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## Police Interrogations, False Confessions, and Alleged Child Abuse Cases

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## POLICE INTERROGATION, FALSE CONFESSIONS, AND ALLEGED CHILD ABUSE CASES

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Richard A. Leo\*

I want to thank Justice McCormack for that great introduction. I want to thank Anna and Ben for having me here and for putting on this important Symposium. It's a great honor to be at the University of Michigan, one of the great universities in the country and certainly one of the great law schools. It's always great to be in this building. When Justice McCormack's assistant contacted me, I didn't do what I usually do and send a bio and a CV. Instead, I sent her a 2012 opinion by the Michigan Supreme Court that trashed me and the scientific discipline that has empirically studied police interrogation and false confessions for more than a century. It's the *Kowalski* opinion.<sup>1</sup>

The Michigan Supreme Court not only trashed the science of false confessions, but it also upheld the exclusion of my testimony in a case where the defendant was almost certainly innocent.<sup>2</sup> The Michigan Supreme Court's shameful and retrograde opinion meant that Mr. Kowalski didn't get the chance to have an expert witness to educate the jury about the psychology of police interrogations and the counter-intuitive phenomenon of police-induced false confessions. Justice McCormack's assistant pointed out, which I could have figured out had I tried, that Justice McCormack was not on the court at that time [laughter], but I don't want to mince any words. I'm disgusted by the poor quality of legal reasoning and tendentious legal analysis by the Michigan Supreme Court in the *Kowalski* case. And my experience working on cases in Detroit is that the quality of the judging at the trial level can also be awful and that the quality of the justice in Detroit, perhaps more generally in Michigan, is not that much better in disputed confession cases.

None of this has anything to do with Justice McCormack [laughter]. Although one thing I want to say is that it's nice to believe that the United States has the best legal system in the world. But to

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1. *People v. Kowalski*, 821 N.W.2d 14, 32 (Mich. 2012).

2. *See id.* at 31–33 (asserting the misguided belief that the empirical psychological science of false confessions is not sufficiently reliable to admit expert testimony on the subject, despite the fact that social psychologists like me have routinely been allowed to testify in hundreds of such cases across the United States in the last three decades).

make that statement, you have to look at the United States and other criminal justice systems comparatively, and there are a lot of comparative scholars in law who've done that research and don't believe the United States has the best system in the world. We don't know how many innocent people have been wrongly convicted, and we don't know how well we can discover it, so we simply don't know the numbers. I'll talk about that at some point. But it appears we might have, arguably, the biggest wrongful conviction problem in the world. So it's possible in theory that we have the best legal system in the world, but I'd want to see some evidence supporting that statement, and looking at the wrongful conviction problem in America—which has been so well documented by the National Registry of Exonerations housed here at the University of Michigan—I don't think such a statement is accurate.

I'm going to talk about false confession cases. I wanted to start with two cases. The first is the case of Adrian Thomas. Some of you may have heard of this case. This case was the subject of a movie.<sup>3</sup> I'm going to show you the trailer too because it's so brief and I couldn't get any clips from the interrogation.<sup>4</sup> Adrian Thomas's three-year-old son Matthew was feverish, wheezing, and was excessively crying.<sup>5</sup> The wife found him one morning not breathing. They took him to the emergency room.<sup>6</sup> This is in Troy, New York. A blood test was done there that showed he was in septic shock.<sup>7</sup> He was transferred to the Albany Medical Center, and a CAT scan showed fluid collections in the brain. He was put on life support, declared brain dead, and eventually died.<sup>8</sup>

The CAT scan did not show a skull fracture.<sup>9</sup> But the emergency room doctors told the police that the baby was murdered and that there was a skull fracture.<sup>10</sup> And the police ended up interrogating Adrian Thomas for ten hours, not knowing how the baby died. Their theory was that he had killed the baby; that he had thrown the baby.<sup>11</sup> The police detectives repeatedly lied to him about the

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3. SCENES OF A CRIME (New Box Productions 2011).

4. SCENES OF A CRIME, Trailer, <https://www.youtube.com/watch?v=N0Fuyrh0eWA>.

5. Brief for The Innocence Network as Amicus Curiae at 21, *People v. Thomas*, 8 N.E.3d 308 (N.Y. 2014) (No. 2012-00306) [hereinafter Brief for The Innocence Network].

6. *Id.* at 22.

7. *See id.*; *see also* Maurice Possley, *Adrian Thomas*, THE NAT'L REGISTRY OF EXONERATIONS (Nov. 20, 2016), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4449>.

8. Brief for The Innocence Network, *supra* note 5, at 22.

9. *Id.*

10. *Id.* at 22–23.

11. *Id.*

scientific evidence.<sup>12</sup> They threatened him, they promised him he could go home if he confessed.<sup>13</sup> They threatened to arrest his wife. Eventually, he did confess.<sup>14</sup> As in the *Kowalski* case here in the State of Michigan,<sup>15</sup> he was convicted. The judge in Albany, New York did not let a false confession expert testify. It wasn't me, it was my good colleague, now retired, UC-Berkeley Professor Richard Ofshe who was excluded.<sup>16</sup> Mr. Thomas was convicted,<sup>17</sup> despite the fact that there was no medical evidence supporting that he killed the baby. In fact, the autopsy never said that the baby died as a result of homicide, and it was very clear that the baby died as a result of sepsis. A very prominent physician testified that sepsis was the likely cause of death.<sup>18</sup> And then there was the local medical emergency room doctor who testified that the child died of Shaken Baby Syndrome.<sup>19</sup>

The highest New York court reversed the conviction.<sup>20</sup> Adrian Thomas was subsequently retried without the confession,<sup>21</sup> and he was acquitted at retrial.<sup>22</sup> But of course there was great harm to Adrian Thomas and his family. His wife divorced him, and he spent six years in prison away from his five other children after his initial conviction.<sup>23</sup>

Adrian Thomas endured a nine-hour interrogation over two sessions.<sup>24</sup> The police from the start believed he was responsible for

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12. *Id.* at 26, 38.

13. *Id.* at 29.

14. *Id.* at 63.

15. Lisa Roose-Church, *Appeals Court Affirms Double Murder Conviction, Sentence*, LIVINGSTON DAILY (Dec. 3, 2004), <http://www.livingstondaily.com/story/news/crime/2014/12/03/appeals-court-affirms-double-murder-conviction-sentence/19827185/>.

16. *People v. Thomas*, 8 N.E.3d 308, 310 (N.Y. 2014); *see also* Brief for the New York City Bar Association as Amicus Curiae at 38–40, *People v. Thomas*, 8 N.E.3d 308 (N.Y. 2014) (No. 2012-00306).

17. *Id.* at 309 (2014).

18. *See Adrian P. Thomas*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Adrian\\_P.\\_Thomas](https://en.wikipedia.org/wiki/Adrian_P._Thomas) (last visited Jan. 14, 2017) (“Chicago specialist Dr. Jan Leestma told the jury that the infant died of septic shock due to a bacterial infection.”); *see also* Transcript of Record at 1970, *New York v. Thomas*, No. 08-1074 (Troy Cty. Ct., Oct. 15, 2009).

19. *Thomas*, 8 N.E.3d at 310 (reviewing testimony the jury heard from the local emergency room doctor that Matthew died from injuries caused by abusive head trauma, another name for Shaken Baby Syndrome).

20. *Id.* at 317.

21. *Id.*

22. Possley, *supra* note 7.

23. *See Police Tactics on Trial: Thomas Acquitted for Murder of Son*, CRIMINALU.CO PRISON NEWS (June 13, 2014), <http://www.blog.criminalu.co/tag/adrian-thomas>.

24. Brief for The Innocence Network, *supra* note 5, at 6, 23, 58.

the death of his child.<sup>25</sup> They believed it was caused by a skull fracture or subdural hematoma.<sup>26</sup> They got him to reenact the killing of his child by throwing something against a crib.<sup>27</sup> The kid died of septic shock. It's clear he was innocent. But the cops began with a theory that he did it. They lied to him repeatedly about the alleged scientific evidence, just making it up as they went along. They promised him, they threatened him, and eventually they got a confession.<sup>28</sup>

Nga Truong is the second case that I want to just briefly talk about.<sup>29</sup> At the time of her interrogation, she was two days short of her seventeenth birthday.<sup>30</sup> She had been a fifteen-year-old mother in a poor Vietnamese household.<sup>31</sup> The child had a history of chronic respiratory problems, including asthma.<sup>32</sup> When the child was thirteen months old in November of 2008, he fell ill with strep throat and bronchitis, was taken to the hospital, and was pronounced dead.<sup>33</sup>

The autopsy never disclosed a cause of death. When the baby was found, there was vomit all over him. He had a very high fever. Apparently, one hour after the boy's death, he still had a 101-degree fever.<sup>34</sup> There was no reason to believe that the baby was murdered, but the police began with the theory that she had to have killed the baby. Six years earlier, when Nga Truong was nine years old, her mother had left her to watch a three-month old baby. That baby (her mother's baby) had died of Sudden Infant Death Syndrome.<sup>35</sup> So the police had assumed she had killed her mother's baby. There was never an investigation into the death of her mother's baby—and the police assumed that she must have therefore have also killed her own baby. Police assumed the mechanism of the prior SIDS death (i.e., her mother's baby) must have been suffocation,

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25. *Id.* at 6.

26. *Id.*

27. *Id.* at 44.

28. *See id.* at 40–45.

29. *See generally* WBUR, *Anatomy of a Bad Confession—Excerpt 3*, YOUTUBE (Dec. 6, 2011), <https://www.youtube.com/watch?v=I-E4CMX07Y0> (showing excerpt of interrogation of Nga Truong).

30. David Boeri, *How a Teen's Coerced Confession Set Her Free*, NAT'L PUBLIC RADIO (Dec. 30, 2011), <http://www.npr.org/2012/01/02/144489360/how-a-teens-coerced-confession-set-her-free>; *see also* Julian Seltzer & Amanda Jane Stern, *Coerced: A Documentary Play*, BRANDEIS UNIV., AM. STUDIES PROGRAM, <https://www.brandeis.edu/programs/american-studies/coerced.html> (last visited Jan. 31, 2017).

31. *See* Boeri, *supra* note 30.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

even though there was no evidence that the baby died of suffocation.

As a result, the police interrogated her for only two-and-a-half hours. The whole thing is on tape, like the Adrian Thomas case, which is the reason why I began with these two cases. Most are not on tape. They yelled at her. They accused her of lying. They lied at every turn about what the alleged scientific evidence showed—the autopsy, the doctors, and telling her repeatedly that it showed that she did it.<sup>36</sup> They gave her two choices: she could either go home and be charged as a juvenile and go through the juvenile system, which wouldn't punish her, but would instead take her and her brothers out of the home, a very poor home, and put them in a better foster care system, or she could be charged as an adult, and they would have to go to court and show that she never cooperated, that she was lying, and she would be punished.<sup>37</sup>

I began with these two examples just to give some context. I'm sure Dr. Barnes sees this all the time, this rush to judgment when there are ambiguous injuries or a death to a child. And the police officers either assume the child must have been murdered or believe a flawed emergency room speculation that sometimes, as in Adrian Thomas's case, was contradicted by the evidence—there was no skull fracture—must be the truth and setting out to prove it, and they use coercive interrogation techniques to do so.

Here I want to talk first about false confessions. This is a phenomenon that's been well studied. The modern science of false confessions begins about thirty, thirty-five years ago.<sup>38</sup> The actual empirical study goes back over a century.<sup>39</sup> There are multiple types of data. I tend to work with real-world data, with actual cases. As a scientist or social scientist knows, there's no such thing as perfect data. All data has strengths and weaknesses. The kind of data I work with tends to have internal validity problems. We can't parse out causation, we can't control our variables—though we can, with good statistical data, do good statistical analysis. Laboratory data—particularly in this area where we can't recreate ten-hour interrogations where people are accused of murder and lied to and threatened—has what's called external validity problems. But you get convergent validity when multiple methods that have different limitations converge on the same findings.

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36. *Id.*

37. *Id.*

38. See, e.g., Saul Kassin & Lawrence Wrightsman, *Confession Evidence*, in *THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE* 67–94 (S. Kassin & L. Wrightman eds., 1985).

39. See HUGO MUNSTERBERG, *ON THE WITNESS STAND: ESSAYS ON PSYCHOLOGY AND CRIME* (1908).

In what I do, I focus on individual case studies. There are lots of them—books written about false confessions, including one I’ve written.<sup>40</sup> Many of these cases reveal multiple false confessions. Perhaps some of you have seen the Central Park Jogger movie. You know, if you are of a certain age, those of us who lived through it (and it looks like most of the people in this room are of a certain age, right?). This was the trial of the century. We all assumed that the young men charged in the Central Park jogger rape case were guilty, and it turned out they falsely confessed and were coerced into doing so.<sup>41</sup> And many others happen, many others in multiple false confession cases.

I don’t just look at individual cases; I also look at aggregated cases. These were a couple of the studies that I’ve done. There’s one in progress that I can’t seem to finish. We’ve got two hundred proven false confessions. That’s about two hundred total in which we found false confessions that are absolutely proven false.<sup>42</sup> That is, nobody would dispute them, where no crime occurred, or where it was physically impossible for the person to have committed the crime, where there’s scientific evidence that exculpates conclusively, or where the true perpetrator is identified. Sometimes, there’s more than one of these. They’re not mutually exclusive. The idea is that no one can say, “This person might have done it,” because we can prove to a near certainty, if not absolute certainty in many of these cases, that the confession is false. These are very conservative criteria, and it limits the cases we can talk about.

Another source of data are the DNA exonerations, which are very well known.<sup>43</sup> But this dataset, of course, has a selection bias in that these are only cases in which DNA evidence is available (and there are others here more qualified here to talk about those selection biases than I am). But we’ve learned a great deal about false confessions and other sources of wrongful conviction from this dataset.

One of my favorite people on the planet who is here, Sam Gross, started with Rob Warden, the National Registry of Exonerations, which is housed here at the University of Michigan Law School.<sup>44</sup> It is one of the reasons I said it was a privilege to be talking to you.

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40. See, e.g., TOM WELLS & RICHARD A. LEO, *THE WRONG GUYS: MURDER, FALSE CONFESSIONS, AND THE NORFOLK FOUR* (2008).

41. Benjamin Weiser, *5 Exonerated in Central Park Jogger Case Agree to Settle Suit for \$40 Million*, N.Y. TIMES (June 19, 2014), <http://www.nytimes.com/2014/06/20/nyregion/5-exonerated-in-central-park-jogger-case-are-to-settle-suit-for-40-million.html?r=0>.

42. Richard A. Leo, Steven Drizin, Gillian Emmerich & Amy Shlosberg, *Analyzing Proven False Confessions* (forthcoming) (cases on file with authors).

43. *Id.*

44. *Id.*

The DNA cases consistently show fifteen to twenty-five percent false confessions.<sup>45</sup> I think the number is really closer to fifteen percent.<sup>46</sup> I think they over-count because they count each defendant in cases in which there's a false confession about the same crime, even if not every defendant made a false confession. So if there are four defendants and two falsely confessed and they were all exonerated, exculpated, by DNA, the National Registry of Exonerations counts all four as false confessions. I would just count the two.

The National Registry of Exonerations, which looks at a broader swath of cases, has about a thirteen percent false confession rate, if you look at those cases.<sup>47</sup> This database is ever-growing, and I'm a little bit nervous talking about it with Sam Gross, the world's expert, in the room. So I merely make this point: to begin with the data, and what the sources of the data are for the comments that I'm going to make in my time.

Now, as Sam and many others would say, these cases are undoubtedly the tip of the iceberg. We don't know how frequent or common false confessions are, much less wrongful convictions. We're studying a phenomenon that is largely invisible. And so we don't know. It could be one percent of interrogations lead to false confessions; it could be ten percent; it could be more. We don't know what percentage of the false confessions lead to wrongful convictions.

I did want to talk about the impact of confession evidence. There's every reason to believe that when you have a false confession, you're likely to get a wrongful conviction, particularly if the case goes to trial. Nga Truong's case didn't go to trial.<sup>48</sup> She was in jail for two-and-a-half years, and her confession was ultimately suppressed and thrown out<sup>49</sup> as a Miranda violation, as a voluntariness violation, as a violation of a rule in Massachusetts that when a juvenile is interrogated in custody, the juvenile must have a meaningful opportunity to consult with an adult before agreeing to participate.<sup>50</sup> It never got into the stream of evidence that led to a trial. It

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45. See NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/browse.aspx> (last visited Jan. 31, 2017); see also INNOCENCE PROJECT, <http://www.innocenceproject.org/latest/> (last visited Jan. 14, 2017).

46. See RICHARD A. LEO, *POLICE INTERROGATION AND AMERICAN JUSTICE* 244 (2008); see also BRANDON GARRETT, *CONVICTING THE INNOCENT* 18 (2011).

47. See LEO, *supra* note 46, at 244; see also GARRETT, *supra* note 46, at 18.

48. Boeri, *supra* note 30.

49. *Id.*

50. See *Commonwealth v. Smith*, 28 N.E.3d 385, 389–90 (Mass. 2015) (extending “interested adult” rule to apply to seventeen-year-olds, which requires that juveniles be afforded a meaningful opportunity to consult with an “interested adult” before waiving his or her Miranda rights).



was weeded out. I emphasize this because there's also some data to show that many false confession cases do get weeded out. The problem is when they get into the stream of evidence, as occurred in the Adrian Thomas case. Thomas was convicted despite the fact that there was a ten-hour recorded interrogation for the jury to see, which was highly coercive. He was threatened, promised, repeatedly lied to, including told that he could go home.<sup>51</sup> The world's expert from Harvard on sepsis said this baby clearly died of septic shock. There was no evidence of a skull fracture.<sup>52</sup> Yet he had confessed to it.<sup>53</sup> The CAT scan clearly showed there was no skull fracture.<sup>54</sup> When the confession was used against him, he was convicted.<sup>55</sup> When the New York court reversed the conviction, and he was tried again without the confession, he was acquitted.<sup>56</sup>

Confessions are highly prejudicial when they are introduced. These are some survey studies showing what the law has known for centuries—that when people hear somebody has confessed, they assume they're guilty.<sup>57</sup> The real trial is what occurs in the interrogation room. One of these studies is of real jurors that I did with some colleagues in southern California.<sup>58</sup> Real jurors have no idea about the scientific literature on interrogation and confessions. The subject of police interrogation and false confessions is beyond common knowledge and highly counter-intuitive.<sup>59</sup> Police

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51. Brief for The Innocence Network, *supra* note 5, at 40–45.

52. *Id.* at 22.

53. *People v. Thomas*, 8 N.E.3d 308, 309 (N.Y. 2014).

54. Brief for The Innocence Network, *supra* note 5, at 22.

55. *Thomas*, 8 N.E.3d at 309.

56. Possley, *supra* note 7.

57. See Iris Blandon-Gitlin, Kathryn Sperry & Richard Leo, *Jurors Believe Interrogation Tactics Are Not Likely to Elicit False Confessions: Will Expert Testimony Inform Them Otherwise?*, 17 *PSYCHOL., CRIME & L.* 239, 244, 247 (2011) (finding that most jurors believed coercive interrogation tactics would likely elicit confessions from guilty, but not innocent suspects); see Richard A. Leo & Brittany Liu, *What Do Potential Jurors Know about Police Interrogation Techniques and False Confessions?*, 27 *BEHAV. SCI. & L.* 381, 388–90 (2009) (finding that survey participants believed that coercive interview techniques are not likely to elicit false confessions). In addition to these studies, see generally Danielle Chojnacki, Michael Cicchini & Lawrence White, *An Empirical Basis for the Admission of Expert Testimony on False Confessions*, 40 *ARIZ. ST. L.J.* 1 (2008); Linda Henkel, Kimberly Coffman & Elizabeth Dailey, *A Survey of People's Attitudes and Beliefs About False Confessions*, 26 *BEHAV. SCI. & L.* 555 (2008); Mark Costanzo, Netta Shaked-Schroer & Katherine Vinson, *Juror Beliefs About Police Interrogation, False Confession, and Expert Testimony*, 7 *J. LEGAL EMPIRICAL STUD.* 231 (2010).

58. See generally Blandon-Gitlin, Sperry & Leo, *supra* note 57 (surveying 126 jurors from Orange County, California on their perceptions about interrogation tactics and expert testimony on confessions).

59. See Chojnacki, Cicchini & White, *supra* note 57; see also Leo & Liu, *supra* note 57; Henkel, Coffman & Dailey, *supra* note 57; Blandon-Gitlin, Sperry & Leo, *supra* note 57; see generally Costanzo, Shaked-Schroer & Vinson, *supra* note 57.

detectives receive specialized training in psychological interrogation techniques; most people do not know what these techniques are or how the techniques are designed to work (i.e., move a suspect from denial to admission). In addition, most people also do not know what psychological coercion is, why some techniques are regarded as psychologically coercive, and what their likely effects are. Moreover, most people do not know which interrogation techniques create a risk of eliciting false confessions or how and why the psychological process of police interrogation can, and sometimes does, lead suspects to falsely confess. This unfamiliarity causes most people to assume that virtually all confessions are true.

So one of the things—and I hadn't planned to talk this way, but this is extemporaneous—one of the things that the Michigan Supreme Court would have noticed if it paid any attention to the actual empirical scientific literature on false confessions, is that actual jurors think that police can be human lie detectors, that when they think somebody is lying, they usually get it right, eighty, eighty-five percent of the time.<sup>60</sup> The scientific, the psychological literature very clearly shows they get it right about fifty-five percent of the time, like most people do, that there are high rates of error.<sup>61</sup> But there are other things in this literature about misconceptions and myths that influence the highly prejudicial impact of confession, including false and coerced confession evidence when put before a jury.

When making the argument that confessions are highly prejudicial, we rely both on laboratory studies and field studies. Many psychologists—most noteworthy Saul Kassin<sup>62</sup> of John Jay College of Criminal Justice—have done experimental studies, showing that when mock jurors evaluate confession evidence, they rate it more highly or more impactful than other types of evidence. This finding holds even when the confession evidence is coerced, even when they're instructed to disregard it, even when it's contradicted by other types of case evidence, and is not highly probative. A second line of research involves the aggregated case studies of false confessions that I mentioned earlier. In these studies, we have looked at, among other things, the case outcomes when innocent individuals falsely confess. In these studies, about half of the cases have gone to trial, and the other half were weeded out prior to trial. In the half

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60. See generally Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 *LAW & HUM. BEHAV.* 3 (2010).

61. See *id.* at 6.

62. See Saul M. Kassin, *False Confessions: Causes, Consequences, and Implications for Reform*, 1 *POL. INSIGHTS FROM BEHAV. & BRAIN SCI.* 112, 117 (2014) (summarizing studies about how jurors evaluate confession evidence).

of the cases that went to trial, we have numbers showing the percentage who were convicted. Three out of four<sup>63</sup> to four out of five<sup>64</sup> to nine out of ten<sup>65</sup> of these individuals were wrongly convicted—many of them, their cases reversed when the DNA showed they were innocent or exonerated through other means. These figures are surprising, since in all of these cases the defendants were factually innocent, the confession was factually false, the confessions were contradicted by other case evidence and only illusorily supported, if at all, by ambiguous or misleading circumstantial evidence, and the defendants had typically alleged that they were made to confess falsely after a psychologically coercive interrogation process. But, unlike the Thomas and Truong cases discussed early, virtually all of the interrogations that produced these factually false confessions were not electronically recorded.

There is a biasing effect of confession evidence—whether it’s false or not—at every stage of the process, including in post-conviction. I have some more specific data that I’m going to very briefly mention on the aggregated case studies. The biggest one to date is one I’ve done with Steve Drizin. Many of these false confessions also lead to false plea bargains, which is not surprising. In this study, eighty-one percent of the false confessors who went to trial were erroneously convicted—four out of five.<sup>66</sup> But when you add the plea bargains in, it means eighty-five percent of the people whose cases were not dismissed pre-trial ended up being convicted.<sup>67</sup> I mentioned earlier that Steven Drizin and Gillian Emmerich and I have a study of 200 proven false confessions.<sup>68</sup> To date, we’ve coded 168 of them; we’re not done. But what these numbers show is that ninety-three percent so far of those whose cases went to trial were convicted.<sup>69</sup> Again, these are proven false confessions. These aren’t, “We think they’re innocent.” These are, “We can affirmatively

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63. See Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 483 (1998) (finding that in a study of sixty false confessions, seventy-three percent of the false confessions resulted in convictions).

64. See Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 960 (finding that in a study of 125 “proven false confessions” that eighty-one percent resulted in jury convictions).

65. See Jon B. Gould et al., *Predicting Erroneous Convictions*, 99 IOWA L. REV. 471, 495 n.65 (finding that in a study of 460 convictions and “near misses,” 110 of which involved false confessions, eighty-eight percent resulted in wrongful convictions).

66. See Drizin & Leo, *supra* note 64, at 960.

67. See *id.* at 961.

68. Leo et al., *supra* note 42; Richard Leo, Powerpoint Presentation at the University of Michigan Law School: Child Abuse Evidence: Perspectives from Law, Medicine, Psychology, and Statistics (Nov. 6, 2015) (on file with the UNIV. MICH. J.L. REFORM).

69. Leo et al., *supra* note 42; Leo, Powerpoint Presentation, *supra* note 68.

prove, you know, that the murder victim showed up alive,” although that typically doesn’t lead to a conviction. But there are cases like that in our dataset. More common is the baby really died through other means, physical impossibility—somebody’s at another place and it can be documented at the time of the crime, the DNA exculpations, and the true perpetrator cases. When you add the plea bargains in this dataset, which so far are slightly higher, you get ninety-five percent of the cases that aren’t weeded out leading to conviction.<sup>70</sup>

I want to now discuss the social psychology of police interrogation and risk factors for false confession. Police interrogation is a cumulative, structured, and time-sequenced process in which detectives draw on an arsenal of psychological techniques in order to overcome a suspect’s denials and elicit incriminating statements, admissions, and/or confessions. This is the sole purpose of custodial interrogation. To achieve this purpose, interrogators use techniques that seek to influence, persuade, manipulate, and deceive suspects into believing that their situation is hopeless and that their best interest lies in confessing.<sup>71</sup> Sometimes, however, interrogators cross the line and employ techniques and methods of interrogation that are coercive and increase the likelihood of eliciting unreliable confessions or statements.

Contemporary American interrogation methods are structured to persuade a rational guilty person who knows he is guilty to rethink his initial decision to deny culpability and choose instead to confess. Police interrogators know that it is not in any suspect’s rational self-interest to confess. They expect to encounter resistance and denials to their allegations, and they know that they must apply a certain amount of interpersonal pressure and persuasion to convince a reluctant suspect to confess. As a result, interrogators have, over the years, developed a set of subtle and sophisticated interrogation techniques whose purpose is to alter a guilty suspect’s perceptions so that he will see the act of confessing as being in his self-interest.

These interrogation techniques were developed for the purpose of inducing guilty individuals to confess to their crimes, and police are admonished in their training to use them only on suspects believed to be guilty.<sup>72</sup> When these same techniques are used on

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70. Leo et al., *supra* note 42; Leo, Powerpoint Presentation, *supra* note 68.

71. See generally Deborah Davis & William O’Donohue, *The Road to Perdition: Extreme Influence Tactics in the Interrogation Room*, in HANDBOOK OF FORENSIC PSYCHOLOGY 897–996 (William O’Donohue ed., 2004).

72. See FRED INBAU, JOHN REID, JOSEPH BUCKLEY & BRIAN JAYNE, CRIMINAL INTERROGATION AND CONFESSIONS 187 (5th ed. 2013) (“These nine steps are presented in the context of the

innocent suspects, they carry a heightened risk that they will elicit false statements, admissions, and/or confessions.

The goal of an interrogator is to persuade a suspect to view his immediate situation differently by focusing the suspect's attention on a limited set of choices and alternatives, and by convincing him of the likely consequences that attach to each of these choices.<sup>73</sup> The process often unfolds in two steps: first, the interrogator causes the suspect to view his situation as hopeless; and, second, the interrogator persuades the suspect that only by confessing will the suspect be able to improve his otherwise hopeless situation.<sup>74</sup> The interrogator makes it clear what information he is seeking and attempts to convince the suspect that his only rational option is to confirm the information the interrogator purports to already know.

The first step or stage of an interrogation consists of causing a suspect to view his situation as hopeless.<sup>75</sup> If the interrogator is successful at this stage, he will undermine the suspect's self-confidence and cause the suspect to reason that there is no way to escape the interrogation without incriminating himself. To accomplish this, interrogators accuse the suspect of having committed the crime; they attack and try to undermine a suspect's assertion of an alibi, alternate sequence of events, or verbalization of innocence (pointing out or inventing logical and factual inconsistencies, implausibilities, and/or impossibilities); they exude unwavering confidence in their assertions of the suspect's and his accomplices' guilt; they refuse to accept the possibility of the suspect's denials; and, most importantly, they confront the suspect with incontrovertible evidence of his guilt, whether real or non-existent. Because interrogation is a cumulative and time-sequenced process, interrogators often draw on these techniques repeatedly and/or in succession, building on their earlier accusations, challenges and representations at each step in the interrogation process.<sup>76</sup>

Through the use of these techniques, the interrogator communicates to the suspect that he has been caught, that there is no way he will escape the interrogation without incriminating himself and

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interrogation of suspects whose guilt seems definite or reasonably certain." For empirical support for this observation, see generally LEO, *supra* note 46.

73. See Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 985 (1997) [hereinafter Ofshe & Leo, *The Decision to Confess Falsely*]; LEO, *supra* note 46, at 119–64.

74. See Ofshe & Leo, *The Decision to Confess Falsely*, *supra* note 73, at 985; LEO, *supra* note 46, at 119–64.

75. See Ofshe & Leo, *The Decision to Confess Falsely*, *supra* note 73, at 985; LEO, *supra* note 46, at 119–64.

76. See Ofshe & Leo, *The Decision to Confess Falsely*, *supra* note 73, at 985; LEO, *supra* note 46, at 119–64.

other suspects, and that his future is determined—that regardless of the suspect’s denials or protestations of innocence, he is going to be arrested, prosecuted, convicted, and punished. The interrogator seeks to convince the suspect that this is a fact that has been established beyond any doubt, and thus that any objective person must necessarily reason to this conclusion.<sup>77</sup> By persuading the suspect that he has been caught, that the existing evidence or case facts objectively prove his guilt, and that it is only a matter of time before he will be prosecuted and convicted, the interrogator seeks to alter the suspect’s perceptions, such that he comes to view his situation as hopeless and to perceive that resisting the interrogator’s demands is futile.<sup>78</sup>

Once the interrogator has caused the suspect to understand that he has been caught and that there is no way out of this predicament, the interrogator seeks to convince the suspect that the only way to improve his otherwise hopeless situation is by confessing to the offense(s) of which he is accused and confirming the information the interrogator is seeking to extract from the suspect.<sup>79</sup> The second step of the interrogation thus consists of offering the suspect inducements to confess—reasons or scenarios that suggest the suspect will receive some personal, moral, communal, procedural, material, legal or other benefit if he confesses to the interrogator’s version of the offense.<sup>80</sup> One goal of these scenarios or inducements is to downplay both the seriousness of the alleged crime as well as the consequences of confessing, leading the suspect to perceive that the consequences of continuing to deny the accusations will be worse than the consequences of admitting to participation in the crime. The interrogator’s attempt to diminish the suspect’s perception of the consequences of confessing is combined with techniques that are designed to increase the suspect’s anxiety in order to create the perceived need for release from the stress of prolonged interrogation.<sup>81</sup> Investigators also use scenarios to plant

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77. See Ofshe & Leo, *The Decision to Confess Falsely*, *supra* note 73, at 985; LEO, *supra* note 46, at 119–64.

78. Ofshe & Leo, *The Decision to Confess Falsely*, *supra* note 73, at 1041, 1045; see LEO, *supra* note 46, at 119–64.

79. Ofshe & Leo, *The Decision to Confess Falsely*, *supra* note 73, at 1051; see LEO, *supra* note 46, at 119–64.

80. Ofshe & Leo, *The Decision to Confess Falsely*, *supra* note 73, at 1056–57, 1060–61; see LEO, *supra* note 46, at 119–64.

81. See Brian Jayne, *The Psychological Principles of Criminal Interrogation*, in *CRIMINAL INTERROGATION AND CONFESSIONS* 332 (3d ed., 1986) (“The goal of interrogation is therefore to decrease the suspect’s perception of the consequences of confessing, while at the same time increasing the suspect’s internal anxiety associated with his deception.”).

ideas or suggestions about how or why the suspect may have committed the crime which they may later pressure the suspect to accept and repeat.

Researchers have classified the types of inducements investigators use during the second step of interrogation into three categories: *low-end* inducements, *systemic* inducements, and *high-end* inducements.<sup>82</sup>

*Low-end* inducements refer to interpersonal or moral appeals the interrogator uses to convince a suspect that he will feel better if he confesses. For example, an interrogator may tell a suspect that the truth will set him free if he confesses, that confessing will relieve his anxiety or guilt, that confessing is the moral or Christian thing to do, or that confessing will improve his standing in the eyes of the victim or the eyes of the community.

*Systemic* inducements refer to appeals that the interrogator uses to focus the suspect's attention on the processes and outcomes of the criminal justice system in order to get the suspect to come to the conclusion that his case is likely to be processed more favorably by all actors in the criminal justice system if he confesses. For example, an interrogator may tell a suspect that he is the suspect's ally and will try to help him out—both in his discussions with the prosecutor as well as in his role as a professional witness at trial—but can only do so if the suspect first admits his guilt. Or the interrogator may ask the suspect how he expects the prosecutor to look favorably on the suspect's case if the suspect does not cooperate with authorities. Or the interrogator may ask the suspect what a judge and jury are really going to think, and how they are likely to react, if he does not demonstrate remorse and admit his guilt to authorities. Interrogators often couple the use of *systemic* incentives with the assertion that this is the suspect's one and only chance—now or never—to tell his side of the story;<sup>83</sup> if he passes up this opportunity, all the relevant actors in the system (police, prosecutor, judge, and jury) will no longer be open to the possibility of viewing his actions in their most favorable light. This tactic may incentivize a suspect to either falsely confess or confirm an incorrect story for the interrogator based on the belief that the suspect will not have the same opportunity to help himself again in the future. Interrogators rely on *systemic* inducements to persuade the suspect to reason to the conclusion that the justice system naturally confers rewards for

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82. Ofshe & Leo, *The Decision to Confess Falsely*, *supra* note 73, at 1056, 1060, 1077; *see* LEO, *supra* note 46, at 119–64.

83. Ofshe & Leo, *The Decision to Confess Falsely*, *supra* note 73, at 1060–61, 1064; *see* LEO, *supra* note 46, at 119–64.

those who admit guilt, demonstrate remorse, and cooperate with authorities, whereas it inevitably metes out punishment for those who do not.

Finally, *high-end* inducements refer to appeals that directly communicate the message that the suspect will receive less punishment, a lower prison sentence and/or some form of police, prosecutorial, judicial, or juror leniency and/or immunity if he complies with the interrogator's demand that he confess, but that the suspect will receive a higher sentence or greater punishment if he does not comply with the interrogator's demand that he confess.<sup>84</sup> High-end inducements may either be implicit or explicit: the important question is whether the interrogation technique communicates the message, or is understood to communicate the message, that the suspect will receive a lower (or no) criminal charge and/or lesser (or no) punishment if he confesses as opposed to a higher criminal charge and/or greater amount of punishment if he does not. For example, if police interrogators lead a suspect to believe he will be able to go home and not be charged with a homicide if he confesses to witnessing the crime and fingering someone else as the triggerman, this would be a *high-end* inducement because it communicates immunity in exchange for making such a statement.<sup>85</sup>

Explicit *high-end* incentives can include telling a suspect that there are several degrees of the alleged offense, each of which carry different amounts of punishment, and asking the suspect which version he would like to confess to. Or the interrogator may explicitly tell the suspect that he will receive a long prison sentence—or perhaps even the death penalty—if he does not confess to the interrogator's version of events. The interrogator may also point out what happens to men of the suspect's age, or men accused of crime, in prison if the suspect does not confess to the interrogator's minimized account. Sometimes interrogators who rely on *high-end* inducements will present the suspect with a simple two-choice situation (good vs. bad): if the suspect agrees to the good choice (a minimized version of the offense, such as involuntary manslaughter or self-defense, or the implication of another person), he will receive a lower amount of punishment or no punishment at all; but if he does not confess right then, criminal justice officials will impute to him the bad choice (a maximized version of the offense, such as pre-meditated first degree murder, or that the suspect was acting

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84. Ofshe & Leo, *The Decision to Confess Falsely*, *supra* note 73, at 1077; *see* LEO, *supra* note 46, at 155–62.

85. Ofshe & Leo, *The Decision to Confess Falsely*, *supra* note 73, at 1103; *see* LEO, *supra* note 46, at 155–62.



alone), and he will receive a higher level of punishment, or perhaps the harshest possible punishment.<sup>86</sup> The purpose of *high-end* inducements is to communicate to a suspect that it is in his rational self-interest to confess to the minimized or less-incriminating version of events that the interrogator is suggesting because if the suspect does so, he will receive a lower charge, a lesser amount of punishment and/or no time in prison.<sup>87</sup> If he fails to do so, he will receive a higher charge, a greater amount of punishment and more time in prison, perhaps even the death penalty.

To evaluate whether a particular interrogation was psychologically coercive, an expert must evaluate the interrogator's techniques, methods, and strategies in the light of the generally accepted findings of the social science research literature on the subjects of interrogation, coercive influence techniques, and confessions.<sup>88</sup>

Social science research has repeatedly demonstrated that some *systemic* inducements (depending on the content of the inducement, how explicitly or vaguely it is stated, and the message that it communicates) and all *high-end* inducements are coercive because they rely on implicit and/or explicit promises of leniency and threats of harm to induce compliance. *Systemic* and *high-end* inducements increase the likelihood of eliciting false confessions and false statements from suspects because of the *quid pro quo* arrangement and the benefit a suspect expects to receive in exchange for the information the interrogator is seeking, regardless of whether the suspect knows that information to be true or not. Such promises of leniency and threats of harm are regarded as coercive in the social science literature because of the messages they convey and their demonstrated impact on the decision-making of individuals. The expert may also evaluate whether the interrogation techniques, either individually or cumulatively, had the effect of causing a suspect to perceive that he had no choice but to comply with the demands of the interrogator, and thus, the interrogation, in effect, overbore the suspect's will.<sup>89</sup>

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86. This technique is sometimes referred to in the academic literature as the maximization/minimization technique. See Kassin et al, *supra* note 60, at 12; LEO, *supra* note 46, at 155–62.

87. Ofshe & Leo, *The Decision to Confess Falsely*, *supra* note 73, at 1089; see LEO, *supra* note 46, at 155–62.

88. See LEO, *supra* note 46, at 314–16 (discussing social science expert testimony on interrogations and confessions); see also Keith Findley, Brian Cutler & Danielle Loney, *Expert Testimony on Interrogation and False Confessions*, 82 UMKC L. REV. 589 (2014).

89. *Id.*

False confessions and false statements, of course, will occur in response to traditionally-coercive methods of interrogation such as the use of physical violence, threats of immediate physical harm, excessively long or incommunicado interrogation, or deprivation of essential necessities such as food, water, and/or sleep. However, these types of traditionally coercive techniques no longer appear to be common in the United States.<sup>90</sup> The psychological techniques of interrogation that cross the line and sometimes cause false confessions typically involve one of two patterns: (1) the interrogator communicates to the suspect, implicitly or explicitly, that he will receive a higher charge and harsher sentence or punishment if he does not provide a satisfactory statement, but that he will receive a lesser charge or sentence, or perhaps no charge or punishment at all, if he does; or (2) the interrogator wears down and distresses the suspect to the point that the suspect subjectively feels that he has no choice but to comply with the interrogator's demands if he is to put an end to the intolerable stress of continued interrogation and/or escape the oppressive interrogation environment. As will be discussed later, some individuals have a greater vulnerability to making false confessions both because of their individual characteristics (e.g., juveniles, the mentally handicapped, etc.) or because of certain interrogation techniques (e.g., being promised freedom and immunity in exchange for admitting to witnessing a crime).

Whether a police-induced false confession or statement is caused primarily by coercive interrogation techniques or by a suspect's pre-existing vulnerabilities to interrogation, or some combination of both, there are three fundamental types of false confessions and statements: a *voluntary* false confession or statement (i.e., a false confession knowingly given in response to little or no police pressure); a *coerced* or *stress-compliant* false confession or statement (i.e., a false confession knowingly given to put an end to the interrogation or to receive an anticipated benefit or reward in exchange for confession); and a *coerced* or *non-coerced-persuaded* false confession or statement (i.e., a confession given by a suspect who comes to doubt the reliability of his memory and thus comes to believe that he may have committed the crime, despite no actual memory of having done so).<sup>91</sup> These different types of false confession typically involve

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90. Ofshe & Leo, *The Decision to Confess Falsely*, *supra* note 73, at 983; see LEO, *supra* note 46, at 75–77.

91. See Richard Ofshe & Richard A. Leo, *The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions*, 16 *STUD. L., POL. & SOC'Y* 189, 207–08 (1997) [hereinafter Ofshe & Leo, *Social Psychology of Police Interrogations*].

different levels of police pressure, a different psychology of influence and decision-making, and different beliefs about the likelihood of one's guilt. Regardless of type, false confessors typically recant their confessions shortly after they are removed from the pressures and reinforcements of the interrogation environment.

As the social science research has indicated, there are numerous "situational" risk factors for police interrogation-induced false confession. These include:

1) *Presumption of Guilt, Presumption of Guilty Knowledge, and Investigative Bias.*<sup>92</sup> Substantial social science research has demonstrated that a behavioral presumption of guilt leads to tunnel vision, confirmation bias, and investigative bias among police investigators, who, as a result, often end up eliciting unreliable case information.<sup>93</sup> When investigators begin with or arrive at a premature presumption of guilt, they seek to build a case against an individual whose guilt they assume *a fortiori*—rather than seeking to even-handedly collect factual information and objectively investigate a case. Under these circumstances, investigators act as if they are seeking to prove their pre-existing theories or conclusions rather than investigate a hypothesis. This mental framework causes investigators to disregard contradictory information and evidence, selectively mischaracterize existing information and evidence, misinterpret a suspect's statements and behavior to conform to the investigators' pre-existing assumptions, and to more aggressively interrogate suspects whose guilt they presume.<sup>94</sup> Most significantly, social science research has demonstrated that investigators' pre-existing presumption of guilt puts innocent suspects at an elevated risk of making or agreeing to a false statement, admission, or confession in order to satisfy overzealous investigators and put an end to the accusatory pressures of sustained police interrogation.<sup>95</sup>

2) *Lengthy Interrogation and Sleep Deprivation.* Lengthy interrogation/custody and sleep deprivation are two related *situational* risk factors for making or agreeing to a false confession during police

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92. See Saul Kassin, Christine Goldstein & Kenneth Savitsky, *Behavioral Confirmation in the Interrogation Room: On the Dangers of Presuming Guilt*, 27 LAW & HUM. BEHAV. 187, 198 (2003); Carole Hill et al., *The Role of Confirmation Bias in Suspect Interviews: A Systematic Evaluation*, 13 LEGAL & CRIMINOLOGICAL PSYCHOL. 357 (2008); Fadia Narchet, Christian Meissner & Melissa Russano, *Modeling the Influence of Investigator Bias on the Elicitation of True and False Confessions*, 35 LAW & HUM. BEHAV. 452, 452 (2011).

93. See generally CAROL TAVRIS & ELLIOTT ARONSON, MISTAKES WERE MADE (BUT NOT BY ME) (2007).

94. See Kassin, Goldstein & Savitsky, *supra* note 92, at 199.

95. See Kassin et al., *supra* note 60, at 6, 16.

interrogation.<sup>96</sup> Empirical studies indicate that the overwhelming majority of routine custodial interrogations last less than one hour,<sup>97</sup> whereas the combined time period of custody and interrogation in most interrogations leading to a false confession is more than six hours.<sup>98</sup> The Reid and Associates police interrogation training manual specifically recommends that police interrogate for no longer than four hours absent “exceptional situations” and that “most cases require considerably fewer than four hours.”<sup>99</sup> Lengthy detention and interrogation is a significant risk factor for false confessions because the longer an interrogation lasts, the more likely the suspect is to become fatigued and depleted of the physical and psychological resources necessary to resist the pressures and stresses of accusatory interrogation,<sup>100</sup> especially where investigators use physically or psychologically coercive methods.<sup>101</sup> It can also lead to sleep deprivation, which, as mentioned earlier, heightens interrogative suggestibility by impairing decision-making abilities, such as the ability to anticipate risks and consequences, inhibit behavioral impulses and resist suggestive questioning.<sup>102</sup> The longer an interrogation lasts, the more pressure investigators bring to bear on the suspect and the more techniques and strategies they may use to move the suspect from denial to admission. Researchers consider the length of an interrogation to include both the time that a suspect is being questioned and/or accused as well as any breaks between questioning/accusation sessions because breaks between accusation and questioning add to the stress and fatigue of the interrogation and sometimes is used as an interrogation technique itself.

3) *False evidence ploys.* Police interrogators routinely tell criminal suspects that the evidence establishes their guilt: if police possess real evidence, this is called a true evidence ploy. If police are making up, lying about, or exaggerating non-existent evidence, this is called a false evidence ploy. The social science research literature

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96. See *id.* at 6.

97. Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 302 (1995–1996); see also BARRY FELD, *KIDS, COPS AND CONFESSIONS: INSIDE THE INTERROGATION ROOM* 156 (2013).

98. Drizin & Leo, *supra* note 64, at 948.

99. FRED INBAU, JOHN REID, JOSEPH BUCKLEY & BRIAN JAYNE, *CRIMINAL INTERROGATION AND CONFESSIONS* 597 (4th ed. 2001).

100. Deborah Davis & Richard A. Leo, *Interrogation-Related Regulatory Decline: Ego-Depletion, Failures of Self-Regulation and the Decision to Confess*, 18 PSYCHOL., PUB. POL’Y & L., 673 (2012).

101. See Kassin et al., *supra* note 60.

102. See Mark Blagrove, *Effects of Length of Sleep Deprivation on Interrogative Suggestibility*, J. EXPERIMENTAL PSYCHOL. 2, 48 (1996); see also Stephen Frenda et al., *Sleep Deprivation and False Confessions*, 113 PROC. NAT’L ACAD. SCI. 2047 (2016).

has demonstrated that false evidence ploys are virtually always present in, and substantially likely to increase, the risk of eliciting false statements, admissions, and/or confessions. False evidence ploys are among the most well-documented situational risk factors for eliciting false and unreliable statements, admissions, and/or confessions, as described in the social science research literature.<sup>103</sup> Many people do not know that police detectives can legally lie by pretending to have incriminating evidence that does not exist, is fabricated, or is exaggerated; even those who suspect that the police may be bluffing about the evidence are likely to fear that police will manipulate evidence to prosecute them. The use of false evidence ploys can create or contribute to the suspect's perception that he or she is trapped, there is no way out, and/or that his conviction will be inevitable, thus leading to the perception that he or she is in a hopeless situation and has little choice but to agree to or negotiate the best available outcome or mitigation of punishment given the perceived, subjective reality of the suspect's situation.

As a century of basic psychological research on misinformation effects has shown<sup>104</sup> (as well as decades of psychological research on police lying to suspects during interrogation<sup>105</sup>), false evidence ploys are effective at eliciting compliance,<sup>106</sup> confusing some suspects into believing that they have been framed or that such evidence really does exist,<sup>107</sup> causing some suspects to doubt themselves (deferring to interrogators' authoritative assertions of irrefutable evidence despite knowing they did not commit a crime),<sup>108</sup> and even causing some suspects to develop false beliefs and/or memories of committing crimes.<sup>109</sup> Based on well-established basic and applied social scientific research going back decades, the multiple general and specific false evidence ploys that the investigators used in their interrogations of Adrian Thomas significantly increased the risk of eliciting a false and unreliable

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103. See Kassin et al., *supra* note 60, at 17.

104. Elizabeth Loftus, *Planting Misinformation in the Human Mind: A 30 Year Investigation of the Malleability of Memory*, 12 LEARNING & MEMORY 361 (2005).

105. Kassin et al., *supra* note 60, at 28–29.

106. See LEO, *supra* note 46, at 147, 191–92.

107. Ofshe & Leo, *Social Psychology of Police Interrogation*, *supra* note 91, at 200–03.

108. *Id.*

109. See LEO, *supra* note 46, at 210–25 (discussing persuaded false confessions); see also Julia Shaw & Don Read, *Constructing Rich False Memories of Committing Crime*, 26 PSYCHOL. SCI. 291, 291–301 (2015), <http://pss.sagepub.com/content/early/2015/01/14/0956797614562862.full.pdf+html>; cf. Deborah Wright, Kimberly Wade & Derrick Watson, *Delay and Déjà Vu: Timing and Repetition Increase the Power of False Evidence*, 20 PSYCHONOMIC BULL. REV. 812 (2013).

confession from him, especially the longer his interrogation lasted and the more sleep deprived and frightened he became.

4) *Minimization and maximization.* A common interrogation strategy is for investigators to portray the offense in a way that minimizes its moral, psychological, and/or legal seriousness, thus lowering the perceived cost of confessing by communicating that the consequences of confessing will not be that serious. Interrogation techniques and strategies that minimize the legal seriousness of the crime, in particular, are associated with and known to increase the risk of eliciting false confessions. Such minimization strategies can imply leniency, reduced punishment, or even no punishment at all if the suspect perceives that there is no consequence to confessing (i.e., either that the act to which the suspect is confessing is not a crime or that it carries little or no penalty).<sup>110</sup> Conversely, interrogation techniques and strategies that maximize the legal seriousness of the crime—i.e., suggest that the suspect will face a bad or perhaps the worst possible outcome if he or she does not make or agree to an incriminating statement—are also associated with and known to increase the risk of eliciting false confessions. Such maximization strategies can imply harsher treatment, confinement, punishment, sentencing and/or other negative outcomes if the suspect fails to comply and confess.

5) *Explicit Promises and Threats.* The use of explicit promises of leniency, immunity and/or a tangible benefit, as well as the use of explicit threats of harm, significantly increases the risk of eliciting an involuntary false statement, admission, and/or confession when applied to the innocent. Indeed, as empirical social science research has repeatedly demonstrated, promises of leniency—like threats of harm or harsher punishment and whether explicit or implicit—are widely associated with police-induced false confession in the modern era and are believed to be among the leading causes. Promises and threats (whether implied or express) are inherently coercive because they exert substantial pressure on a suspect to comply and thus can easily overbear the will or ability of a suspect to resist an interrogator's demands or requests. Like other *high-end* inducements, promises and threats contribute to creating a sense of despair and hopelessness about a suspect's perceptions of his available options during interrogation. This may be especially the case when one is not merely being promised leniency, but being promised complete freedom (i.e., immunity) in exchange for making a

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110. Kassir et al., *supra* note 60, at 12, 18–19.

statement while being threatened with a harsh outcome if one refuses. There may be no psychological interrogation technique more potent than the use of threats and promises.

In my remaining time, what I want to talk about, which is why I think I was invited to be here, certainly not to make negative comments about the Michigan Supreme Court—although I want you to consider in those comments all the positive things I’ve said about this great university and this great law school, so it’s a juxtaposition. There are a lot of ways we can talk about causation, and philosophers and statisticians would probably reprimand us for talking in the loosey-goosey way that sometimes we do. The word “cause” may be the wrong word to use here. What I want to talk about are three processes that tend to be sequential and that explain how and why you get a false confession that is false but appears to be true. It not only appears to be true, but appears to be persuasively true. So often when introduced into evidence at trial, these false confessions lead to a wrongful conviction.

There are three processes here: misclassification, coercion, and contamination. We actually heard a lot in Dr. Barnes’s excellent talk this morning about the sources of misclassification in so-called Shaken Baby or Abusive Head Trauma cases and other cases involving injury or death to babies that set over-zealous medical professionals, child workers and especially police in motion, that lead to coercive interrogations and false confessions. How is it that somebody who is factually innocent or did not commit a crime is judged to be guilty? And then subjected to a guilt-presumptive interrogation, as Adrian Thomas and Nga Truong were? These are, in fact, guilt-presumptive interrogations.

The interrogation training manuals teach police to be human lie detectors. They spread misinformation, dishonestly and falsely in their manuals and training programs, misrepresent the science, and weasel their way out by claiming that these are just a cluster of symptoms that are associated with lying.<sup>111</sup> If somebody is nervous, if their eyes are looking downward, if they’re evasive, if they’re too sincere, if they’re not sincere enough, if they’re slouching in their chair, picking lint off their jacket, running their hands through their hair, too close to you—these manuals are so absurd from a scientific standpoint that they actually have pictures of people slouching in chairs and claiming that this is how people lie.<sup>112</sup> As if there are ways of sitting that, like Pinocchio’s nose, tell you whether somebody is lying or telling the truth. But this isn’t the whole story.

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111. See INBAU, REID, BUCKLEY & JAYNE, *supra* note 72, at 101–37.

112. *Id.* at 121–28.

And I just want to say, since I mentioned it, this is some data from a study that Dr. Paul Ekman and Maureen O'Sullivan did<sup>113</sup> showing that most people simply can't judge when somebody is lying or telling the truth based on their demeanor. The groups being studied were all lie-catchers or people like police interrogators whose profession it is to judge the veracity of statements that are being made by those they work with. But this isn't the whole story. Part of the story is that police are poorly trained, that they come to believe that they have this gut hunch, this sixth sense that they know whether or not somebody is lying or telling the truth, and they rush to judgment.<sup>114</sup>

In the Adrian Thomas case, the rush to judgment was based on the emergency room doctor telling the detectives that the baby was murdered and that he had a fractured skull, despite the fact that the CAT scan showed he didn't have a fractured skull. Their mind was made up. They were set to go, they never considered or looked at any contradictory evidence, though there were mountains of it right in front of their eyes for them to see. In the Nga Truong case, they simply decided she had to have done it because the baby—and I'm sure this happened, I'm sure Dr. Barnes can tell so many stories about this—the baby experienced the symptoms that ultimately led to its death, even though he had this history of respiratory problems, while she was watching the baby. She was the one who discovered that the baby was not breathing and called 911. Her boyfriend, the father of the baby, was in the room with her but he was sleeping. So it had to be her, right?

The first issue is: how does the misclassification occur? That's especially important for the subject of today's symposium. The second issue, then, is: once you get an innocent person in the interrogation room, how is that they are made to falsely confess? We've talked a little bit about this with the Adrian Thomas and the Nga Truong case. But the big picture psychology, as Richard Ofshe and I have argued<sup>115</sup> for many years, is that interrogation, psychologically, is a two-step process: convince somebody they're caught, their situation's hopeless, there's no way out, no one's going to believe they're innocent. Decimate their subjective self-confidence that they are going to get out of this without agreeing that they are guilty of something, or they did something, they did the act. And

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113. Cf. Paul Ekman & Maureen O'Sullivan, *Who Can Catch a Liar?*, 46 AM. PSYCHOL. 913, 916 (1991).

114. Cf. *id.* at 916–17.

115. See generally Ofshe & Leo, *The Decision to Confess Falsely*, *supra* note 73 (discussing the two steps to obtaining a false confession that occurs pre- and post-admission).



then when you've broken them and destroyed their resistance, convince them that—and this is the counterintuitive part that bedevils lawyers and law professors—that it's somehow in their self-interest, somehow in their self-interest to stop denying and start admitting.

## **THE CONFRONTATION INTERROGATION TECHNIQUE**

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### **INTRODUCTION**

Proven to be successful in situations where the guilt of the suspect is fairly certain.

It is employed after completion of administrative and humanitarian questions, and after obtaining a Miranda waiver.

It operates on the principle of - *"You did it. We know you did it. We have overwhelming evidence to prove you did it. But the reason makes a difference. So why don't you tell me about it?"*

Although you can use this technique on virtually every type of suspect and psychological profile, you will not interrogate all suspects the same way.

Think of the Confrontation Interrogation Technique as an outline for an interrogation. The type of suspect and/or psychological profile will determine how you present each heading or component of the outline.

This image is from a Los Angeles police department training manual, and this says it better than long-winded academics like me.<sup>116</sup> The italicized part is essentially the two-step psychology of police interrogation. Interrogation operates on the principle of "You did it, we know you did it. Adrian Thomas, Nga Truong, we know you did it absolutely. We have overwhelming evidence to prove you did it." They lie about that evidence when they don't have it, as they did in both of those cases. But the reason makes a difference. That's the inducement, that's the counterintuitive step to get somebody to agree that confessing is in their best interest. "So why don't you tell me about it?"

I will say more about these two steps and how resistance is broken down and how the police create isolation and get the suspect onto their turf into an interrogation room. There may be some rapport-building, usually the part that precedes the Miranda warnings. Accusation, domination, this overwhelming sense of self-confidence. Police are trained to do this. Some of you in this room are familiar with the Reid Method, right? They are trained only to interrogate

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116. Rick Papke, *The Confrontation Interrogation Technique*, LOS ANGELES POLICE DEP'T 1 (1995).

people whom they think are guilty, and that the goal of an interrogation should be to get a confession from whom they presume to be guilty.<sup>117</sup> They signal the expectation that the person will talk, and they challenge the denials, which they expect, as false and contradicted by logic or evidence or the detective's experience. They pressure and persuade the subject to stop denying and start agreeing to the accusations.

Now, I've talked already a lot about lies of evidence in the context of Adrian Thomas and Nga Truong. And police are allowed to lie about anything in the interrogation room so long as it does not violate the Fourteenth Amendment due process voluntariness standard, which is vague. Police interrogation deception is, as many of you know, merely one factor in the totality of circumstances test, and it is not dispositive. Moreover, interrogation is not considered to be inherently, or even most of the time, coercive. Police, I think, do or would take their cues from the courts if the courts were aggressive in policing police deception and lies about non-existent evidence, whether it's eyewitness or alleged scientific evidence or failed polygraph evidence. I heard Dr. Barnes, in his excellent talk, mention something about exculpatory polygraphs. I may have not heard that right. But I just want to say, there's no such thing as an exculpatory polygraph. So if I did hear that right, there's no science behind polygraphy. There's no way you could say a polygraph by itself is exculpatory.

Maybe that offends some of the defense attorneys. I know you line up your experts and you make your cases. But there's simply no science behind polygraphy. It's not even junk science—it's junk. It's simply correlating emotional arousal to questions. If there is emotional arousal in response some of the questions, it could be for a hundred different reasons having nothing to do with whether the person is lying or telling the truth. There's no unique physiological response like the nose growing that could possibly be associated with lying. Now some people talk about micro-expressions in the face, but until we discover Pinocchio's nose, it's junk science. I understand why, from the perspective of a defense attorney, you would do that strategically, however.

I want to go back to the Adrian Thomas case. They convinced him it was just an accident and that he would go home if he confessed. The implication was very clear: if it was an accident, he was

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117. See generally LOUIS C. SENESE, ANATOMY OF INTERROGATION THEMES: THE REID TECHNIQUE OF INTERVIEWING AND INTERROGATION (John E. Reid & Assoc. 2005) (discussing interview and interrogation techniques that use an accusatory process by which the investigator tells the suspect she or he is guilty and involves less question/answer format).

not criminally liable. They told him—when they were lying to him—that his wife had said he did this. She hadn't. And they would put it on her if he didn't do what they said he did. These are just more explicit versions of inducements that police use to get somebody to think it's in their self-interest to confess. Indeed, they have a whole manual of inducements by crime, you know. In the Shaken Baby cases, it's often, "You were stressed out, you were frustrated, anybody would have understood. We've all been parents. The baby was screaming." These inducements often communicate leniency and they often communicate reward and benefit to motivate the confessions.

There's just one thing I want to talk about in these studies. These studies look at what's called diagnosticity.<sup>118</sup> If you induce true and false confessions in the laboratory, albeit to lower level transgressions like cheating in university environments, what techniques induce a high rate of true relative to false confessions? Those would be good techniques. What techniques induce high rates of false relative to true confessions? Those would be bad techniques, right? Those would be techniques that we could say increase the risk factors for false confession. That is the important point to come out of here because, as many police and prosecutors will point out, you can coerce true confessions. How do you know the confession's false? You don't. How you get the confession explains why the person confessed. It isn't evidence that the confession is false. It might be true. It might be also evidence that there's increased risk. You have to look at the confession against the suspect's knowledge base, assuming there's been no contamination, and against the physical evidence and alternative explanations if the physical evidence is ambiguous.

Contamination is the leaking or disclosing of non-public case facts to the suspect.<sup>119</sup> This is the third process in the sequence of

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118. See generally Allyson J. Horgan, Melissa B. Russano & Christian A. Meissner, *Minimization and Maximization Techniques: Assessing the Perceived Consequences of Confessing and Confession Diagnosticity*, 18 *PSYCHOL., CRIME, & L.* 65 (2012) (examining how techniques that manipulate the perceived consequences of confessing influence the decision to confess and the diagnostic value of the confession evidence); see also Melissa B. Russano et al., *Investigating True and False Confessions within a Novel Experimental Paradigm*, 16 *PSYCHOL. SCI.* 481, 484 (2005) (finding that the use of minimization techniques and an offer of leniency increased both true and false confessions).

119. See generally Richard A. Leo & Steven A. Drizin, *The Three Errors: Pathways to False Confession and Wrongful Conviction*, in *POLICE INTERROGATIONS AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY RECOMMENDATIONS* (G. Daniel Lassiter & Christian A. Meissner eds., 2010).

errors that lead to false but seemingly true (and thus seemingly persuasive) confessions.<sup>120</sup> So police misclassify somebody who's innocent, subject them to a guilt-presumptive interrogation, use coercive, psychologically coercive, high-pressure techniques. Some individuals are vulnerable. We have lots of clinical data about who those are and why the person admits to a crime they did not commit.<sup>121</sup> Now, typically an admission is agreeing to something. It's not getting in the confessional and giving an act of confession. The confession is made. It's not given. In the post-admission phase as well as the pre-admission phase, police often suggest details.

Brandon Garrett, a very well-known, excellent researcher at the University of Virginia Law School, has done studies of the DNA cases, looking at how many of them have contamination, where the subjects were fed non-public facts.<sup>122</sup> One of the cases he mentioned was the Bruce Godschalk case where this person got convicted and spent fifteen years in prison for raping two women he didn't even know.<sup>123</sup> He had never set foot in the apartment complex. I just want to mention one of these facts: prior to having sex with one of the victims, the assailant removed the victim's tampon and tossed it to the side.<sup>124</sup> I would have convicted him if I had been on that jury, right?

Details like that make confessions appear to be true, even though the details almost certainly come from police. So we've got misclassification, coercion/vulnerable personalities, contamination or feeding of details. One of the reasons why the full electronic recording of interrogations is so important, that together lead to a statement that looks like it's true, but is not the product typically of coercion and manifestly false. But for DNA in the cases that Brandon Garrett looked at, these people would almost certainly still be in prison. He found in his first study, I believe, ninety-seven percent,<sup>125</sup> the second one ninety-four percent of the DNA cases—as best he could tell from limited records in many of those cases—

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120. *Id.*

121. *Id.*

122. See generally Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051 (2010) (examining how police procedures can feed detailed and accurate information to accused individuals and elicit false confessions).

123. See *id.* at 1078.

124. *Godschalk v. Montgomery Cty. Dist. Atty's Office*, 177 F. Supp. 2d 366, 369 (E.D. Pa. 2001).

125. See Garrett, *supra* note 122, at 1054 (noting that in ninety-seven percent of the exonerates for whom trial or pretrial records could be obtained, police reported that suspects confessed to specific details concerning how the crime occurred).

involved contamination, because all but one lacked a full recording and many had no recording.<sup>126</sup>

I'm not going to talk about the ways in which we could change the system for the better to minimize false confession evidence. But if we wanted to do so, these are basically the leading reforms: at the very front end would be electronic recording, improved training, and at the back end—meaning further along in the process where the errors have accumulated and are harder to undo—would be cautionary jury instructions and allowing more expert witness testimony on the science of false confessions. The Michigan Supreme Court's decision in *Kowalski* is not only erroneous and misguided, but it is contradicted by all of the scientific research going back decades on interrogations and false confessions. I think expert witness testimony is necessary in this area. I think it's helpful. I think it can make a difference, but I don't think it is the best or most important reform for preventing wrongful convictions based on false confessions.

The last point I will make is that we need front-end reforms more than we need back-end reforms. We need a state supreme court that will get it right and admit experts where the science supports it. But that's not the most important reform. The most important reform is to make sure that we get valid and reliable information going into the stream of evidence that eventually leads to trial in three percent of the cases, though probably more in the cases that are the subject of today's symposium. We need those reforms more importantly at the front-end.

#### QUESTION & ANSWER SESSION

AUDIENCE MEMBER: I'm an attorney working in post-conviction cases. I know that false confessions are a problem when an individual who's accused of child abuse confesses. But the problem I've been grappling with are child abuse prevalence studies in this area are based on cases that have confirmed child abuse based on a confession. For example, I've come across a study that said, "We found these injuries, we suspected child abuse, an investigation confirmed the caretaker shook the baby," which I suspect is a confession. The authors say at the end of a three-case study summary, they say, "Therefore, we find when a baby's shaken, you'll find these injuries." Or, "If you find these injuries, it's likely child abuse." The

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126. See Brandon L. Garrett, *Contaminated Confessions Revisited*, 101 VA. L. REV. 395, 410 (2015).

problem I'm grappling with is, when there's not an individual confession by the defendant, how do you address the false confession literature when the studies themselves are based on confessions? Does that make sense?

RICHARD LEO: So I think what you're talking about is not the false confession literature, but I think you're taking about—correct me if I'm wrong—the Shaken Baby literature that uses confession evidence to verify the accuracy of the allegations.

AM: Yes. Correct.

RL: Keith Findley of the University of Wisconsin and Saul Kassin, who I mentioned earlier, Larry White, who's a psychologist at Beloit College in Wisconsin, and another individual are doing a study of that.<sup>127</sup> They're going back and getting Shaken Baby cases and looking at where there were confessions, and looking at those confessions to see if they were problematic, as happened in some of the University of Wisconsin Innocence Project cases that Keith has litigated. So that study is in the works.

The body of research on confessions and false confessions is voluminous, and that literature should give us pause about the validity or accuracy of confessions in part or in whole where we don't have independent corroboration, with a fully recorded interrogation. So in the absence of the study that Keith Findley et al. are doing now—and no doubt others will do as well in the future—I think the next best go-to is the reason why confessions cannot corroborate. If you think about it, confessions are testimonial evidence. They're malleable. It's very easy to manipulate testimonial evidence, particularly in the conditions in which it was elicited in cases like Shaken Baby cases. I wish I could give you a better roadmap to challenge it, but I think that's where we're at right now.

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127. Keith Findley et al., *The Diagnostic Significance of Confessions in Shaken Baby Syndrome and Abusive Head Trauma Cases* (forthcoming).