, vigorous cross-examinations, and particularized jury instructions would help reinforce the jury's ability to detect an untrustworthy confession without unduly trampling upon the jury's role as the trier of fact. Our criminal justice system is founded on the belief that juries can understand when statements might be unreliable, and admitting expert testimony on false confessions upends this fundamental pillar.

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<sup>301</sup> *Lawhorn*, 762 S.W.2d at 822-23.