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A Three-Dimensional Model for the Use of Expert Psychiatric and Psychological Evidence in False Confession Defenses Before the Trier of Fact

Joshua E. Kastenberg
University of New Mexico - School of Law

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*Major Joshua E. Kastenberg**

INTRODUCTION

A substantial percentage of criminal trials involve confessions. Empirical jury studies indicate reliance on confessions as evidence.[1] However, not every confession is truthful or accurate. Indeed, some confessions admitted into evidence have later been shown to be false. A recent example of false confessions resulting in conviction occurred with the highly publicized 1989 Central Park Jogger case in New York, where five men were found guilty by a court and were only recently exonerated.[2] A social science of false confessions has developed to address the issue of false confessions, yet its methodology is anecdotal and incomplete. This Article examines both current law and contemporary studies of false confessions. Both a psychiatry-based (medical model) and psychology-based (social model) approach is ana-

* Major Joshua E. Kastenberg, USAF is an Air Force Judge Advocate. Major Kastenberg's educational degrees include an L.L.M. from Georgetown University (with highest honors), a J.D. from Marquette University, an M.A. from Purdue University, and a B.A. from University of California at Los Angeles. He is currently assigned as an international and criminal law advisor to the United States Air Forces in Europe, at Spangdahlem Air Base, Germany. Major Kastenberg wishes to thank Professor Heathcote W. Wales of Georgetown University for his help and insight, Lt. Colonel Larry McRell, Major James Floyd, Major Tom Farmer, and Elizabeth and Allenby Kastenberg for their help. The views expressed in this Article are those of the author and not the Department of Defense.

1. *See, e.g.*, Lissa Griffen, *The Correction of Wrongful Convictions: A Comparative Perspective*, 16 AM. U. INT'L L. REV. 1241, 1249–50 (2001). Professor Griffen notes, "[O]f the DNA exonerations studied by the Innocence Project at Cardozo Law School, twenty-three percent were based on false confessions or admissions. Other studies show that seventy-three percent of juries 'will vote to convict even when admissions have been repudiated by the defendant and contradicted by physical evidence.'" *Id.* at 1250 n.21 (citing JIM DWYER, PETER NEUFELD & BARRY SCHECK, ACTUAL INNOCENCE 92 (2000)). *See also* Saul M. Kassin & Lawrence S. Wrightsman, *Coerced Confessions, Judicial Instructions, and Mock Juror Verdicts*, 11 J. APPLIED SOC. PSYCHOL. 489 (1981).

2. *Central Park Shocker, D.A. to Recommend Tossing All Convictions*, Dec. 4, 2002, *at* http://abcnews.go.com/sections/us/DailyNews/centralpark_rape_021204.html.

lyzed for admission of expert evidence. The analysis is presented in a three-dimensional context. These dimensions include the concepts of admissibility, the right to a complete defense, and the perpetual evolution of case law.

In criminal courts, a defendant has a variety of rights and options regarding the prosecution's use of his confession. For instance, in a pretrial hearing, the defendant is entitled to move for suppression of evidence that is obtained by violating his or her constitutional rights. These motions to suppress customarily involve issues of voluntariness, such as the conditions under which the police obtained the confession. Moreover, in many jurisdictions the defendant may challenge the voluntariness of the confession before the trier of fact at the time of trial. However, once a judge determines a confession is admissible, the latter course is unlikely, because the defendant is essentially admitting to the facts in the confession while attacking police interrogation techniques. Finally, for some time defendants have attempted to challenge the credibility of confessions, in effect alleging that it was false and coerced.

Increasingly, defense challenges to voluntariness and credibility of confessions have come through the use of expert psychology- and psychiatry-based testimony. In some of these cases, the defendant challenges the nature of the interrogation techniques used by the police. Experts testify, without providing specifics into the defendant's state of mind, that the defendant's interrogation encompassed elements present in known false confession cases. In other cases, experts may testify that the defendant has a character of malleability (suggestibility) based on a specific mental illness. The thrust of these cases is that the defendant is susceptible to suggestion and adopts as his own the story suggested by the police.

Part I of this Article delineates a defendant's right to present voluntariness and credibility evidence against his or her confession. This section analyzes the basic constitutional framework of how a defendant can present this evidence and describes the traditional safeguards against false confessions. This background information provides a context for the overarching issue of expert testimony admissibility. Part II provides a basic understanding of differences between the psychiatric (medical model) and psychological (social model) approach to false confessions. It then examines the types of false confession defenses used by defendants and the interrogation techniques challenged by defendants. Part III reviews the general rules of expert witness admissibility under the *Frye*, *Daubert*, and *Kumho Tire* tests. The question of expert witness admissibility hinges somewhat on how nar-

rowly a jurisdiction's expert witness rules are interpreted. Part IV then looks at a cross-section of state and federal cases dealing with the admissibility of false confession testimony. In this section, jurisdictions are divided into four categories based on whether they allow or suppress such evidence. Some of these decisions also involve the scope of rebuttal. Rebuttal evidence is of particular importance because few courts (and fewer articles) have analyzed the issue. Finally, Part V presents a hypothetical scenario, providing analytic context for the entire Article. As a conclusion, this section also details what is required to ensure a fair and impartial trial.[3]

I. CHALLENGING CONFESSIONS IN CRIMINAL LAW: THE RIGHT TO CHALLENGE VOLUNTARINESS BEFORE THE TRIER OF LAW AND TRIER OF FACT

A. Defining Voluntariness, Interrogation, and Custody: Basic Legal Concepts

Prior to any discussion of a defendant's constitutional right to challenge the credibility of his of her confession before the trier of fact, it is helpful to briefly examine the twin issues of custody and interrogation. This is because the trier of fact does not determine the admissibility of a confession. Once the trier of law admits a confession into evidence, the trier of fact is charged with the task of weighing that evidence by determining the amount of credibility it should be afforded.[4] However, as in the case of any other testimonial or written evidence, the defendant is not relegated to accepting its authenticity or truth. In the realm of confessions, evidence reflecting issues of voluntariness be-

3. *Black's Law Dictionary* defines a fair and impartial trial as "a hearing by an impartial and disinterested tribunal; a proceeding which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial consideration or evidence and facts as a whole." BLACK'S LAW DICTIONARY 596 (6th ed. 1990). The *Dictionary* cites case law for the proposition that a fair trial is "one where the accuser's legal rights are safeguarded and respected." *Id.* The United States Supreme Court has also explored the meaning of a fair and impartial trial, as seen in *Irwin v. Dowd*, 366 U.S. 717, 728 (1961), which stated the following:

> More than one student of society has expressed the view that not the least significant test of the quality of a civilization is its treatment of those charged with crime, particularly with offenses which arouse the passions of a community. One of the rightful boasts of Western civilization is that the state has the burden of establishing guilt solely on the basis of the evidence produced in court and under circumstances assuring an accused all the safeguards of a fair trial.

Id. at 729 (Frankfurter, J., concurring).

4. *See, e.g.*, Crane v. Kentucky, 476 U.S. 683 (1986).

fore the trier of law are, if the defense so chooses, generally "fair game" before the trier of fact.

A suspect's constitutional rights limit the extent of police interrogation. For example, a suspect has the right to remain silent or seek advice of counsel during a custodial interrogation.[5] Although custody has not been defined per any one case, there are several factors used to determine both actual and *de facto* custody.[6] Some, but by no means all, of these factors include the presence of probable cause to arrest,[7] the subjective intent of the officers,[8] the subjective belief of the accused,[9] the site and physical surroundings of the interrogation,[10] the confrontation of the suspect with evidence of guilt,[11] the focus of the investigation,[12] the language used to summon the accused,[13] the duration and nature of the interrogation,[14] and whether the accused was permitted to leave either during or following the interrogation.[15] Most of these factors are interrelated, in that faulty interrogations usually contain multiple problems. Indeed, an overview of case law demonstrates that reversal of a conviction is rare when only one of these factors is alleged to be in error.

Interrogation is defined as "questioning initiated by a law enforcement officer."[16] There are forms of interrogation that do not involve direct questioning. For example, in *Rhode Island v. Innis*,[17] police accompanying a suspect in a law enforcement vehicle, who had earlier asserted his right to silence, held a conversation between themselves.[18] The suspect then included himself in the conversation and

5. Miranda v. Arizona, 384 U.S. 436 (1966). The warnings mandated by *Miranda* only come into play when the subject of the interrogation is "taken into custody, or otherwise deprived of his freedom of action in a significant way." *Id.* at 444.

6. *See, e.g.*, Berkemer v. McCarty, 468 U.S. 420 (1984).

7. United States v. Alvarado-Garcia, 781 F.2d 422, 426 (1986).

8. Henry v. United States, 361 U.S. 98 (1959).

9. United States v. Joe, 770 F. Supp. 607, 611 (D.N.M. 1991).

10. Oregon v. Mathiason, 429 U.S. 492, 494–95 (1977). In *Mathiason*, the fact that a suspect voluntarily went to a police station did not render him in custody. *Id. See also*, United States v. Beraun-Panez, 812 F.2d 578 (9th Cir. 1987); McCown v. Callahan, 726 F.2d 1 (1st Cir. 1984).

11. Quartararo v. Mantello, 715 F. Supp. 449 (E.D.N.Y. 1989).

12. United States v. Cotton, 223 F. Supp. 2d 1039 (D. Neb. 2002).

13. United States v. Booth, 669 F.2d 1231 (9th Cir. 1981).

14. United States v. Harrell, 894 F.2d 120 (5th Cir. 1990).

15. Cruz v. Miller, 255 F.3d 777 (2d Cir. 2001).

16. *Miranda*, 384 U.S. at 444.

17. 446 U.S. 291 (1980).

18. *Id.* at 294–95. Innis was initially suspected of robbing a taxi driver at gunpoint. He was arrested while walking on a street and taken into custody. After being notified of his rights under *Miranda*, he told the arresting officers he wanted to speak to an attorney. He was placed in a patrol car and taken to the police station by other officers who "were instructed not to question or intimidate him in any way." During the drive to the police station, one of the officers

actually inculpated himself.[19] Although the trial court found the confession voluntary, the confession was challenged on appeal.[20] While the Court acknowledged that the term "interrogation," expands beyond the limits of formal questioning, it determined that the confession was voluntary.[21] There are a variety of instances where the functional equivalent of formal questioning comes under special scrutiny, such as undercover police questioning[22] and exigent circumstances.[23] However, such scrutiny does not automatically result in suppression, and in most instances, good faith by the police will overcome a defendant's objection to admissibility.[24]

In theory, once a constitutional right is invoked, all questioning of the suspect must cease.[25] Likewise, a law enforcement agent must notify a suspect of these rights within a reasonable amount of time after placing the suspect in custody.[26] However, if the suspect does not invoke his right to remain silent, law enforcement agents are permitted to question a suspect with only a few limitations, such as not using coercion and duress.[27] For instance, law enforcement agents may embellish the state of evidence against a suspect.[28] Likewise, a variety of ruses and trickery is permitted in various jurisdictions.[29] As a result, a "science" of interrogations has developed.[30] Generally, embellishments and ruses in interrogation techniques will not preclude a confes-

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said that "there were a lot of handicapped children running around in this area because a school for such children was located nearby." The officer further stated, "God forbid one of them might find a weapon and hurt themselves." *Id.*

19. *Id.* at 295. On hearing the conversation between the officers, Innis interrupted and told the officers he would take them to the location of the shotgun used in the robbery. *Id.*

20. *Id.* at 296–97.

21. *Id.* The *Innis* Court reasoned as follows:

> [T]he *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody).

Id. at 300–01. The Court concluded that Innis had not been interrogated because there was no express questioning or its functional equivalent. *Id.* at 302.

22. Illinois v. Perkins, 496 U.S. 292 (1990).

23. New York v. Quarles, 467 U.S. 649 (1984).

24. Frazier v. Cupp, 394 U.S. 731, 739 (1969).

25. *E.g.*, Stein v. New York, 346 U.S. 156, 182 (1953). In *Stein*, the Court held that while there is a *per se* rule against confessions obtained by physical violence, no *per se* rule exists when the confession was obtained by psychological coercion. *Id.* at 184.

26. *See* United States v. Chamberlain, 163 F.3d 499 (8th Cir. 1998).

27. *Stein*, 346 U.S. at 184.

28. Amaya-Ruiz v. Stewart, 121 F.3d 486 (9th Cir. 1997).

29. *See, e.g.*, Shedelbower v. Estelle, 885 F.2d 570 (7th Cir. 1992); State v. Kelekolio, 849 P.2d 58 (Haw. 1993).

30. *See, e.g.*, FRED INBAU & JOHN REID, CRIMINAL INTERROGATION AND CONFESSIONS (3d ed. 1986).

sion's admissibility.[31] This is because courts have usually accepted that some artifice, deceit, or trickery is valid in obtaining a confession.[32] However, when a trial judge determines the issue of admissibility in the voluntariness context, the defendant can raise the confession credibility defense before the trier of fact.

B. Confession Corroboration Rule

Even when proper interrogation procedures are utilized, a confession alone is not enough to sustain a conviction.[33] A confession must also be sufficiently corroborated by other evidence to be deemed reliable, though it is not necessary that the prosecution corroborate every element of the charged offense.[34] Rather, the prosecution must show by independent evidence that the confession is sufficiently reliable to be truthful.

The corroboration rule existed before the widespread use of expert witnesses in criminal trials,[35] and was intended at common law and today to protect against police zeal or other manifest injustice.[36] For example, the Ninth Circuit has held that where a full confession dominates the government's proof, it is fair to assume that the trier of fact will interpret its duty to find guilt beyond a reasonable doubt to mean that it cannot simply accept a confession at face value.[37] Likewise, most states have adopted the common law rule of corroboration, but have done so in varying forms.[38] It is a basic premise that the more a confession's details are corroborated by independent facts, the less likely the confession given is false.[39] Some adherents of false confession psychology believe the corroboration rule tends to be sub-

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31. *See, e.g.*, Laurie Magid, *Deceptive Police Interrogation Practices: How Far is Too Far?*, 99 MICH. L. REV. 1168, 1174–77 (2001); 2 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 6.2(a), at 447 (2d ed. 1999).

32. *E.g.*, Holland v. McGinnis, 963 F.2d 1044 (7th Cir. 1992); People v. Mann, 333 N.E.2d 467 (Ill. App. Ct. 1975).

33. *E.g.*, Smith v. United States, 348 U.S. 147 (1954).

34. *See, e.g.*, United States v. Singleterry, 29 F.3d 733, 736-38 (1st Cir. 1998).

35. Wong Sun v. United States, 371 U.S. 471, 489 (1963) (stating that the confession corroboration rule has a long-rooted history).

36. *See, e.g.*, *Singleterry*, 29 F.3d at 738.

37. D'Aquino v. United States, 192 F.2d 338, 357 (9th Cir. 1951).

38. *See, e.g.*, People v. Jones, 949 P.2d 890 (Cal. 1998); Nelson v. Delaware, 123 A.2d 859 (Del. 1956); Ballard v. State, 636 A.2d 474 (Md. 1994); Commonwealth v. Manning, 668 N.E.2d 850 (Mass. App. Ct. 1996); State v. Fry, 42 P.3d 369, 370–72 (Or. Ct. App. 2001); State v. Weller, 644 A.2d 839 (Vt. 1994); State v. Aten, 927 P.2d 210, 217–19 (Wash. 1996).

39. *See, e.g.*, Idaho v. Wright, 497 U.S. 805, 822 (1990); Richard J. Ofshe & Richard A. Leo, *The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions*, 16 STUD. IN L., POL. AND SOC'Y 189, 238 (1997); Corey J. Ayling, *Corroborating Confessions: An Empirical Analysis of Legal Safeguards Against False Confessions*, 1984 WIS. L. REV. 1121,1186–87 (1984).

verted by police interrogation procedures.[40] This is because, on occasion, police are suspected of feeding details of a crime to a compliant suspect.[41]

C. Constitutional Right to Present General Evidence Regarding the Credibility of a Confession, and Evidentiary Limitations

In *Jackson v. Denno*,[42] the Supreme Court held that issues of admissibility are solely within the province of the trial judge.[43] Thus, a jury is generally not permitted to hear a confession prior to the judge determining its admissibility. The Court's reasoning for its rule rested in part on the belief that once a confession is heard, it is difficult to keep the facts of the confession out of jurors' minds during deliberations.[44] However, after *Denno* some jurisdictions were reticent to permit the trier of fact to determine the credibility of a confession. The Court laid this issue to rest in *Crane v. Kentucky*, when it decided that the issue of credibility is solely within the discretion of the jury.[45] The facts and holding of *Crane* are, for the purpose of this Article, worth noting because some of the features of Crane's confession, such as his age and the amount of time spent in interrogation, become central issues to a claim of false confession.

In early August 1981, a liquor store clerk was murdered, and the police seemed unable to link this offense with any suspect.[46] Crane, a sixteen-year-old male, was initially arrested for suspected participation in an unrelated crime.[47] Although he denied murdering the liquor store clerk, he confessed to a number of other unsolved offenses.[48]

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40. Ayling, *supra* note 39, at 1186–87.

41. *Id.*

42. 378 U.S. 368 (1964). Prior to *Denno*, some states permitted the jury to determine admissibility of confessions. Thus, even where the jury determined a confession violated due process, the jurors still reviewed the evidence. *See, e.g.*, JOSEPH G. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED 262 (3d ed. 1996).

43. *Denno*, 378 U.S. at 389. The court's reasoning for prohibiting the practice of permitting a trier of fact to consider voluntariness was as follows:

> It is difficult, if not impossible, to prove that a confession which a jury has found to be involuntary has nevertheless influenced the verdict or that its finding of voluntariness, if this is the course it took, was affected by the other evidence showing the confession was true. But the New York procedure poses substantial threats to a defendant's constitutional rights to have an involuntary confession entirely disregarded and to have the coercion issue fairly and reliably determined. These hazards we cannot ignore.

Id.

44. *Id.*

45. Crane v. Kentucky, 476 U.S. 683, 688–89 (1986).

46. *Id.* at 684–85.

47. *Id.*

48. *Id.* at 684. The Court appeared to disbelieve the police officers' version of events, which was that the defendant began confessing "just out of the clear blue sky." *Id.*

During a lengthy interrogation, police transferred Crane from a police station to a juvenile detention facility.[49] At trial, the judge found the confession admissible and prevented the defense from presenting evidence to the trier of fact concerning the conditions of Crane's interrogation, which the defense hoped would illustrate that the confession lacked credibility.[50] The suppressed credibility evidence would have been presented in the form of testimony by the defendant rather than through expert evidence.[51]

The Supreme Court held that the trial judge violated Crane's Sixth Amendment right to present a complete defense.[52] The Court reasoned that the confession credibility evidence was admissible because "certain interrogation techniques, either in isolation, or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice, that they must be condemned."[53] Thus, both voluntariness and credibility are partly for the trier of fact to decide, should the defendant elect to present this evidence.

One result of *Crane* is that, subject to rules of evidence, conditions surrounding the taking of a confession are admissible. There is wide evidentiary latitude under *Crane* because the very elements permitted in interrogations, such as deceit, trickery, and embellishment, become admissible to the jury if the defendant wishes. Indeed, the Court held that even after a confession is deemed voluntary, evidence concerning the "physical and psychological environment that yielded the confession can also be of substantial relevance to the ultimate factual issue of a defendant's guilt or innocence."[54]

Since *Crane*, courts have further clarified the limits of a defendant's right to present evidence. For instance, in *Taylor v. Illinois*, the Court acknowledged that a defendant does not have the unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.[55] Although evidentiary rules are analyzed in greater detail below, one of the most salient cases regarding the limitations of *Crane*—namely, *United States v. Scheffer*[56]—deals with the use of expert testimony.

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49. *Id.*
50. *Id.* at 685.
51. *Id.* at 684.
52. *Id.* at 690–92.
53. *Id.* at 687 (citing Miller v. Fenton, 474 U.S. 104, 109 (1985)).
54. *Id.* at 689.
55. Taylor v. Illinios, 484 U.S. 400, 410 (1988).
56. 523 U.S. 303 (1998).

In *Scheffer*, an Air Force court martial suppressed exculpatory polygraph results that were offered by the defense.[57] The trial judge, in suppressing the evidence, relied on Military Rule of Evidence (MRE) 707, which expressly prohibits such evidence from courts-martial.[58] The trial judge held that polygraph results were not sufficiently reliable to constitute relevant evidence.[59] On appeal, the Air Force Court of Criminal Appeals upheld Scheffer's conviction, but the Court of Appeals for the Armed Forces—the senior military appellate court—reversed, and the Supreme Court granted certiorari.[60]

The Court began its analysis by reviewing *Taylor v. Illinois*,[61] *Rock v. Arkansas*,[62] *Chambers v. Mississippi*,[63] and *Washington v. Texas*.[64] In each of these cases, limitations on the right to a complete defense were reviewed and reversed. However, each of these cases involved lay witness testimony, as opposed to expert testimony. The *Scheffer* Court then recognized that federal and state governments have a legitimate interest in "ensuring [that] reliable evidence is presented to the trier of fact."[65] The Court also noted that "to this day, the scientific community remains extremely polarized about the reliability of polygraph techniques."[66] The Court treated MRE 707 as being consistent with the general rule in favor of preserving the trier of fact's function of making credibility determinations during criminal trials.[67] Thus, the rules of evidence are partly designed to prohibit anything that encroaches on the trier of fact's function as the only lie

57. United States v. Scheffer, 41 M.J. 683, 685 (A.F. Ct. Crim. App. 1995). Scheffer was convicted of (1) wrongful use of methamphetamine, in violation of Uniform Code of Military Justice (UCMJ) Art. 112a, and (2) absenting himself from his unit without authority, in violation of UCMJ Art. 84. *Id.*

58. *Scheffer*, 523 U.S. at 308. MRE 707 reads, in pertinent part, "notwithstanding any other provision of law, the results of a polygraph examination, the opinion of the polygraph examiner, or any reference to an offer to take, failure to take, or the taking of a polygraph examination, shall not be admitted into evidence." *Id.* (citing MIL. R. EVID. 707).

59. *Id.* at 307.

60. *Id.* at 307–08.

61. 484 U.S. 400 (1988).

62. 483 U.S. 44 (1987). In *Rock*, the Court reviewed Arkansas' blanket exclusion of all "hypnotically refreshed testimony." While the court did not strike down the prohibition, it did so where it excluded the defendant from testifying to her version of the case. *Id.* at 62.

63. 410 U.S. 284 (1973). In *Chambers*, the Court invalidated a prohibition against a party impeaching its own witness, as well as an exclusion of the testimony of three witnesses hearing the defendant's confession. *Id.* at 298, 302.

64. 388 U.S. 14 (1967). In *Washington*, the Court invalidated a Texas evidentiary rule that prohibited codefendants from testifying in support of each other. *Id.* at 23.

65. *Scheffer*, 523 U.S. at 309. The Court then conducted an overview of both *Daubert* and FRE 702, FRE 802, and FRE 901. *Id.*

66. *Scheffer*, 523 U.S. at 309.

67. *Id.* at 312.

detector in the courtroom.[68] The Court then concluded that there is nothing unconstitutional about a *per se* rule prohibiting a specific type of highly unreliable evidence.[69] For the purposes of this Article, *Scheffer* is important because it permits the trier of law to exclude, on the basis of unreliability, otherwise relevant evidence.

D. Must the Defendant First Testify?

For expert evidence to be admissible, it must be at least somewhat relevant.[70] Additionally, although some evidence is relevant, it may be too remote or tenuous for admissibility unless other admitted evidence renders it unlikely to confuse issues before the trier of fact or to cause a waste of time.[71]

While a defendant has a right to remain silent, it is possible that this exercise, in some situations, would extinguish the relevance of either social model- or medical model-based false confession evidence.[72] However, it is more likely the case that social model-based false confession evidence should be foreclosed by a defendant's failure to testify. Certainly, this could become the case where witnesses to the confession do not testify as to a coercive nature of the confession. It may be, for the purposes of both admissibility and preservation of a meritorious appeal, that the accused must testify that he (1) felt his will overcome by the interrogation, and (2) did not commit the offenses alleged. Even under the medical model, when the accused's confession is supported by corroborating facts such as fingerprints, eyewitness testimony, or other forensic evidence, the only means to establish relevancy may be through the defendant testifying.

Defense attorneys understand the potential pitfalls of having a client testify. For example, when the defendant testifies, he becomes subject to cross-examination. Therefore, statements that may have been previously suppressed by the trial court become admissible as a result of the defendant's testimony. The defendant has likely made inconsistent statements to others in the course of interviews, interrogations, or discussions with inmates or coworkers. Such inconsistent

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68. *Id.* at 313.

69. *Id.* at 315.

70. *See* FED. R. EVID. 401, which provides as follows: "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

71. *See* FED. R. EVID. 403, which states as follows: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

72. *See, e.g.*, People v. Pecoraro, 677 N.E.2d 875 (Ill. 1997).

statements may make the defendant's veracity suspect in the eyes of the trier of fact. In some jurisdictions, the prosecution may even present evidence of the defendant's character for untruthfulness because the defendant's credibility is at issue once he has testified.[73]

In *People v. Pecoraro,* the Illinois Supreme Court held that for false confession expert testimony to be admissible, the defendant would have to first testify as to his personal condition prior to his interrogation.[74] The defendant in *Pecoraro I* voluntarily told a police officer that he committed a murder.[75] At trial, the defense moved to suppress his confession on grounds that the confession resulted from the defendant's ingestion of substantial quantities of drugs and alcohol prior to confessing.[76] On appeal, Pecoraro raised a claim of ineffective assistance of counsel for failing to introduce expert psychology testimony as to his neurological condition during his interrogation.[77] The court did not find that the failure to present the psychologist's opinion was prejudicial because the expert's testimony would likely have been inadmissible. On habeas review, the District Court for the Northern District of Illinois[78] held that in order for an expert psychologist to testify as to Pecoraro's heightened sense of suggestibility, Pecoraro would have had to first testify, which he did not do during the guilt phase of the trial.[79] The Seventh Circuit affirmed the lower court's rationale in *Pecoraro v. Walls,*[80] when it held that the facts of Pecoraro's condition and perceptions needed to "be gotten into the record for expert testimony premised on them to be admissible."[81]

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73. *See* FED. R. EVID. 608, 609.

74. 677 N.E.2d 875 (Ill. 1997) [hereinafter *Pecoraro I*].

75. *Id.* at 879. On December 8, 1982, the body of one Jimmy Christian was discovered in a parked car. He had been killed as a result of being shot in the chest. Originally, the police suspected Pecoraro, and they interviewed him, but they were unable to connect him to the killing. On August 6, 1986, Pecoraro stopped a police officer and confessed to the murder, claiming he wanted to "clear his chest." *Id.*

76. *Id.*

77. *Id.* at 891. It should be noted that police officers testified they were unaware Pecoraro was under the influence of alcohol or drugs during his statement of guilt. However, at the suppression hearing a defense witness testified that at some time prior to Pecoraro's arrest, he saw Pecoraro consume over six beers and 1.25 grams of cocaine. In the same hearing, Pecoraro testified he was under the influence of alcohol and cocaine. *Id.*

78. United States *ex rel.* Pecoraro v. Page, 169 F. Supp. 2d 815 (N.D. Ill. 2001) [hereinafter *Pecoraro II*].

79. *Id.*

80. 286 F.3d 439 (7th Cir. 2002) [hereinafter *Pecoraro III*].

81. *Id.* at 446.

E. Concluding Remarks to Part I

Even before analyzing the two models of false confession studies or interrogation techniques, a complex array of issues arises regarding the use of lay testimony to challenge confessions before the trier of fact. A confession may be challenged through the defendant's own testimony or through the cross-examination of police witnesses. Nevertheless, the trier of fact still has the confession as evidence. Some believe that without other evidence—like expert evidence—the trier of fact may view the confession uncritically.[82]

II. FALSE CONFESSIONS: SCHOOLS OF THOUGHT, TYPES, THEORIES, AND APPROACHES

A. Psychiatry and Psychology: Brief Overview of Two Models

Before proceeding, a brief contextual note must be made regarding the differences between psychiatrists and psychologists because, in some cases, these differences have significance in this Article's analysis and conclusions. While there is a tendency to simplify the differences between the two fields, these differences may become key in admissibility determinations. A tension exists between the two fields in terms of expert qualifications in testimony regarding issues such as malleability, future dangerousness, and the like.[83] The difference between the two fields is problematic in determining expert qualifications for false confession testimony. A psychiatrist is a physician, either allopathic (M.D.) or osteopathic (D.O.), who specializes in the study and treatment of mental disorders.[84] A psychologist is, according to some

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82. Ayling, *supra* note 39, at 1180. However, Ayling was unconvinced in the trier of fact's absolute reliance on confessions. *See id.* (citing KALVEN & H. ZEISEL, THE AMERICAN JURY 172–74 (1966)). Kalven and Zeisel found that the evidence was "inconclusive as to whether confessions have any impact on judge-jury disagreement." *Id.* at 174. Although they later speculated that "the jury may not so much consider the credibility of the confession as the impropriety of the method by which it was obtained," they offered no statistical evidence to prove this or to show that judges were less swayed by such impropriety. *See id.* at 320.

83. DANIEL W. SHUMAN, PSYCHIATRIC AND PSYCHOLOGICAL EVIDENCE 8-2 (2000). Shuman writes, "Although less so than in years past, the cases addressing the minimum threshold qualifications for experts on questions of mental disorder still frequently favor psychiatrists' testimony and disfavor psychologists' testimony." *Id.* (citing Dix & Poythress, *Propriety of Medical Dominance of Forensic Mental Health Practice: The Empirical Evidence*, 23 ARIZ. L. REV. 961 (1981); Yarney & Popiel, *Judged Value of Medical Versus Psychological Expert Witnesses*, 11 INT'L J.L. & PSYCHIATRY 195 (1988); Comment, *The Psychologist as Expert Witness: Science in the Courtroom*, 38 MD. L. REV. 539 (1979)).

84. SHUMAN, *supra* note 83, at 4-2. Regarding psychiatry as a science, Shuman writes:

> Although it is common among the lay populace to think of the birth of psychiatry in conjunction with Sigmund Freud's work in Vienna in the late nineteenth century, Benjamin Rush, a physician in colonial Philadelphia, is considered the father of

writers, "a person who is trained to study and measure mental processes, and to diagnose and treat mental disorders."[85] Moreover, there are significant differences in the training and educational backgrounds of the two professions, and most, if not all, states have separate licensing boards.[86] Even within each field, there are subfields such as clinical[87] and forensic[88] in the case of psychology, and forensic[89] and child and adolescent[90] in the case of psychiatry. Additionally, each field and subfield is advised, and to an extent, governed by various boards and certification programs.[91] Because of the differences in training and practice, psychiatrists tend to testify on the basis of a "medical model," also referred to as the "disease model," while psychologists tend to testify on the basis of a "social model."[92]

At trial, there is a tendency to favor psychiatrist over psychologist testimony regarding mental illness.[93] For example, a psychologist

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American psychiatry. Rush was a pioneer in the treatment of the mentally ill and wrote the first American psychiatric texts, in which he classified insanity as a brain disease.

Id.

85. *Id.* (citing Laliotis & Grayson, *Psychologist Heal Thyself*, 40 AM. PSYCHOLOGIST 34 (1985)).

86. *Id.* at 4-2.

87. *Id.* at 4-19.

88. *Id.* at 4-19. Forensic psychology is a subspecialty in psychology that relates psychological knowledge to legal problems. *Id.*

89. *Id.* at 4-10. Forensic psychiatry is a subspecialty in psychiatry that relates psychiatric knowledge to legal problems. *Id.*

90. *Id.* Child and adolescent psychiatry is a subspecialty in psychiatry whose practitioners are trained in the diagnosis and treatment of mental disorders in children and adolescents. *Id.*

91. *Id.*

92. Dress Aldrege Grangetto, *Reducing Recidivism by Substance Abusers Who Commit Drug and Alcohol Related Crimes*, 10 J. CONTEMP. LEGAL ISSUES 383, 389 (1999). Grangetto aptly explains as follows:

> The disease model associates mental disorders with brain dysfunction and uses medication or somatic intervention to treat the affliction. The psychoanalytic model considers adult disorders to be the result of childhood trauma and uses psychotherapy as the treatment of choice. Behavioral models view maladaptive behavior as learned responses to past events and treat the behavior through conditioning and reinforcement. Social models regard mental disorders as the result of social disorders that are treated through reorganizing the person's social system. Modern treatment programs combine aspects of various treatment approaches to achieve the best results.

Id.; *see also* Charles A. Kaufman & Daniel R. Weinberger, *The Neurological Basis of Psychiatric Disability*, *in* PSYCHIATRIC DISABILITY: CLINICAL, LEGAL, AND ADMINISTRATIVE DIMENSIONS 23 (Arthur T. Meyerson & Theodora Fine eds., 1987). Authors Kaufman and Weinberger state the following: "Disability may be defined as a functional limitation, imposed by disease, on capacities necessary for independent living and economic self-sufficiency . . . Many patients with psychiatric illnesses, however, are equally limited, especially in their capacities for self[-]care and self[-]direction." *Id.*

93. SHUMAN, *supra* note 83, at 8-12; *see also* Renee Romkens, *Ambiguous Responsibilities: Law and Conflicting Expert Testimony on the Abused Woman Who Shot Her Husband*, 25 LAW &

is generally not permitted to testify about neurological examinations.[94] In several jurisdictions, psychologists are permitted to testify about the results of psychological testing but are limited in the conclusions to which they may testify.[95] For instance, on the issue of mental state at the time of an offense, a psychologist may testify to the results of psychological tests administered, but may not be permitted to suggest whether those results indicated the defendant's sanity at the time of an offense.[96] A psychiatrist would, however, be permitted to offer an opinion of sanity based on the same evidence.[97] There are, of course, criticisms of these distinctions.

The courts' preference for a "medical model" of mental illness is under challenge by the psychological community.[98] Critics of the preference argue that because both psychiatrists and psychologists rely primarily on behavioral theories (rather than organic and biological disorders) for their testimony, there should be no distinction between the two.[99] For the purpose of this Article, the distinction between the medical model and social model is more important than that between psychology and psychiatry. However, while the thesis of this Article is premised on the supremacy of the medical model in assessing and admitting false confession evidence, this Article does not argue that only psychiatrists should be permitted to testify. As with any area of expert testimony, courts must be on guard to prevent bogus, irrelevant, or unfounded testimony.[100]

B. Interrogation Techniques

Police interrogation techniques have become more sophisticated and frequently involve principles of human behavior and experimental data reported in psychology literature.[101] Many city police depart-

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SOC. INQUIRY 355, 382-3 n.35 (2000). According to Romkens, favoring psychiatric over psychological evidence occurs in Western Europe as well. *See id.*

It may likely be the case that this favoritism is a result of psychology testing being largely based on the defendant examinee. This makes psychological tests vulnerable. *See, e.g.*, JAY ZISKIN, COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY 669 (5th ed. 1995).

94. SHUMAN, *supra* note 83, at 8-12.

95. *Id.*

96. *Id.* at 8-4.

97. *Id.*

98. *Id.*

99. *Id.*

100. *See, e.g.*, Steven A. Ormish, *A Blizzard of Lies: Bogus Psychiatric Defenses*, 22 AM. J. FORENSIC PSYCHIATRY 19 (2001). Ormish writes that psychiatric defenses are sometimes proffered when no other viable defense is available. *Id.* at 20. Likewise, this is the case for psychology evidence as well. *Id.*

101. Howard B. Terrell & William Logan, *The False Confession: Manipulative Interrogation of the Mentally Disordered Criminal Suspect*, 13 AM. J. FORENSIC PSYCHIATRY 29 (1992).

ments maintain their own behavioral science components, placing psychology in the service of criminal detection.[102] Not surprisingly, about eighty percent of all criminal cases involve a confession.[103] Although several techniques exist, it is helpful to study one of the more widely used interrogation techniques.

In 1954, two employees of the Chicago Police Scientific Crime Detection Laboratory (CPSCDL), Professor Fred E. Inbau and Mr. John J. Reid, published a study titled *Criminal Interrogation and Confessions*.[104] The study consisted of a compilation of techniques based on case studies for police in obtaining truthful confessions. As a result of *Miranda v. Arizona* in 1967, Inbau and Reid published a second edition. While there are several studies and police information guides in the field of interrogations, Inbau and Reid's work gained enough prominence to become almost universal. Indeed, Inbau and Reid have published two further editions plus several other documents and studies regarding police interrogations.

The purpose for discussing in detail the work of Inbau and Reid in this Article is threefold. First, their work is widely accepted in law enforcement.[105] However, it must be noted that while many law enforcement investigators are trained in what has become known as the "Reid technique," they often employ their own modifications. Second, there is a growing body of case law where experts have been proffered and, in some cases, permitted to testify as to the perceived flaws in the Reid technique. Finally, Inbau and Reid's studies span a large tract of time. This Article focuses on Inbau and Reid's second edition and, to a lesser extent, their most current edition.[106]

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102. *Id.*

103. *Id.*

104. FRED E. INBAU & JOHN J. REID, CRIMINAL INTERROGATION AND CONFESSIONS i (1967). At the time of publication of the second edition in 1967, Reid was the director of his own corporation, John J. Reid & Associates, while Inbau was Professor of Law at Northwestern University. *Id.*

105. *See, e.g.*, Saul M. Kassin, *Effective Screening for Truth Telling: Is it Possible? Human Judges of Truth, Deception and Credibility: Confident But Erroneous*, 23 CARDOZO L. REV. 809 (2002). Kassin writes that the technique has trained more than 150,000 law enforcement officers. *Id.* at 812.

106. FRED E. INBAU, JOHN J. REID & JOSEPH P. BUCKLEY, CRIMINAL INTERROGATION AND CONFESSIONS (3d ed. 1987) [hereinafter Third Edition]. Note that one significant difference between the second and third editions was the addition of a brief chapter on the interrogation of juvenile suspects. Also, in the Third Edition, Inbau and Reid mold their earlier guidance into a nine-step process. The Third Edition's nine-step process places greater emphasis on theme development. That is, interrogators are advised to develop themes likely to result in a guilty suspect's confession response. Suggested themes include minimizing the moral seriousness of the offense, condemning the victim or accomplice, and having the suspect place himself or herself at the scene of the offense. *Id.* Special themes were added for juvenile offenders as well. These included placing blame on parents, and the uncertainty experienced by teenagers.

Criminal Interrogation and Confessions suggests several steps for planning and conducting effective interrogations.[107] Suspects are divided by social class. Additionally, the conditions of the confession room and preliminary preparations are noted. For instance, Inbau and Reid recommend privacy in the interrogation room, devoid of distractions such as telephones, vents, windows, and pictures.[108] They even suggest types of lighting to maximize observance of the suspect without providing the suspect either a high degree of comfort or excessive discomfort.[109] In terms of preliminary preparation for interrogation, the authors suggest a variety of tasks: knowing as much as possible about the victim and the suspect; the social, religious, and racial attitudes of the suspect; potentials for alibi evidence; and the suspect's education level.[110] The deportment of the interrogator is perhaps most important to the Inbau and Reid technique. First and foremost, the authors advise police to avoid creating the impression that the interrogator is a detective, but rather is a person "merely seeking the truth."[111] Additionally, Inbau and Reid recommend such tactics as treating a subject with decency and respect, provided that the investigator remains in a position of authority.[112] Thus, they suggest calling professional, highly educated suspects by their first names while addressing working class or unemployed persons as "Mr." or "Mrs."[113]

Id. at 137–40. Additionally, schematics of a model confession room were included in the Third Edition. *Id.* at 31–34.

107. Various steps are noted in both the second and third editions.

108. INBAU & REED, *supra* note 104, at 11–12. Inbau and Reid did make room for the possibility of a "two-way" mirror. *Id.*

109. *Id.*

110. *Id.* at 14. This is not an all-encompassing list, and the authors suggest learning as much as possible about the suspect and victim, including sexual habits, hobbies, possible motives, and physical and mental condition. *Id.*

111. *Id.* In the second edition, the authors devote twelve specific points over seven pages to different types of suspects. *Id.* at 17–23. For instance, in point 4, they suggest the following:

> The interrogator should sit fairly close to the subject, and between the two there should be no table, desk, or other piece of furniture. Distance or the presence of an obstruction of any sort constitutes a *serious psychological barrier* and also affords the subject a certain degree of relief and confidence not otherwise attainable . . . . As to the *psychological validity* of the above suggested seating arrangement, reference may be made to the commonplace but yet meaningful expressions such as "getting next" to a person, or the "buttonholing" of a customer by a salesman.

Id. at 18 (emphasis added).

112. *Id.* at 19–22. The authors note:

> The interrogator should always be mindful of the fact that regardless of the kind of crime a person has committed, he is nevertheless a human being and will probably be reacting to the interrogation in much the same way as would the interrogator himself if their situations were reversed. It is a mistake, therefore, to look upon the suspect as an animal, even though his offense may be a very brutal sexual assault or killing.

Id. at 23.

113. *Id.* at 20

Reid and Inbau further recommend that investigators temper their language to the type used by the suspect. They also advise to conceal any resentment or surprise when catching a suspect in a lie.[114]

Reid and Inbau's initial studies were fairly detailed and multidimensional. The advice proffered included classifying suspects into emotional offenders and nonemotional offenders, as well as suspects whose guilt was reasonably certain versus those whose guilt was doubtful or uncertain.[115] Within this multidimensional context, Inbau and Reid created a twenty-six point interlocking thematic approach to interrogations and added a section entitled "General Suggestions Regarding the Interrogation of Criminal Suspects." At no time did Inbau and Reid suggest the use of violence, or even the threat of violence, to obtain a confession. This is likely because in police studies, it was found that violence or the threat of violence could lead to false confessions.[116]

In the 1967 (second) edition, the twenty-six points included such basic tactics as pointing out the possibility that a victim has lied or exaggerated the nature of an offense.[117] In some cases, Reid and Inbau advise sympathizing with the suspect by condemning the victim or accomplice, if any.[118] One of the frequently attacked concepts is the advice to "suggest [for the purpose of a socially revolting offense] a less revolting and more morally acceptable motivation or reason for the offense."[119] One basic suggestion is to call attention to a suspect's physical condition as a psychological sign of guilt.[120] The Third Edition adds little to these interrogation tactics.

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114. *Id.* at 22.

115. *Id.* at 24. Reid and Inbau defined emotional offenders as those who committed crimes against persons, such as assault, rape, and murder, for nonfinancial reasons. That is, persons who committed crimes for nonfinancial reasons tended to have a greater likelihood of a "troubled conscience." Nonemotional offenders were primarily defined as those who committed crimes for financial gain, although some of these persons committed violent offenses to gain money. *Id.*

116. *Id.*

117. *Id.* at 64.

118. *Id.* at 47.

119. *Id.* at 43. Inbau and Reid suggest allowing a suspect to save face by letting him base an admission of guilt upon a motivation or reason that is less offensive than the real motivation of his act. Another companion technique is to reduce the suspect's guilt feeling by minimizing the moral seriousness of his offense. *Id.* at 40.

120. *Id.* at 33. On this subject, Reid and Inbau state as follows:

> An offender who is led to believe that his appearance and demeanor are betraying him is thereby placed in a much more vulnerable position. His belief that he is exhibiting symptoms of guilt has the effect of destroying or diminishing his confidence in his ability to deceive and tends to convince him of the futility or further resistance.

Id. Some of the features Reid and Inbau suggest are counterintuitive. For example, they note that pointing out to a suspect an inability to look the interviewer in the eye is counterproductive. Likewise, where a suspect claims to be a "religious man" or have a "spotless past record," he

The Reid technique is not without its critics in both the psychological field as well as the criminal law community.[121] Likewise, some federal and state courts have occasioned to comment on the Reid technique. Some courts found nothing inherently coercive about its utilization.[122] Other courts have viewed the technique as psychologically coercive, but not meriting suppression of a confession.[123]

C. False Confession Theories

1. The Medical Model: Analysis and Limitations

A medical model of false confessions is premised on the condition that a suspect (1) is encumbered by a biological mental disease, and (2) the mental disease is likely to be a contributing factor in adopting the suggestiveness of the interrogation.[124] Unlike the social model, the medical model presents evidence directly related to the defen-

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should be countered with a stronger confrontation of guilt. For instance, the following forceful phrase is suggested:

> I don't care how religious you are, and I don't care how spotless your record is. The fact that you are dragging your religion into this and giving me this business about your spotless record is an effort to make your story sound convincing. The only thing that's going to be convincing to me is when you start telling the truth.

Id. at 37.

121. 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 428, 496 n.30 (1998). Leo and Ofshe specifically write:

> American police interrogation training manuals also fail to advise police of the social psychology of false confessions or instruct them how to recognize when their tactics are leading an innocent suspect to falsely confess. In short, police text writers and interrogation trainers demonstrate a studied indifference to the extensive psychological literature on false confessions.

Id.

122. *See, e.g.*, State v. Ulch, 2002 WL 597397, at *4 (Ohio Ct. App. Apr. 19, 2002).

123. *See, e.g.*, State v. Gevan, 2002 WL 2005441, at *3 (Minn. Ct. App. Sept. 3, 2002). The *Gevan* court noted:

> Common elements of the Reid technique are the officer (1) maintaining privacy with the defendant; (2) positing guilt of the suspect as fact with questions that seek to understand why the crime was committed; (3) minimizing the moral seriousness of the crime; (4) exhibiting confidence in the ability to get a confession; and (5) blaming the victim or society at large.

Id. The court further commented on the Reid technique by stating that "these tactics are designed to put the subject in a psychological state where his story is but an elaboration of what the police purport to know already—that he is guilty. Explanations to the contrary are dismissed and discouraged." *Id.* However, it must be noted that the use of the Reid technique was not the reason for the court's determination in upholding the trial court's suppression of evidence. Rather, the reason for the suppression was that detectives failed to provide the suspect with a *Miranda* warning, and the investigator called himself an "advocate" for the suspect. *Id.*

124. *See* GISLI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS, CONFESSIONS, AND TESTIMONY 32 (1992).

dant.[125] For instance, a moderately retarded suspect may begin to adopt suggestions as to his guilt because this adaptation is a normal feature of the biological illness afflicting the suspect.[126]

One of the difficulties in accepting a medical model of false confessions rests in the initial voluntariness test. Adherents of the medical model may argue that if a person afflicted with a mental illness confesses during an interrogation, the confession is not the product of rational intellect and free will. But mental illness, in and of itself, denotes a high standard of proof. One need only look at the high standard of proof for insanity.[127] There are myriad cases, for instance, where a court recognizes a mental illness affliction, yet finds a confession voluntary.[128] Indeed, questions of mental illness often become relegated to losing issues of voluntariness.[129]

An example of the medical model's usage and perceived shortcomings can be seen in *United States v. Raymer*.[130] In that case, Raymer, while serving a sentence in a Kentucky State penitentiary for robbery, sent threatening mail to his probation officer.[131] As a result of this action, an FBI agent interviewed Raymer in the penitentiary hospital after providing a *Miranda* warning.[132] Raymer was a patient in the hospital for lacerating himself and eating metal wire.[133] During this interview, Raymer confessed to sending the threatening letters.[134]

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125. *Id.*

126. *Id.*

127. *See* SHUMAN, *supra* note 83, at 12-8–12-10.

128. *See, e.g.*, Colorado v. Connelly, 479 U.S. 157 (1986).

129. *Connelly*, 479 U.S. at 169–71. In *Connelly*, the defendant traveled from Boston to Denver and told a police officer he committed murder. *Id.* at 160. Even after receiving his *Miranda* rights, Connelly admitted his role in a murder. *Id.* After Connelly stated he had been institutionalized for mental illness, the officer once more told him of his right to remain silent. *Id.* Connelly refused, and then took the police to the crime scene. *Id.* at 160–61. The following morning, Connelly was interviewed by the public defender and stated that he was told to confess by God. *Id.* at 161. At a pretrial hearing, a psychiatrist testified that the defendant had chronic schizophrenia and was in a psychotic state from at least the day prior to his confession. *Id.* The psychiatrist further testified that Connelly experienced hallucinations that interfered with his ability to make free and rational choices. *Id.* He also testified that the illness did not impair the defendant's cognitive abilities, so he understood his *Miranda* rights when he was advised of them. *Id.* at 161–62. Although the Colorado Supreme Court found the confession inadmissible as involuntary, the Supreme Court reversed because of the absence of police coercion. *Id.* at 170–71.

130. 876 F.2d 383 (5th Cir. 1989).

131. *Raymer*, 876 F.2d at 385. Apparently, Raymer felt that his probation officer (appointed from an unrelated youth offense) had failed to protect his interests. Raymer also sent threatening mail to a court clerk. *Id.*

132. *Id.* Raymer acknowledged his rights by signing a *Miranda* form. *Id.*

133. *Id.*

134. *Id.*

Initially, a medical board found Raymer incompetent to stand trial.[135] However, a second medical board found Raymer competent.[136] At trial, Raymer moved the court to suppress his confession as involuntary based on his mental illness.[137] The court denied this motion and convicted him.[138] On appeal, the Fifth Circuit, relying on *Connelly*, held that Raymer's mental illness was not a factor in determining the voluntariness of his confession.[139] The court acknowledged that a "defendant's mental condition still properly figures into the voluntariness calculus."[140] The court further recognized that "[p]olice exploitation of the mental condition of a suspect, using 'subtle forms of psychological persuasion,' could render a confession involuntary."[141] However, because Raymer understood his *Miranda* rights and then subsequently incriminated himself, the court held that his confession was voluntary.[142] Raymer could have used his psychiatric condition as a defense regarding the credibility of his confession, but apparently chose not to do so.

At present, it is difficult, if not impossible, to create a full list of mental illnesses that are relevant to a confession's credibility. However, any list should be narrow and reflect significantly diminished mental processes. One example of specific illness can be seen with mental retardation, in the general sense.

a. Mental Retardation

Mental retardation's core feature is "significantly sub-average general intellectual functioning . . . that is accompanied by significant limitations in adoptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, or safety."[143] Mental retardation is meas-

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135. *Id.*

136. *Id.*

137. *Id.* at 385–86.

138. *Id.* at 386. However, the court determined that Raymer suffered from a mental disease or defect, and committed him to treatment in lieu of imprisonment. *Id.*

139. *Id.*

140. *Id.* (citing *Connelly*, 479 U.S. at 164–65).

141. *Id.* at 387 (citing *Connelly*, 479 U.S. at 164–65).

142. *Id.* at 387. The Fifth Circuit cited several facts in upholding the voluntariness of the confession. First, Raymer was allowed to leave the interrogation. He did, at one point, request to leave, but voluntarily returned thirty minutes later. *Id.* The interrogation lasted no more than forty-two minutes. *Id.* Moreover, there was an absence of police coercion. *Id.* Finally, Raymer admitted during motion testimony that he was familiar with his constitutional rights because of prior experience with the criminal justice system. *Id.*

143. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 39 (4th ed. 1994) [hereinafter DSM IV].

ured, in part, through the intelligent quotient (I.Q.) testing, where a score of 100 signifies average and 70 or below is classified as significantly below average.[144] Retardation is generally sub-classified as mild, moderate, severe, or profound.[145] Mild retardation is the largest sub-class and involves persons with an I.Q. between 50 and 70.[146] Such persons can usually achieve social and vocational skills adequate for minimum self-support, but require guidance and assistance when under unusual social or economic stress.[147] Mentally retarded people are unusually susceptible to the perceived wishes of authority figures.[148] Even when no direct pressure is exerted on them, they may be inclined to make false statements out of a desire to please perceived authority figures.[149] Under this definition, a court would be hard-pressed to deny a forensic psychiatrist, or psychologist specializing in mental retardation, as an expert witness where the confession was not sufficiently detailed to the known facts of the offense.[150] Indeed, it is almost undisputed that a mentally retarded suspect is more likely to confess, and in some cases falsely confess, than a suspect with an average I.Q.[151]

b. Drugs and Alcohol

The DSM IV defines alcohol and drug abuse as a subset of the mental illness "substance abuse."[152] In differing degrees, use of alcohol and drugs impairs cognitive abilities. Yet there appears to be no contention in the legal literature that persons under the heavy influence of either are open to suggestibility during police questioning. In *Pecoraro III*, the Seventh Circuit, while acknowledging the existence of

144. *Id.* at 40.

145. *Id.*

146. *Id.*

147. *Id.*

148. Morgan Cloud et al., *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495, 503–11 (2002) (citing Harter, *Mental Age, I.Q., and Motivational Factors in the Discrimination Learning Set Performance of Normal and Retarded Children*, 5 J. EXPERIMENTAL CHILD PSYCHOL. 123, 137–38 (1967)).

149. *Id.* at 511.

150. Aimee Borromeo, *Mental Retardation and the Death Penalty*, 3 LOY. J. PUB. INT. L. 175, 188 (2002). Evidence shows that mentally retarded defendants more readily confess to crimes because they are particularly susceptible to coercive police techniques, including friendly suggestions and intimidation. *Id.* (citing John Blume & David Bruck, *Sentencing the Mentally Retarded to Death: An Eighth Amendment Analysis*, 41 ARK. L. REV. 725, 737 (1988)).

151. Cloud et al., *supra* note 148, at 503. The authors also note that a generalized desire to please may predispose a mentally retarded suspect's answers, and mentally retarded people are often unable to discern when they are in an adversarial situation such as a police interrogation room. *Id.* at 512.

152. DSM IV, *supra* note 143, at 182–83.

false confessions, held that there is little evidence of drug- or alcohol-induced false confessions.[153] Instead, the court noted, "[D]rugs or liquor are more likely to induce an involuntary though true confession than a fabricated one."[154] In Pecoraro's initial appeal, a psychologist's affidavit stated that Pecoraro was "most likely experiencing a blackout as a result of excessive consumption of alcohol and drugs."[155] Additionally, the psychologist opined that Pecoraro's cocaine use could have led to cocaine psychosis.[156] This is a condition characterized by poor reality testing, impaired judgment, inability to comprehend and integrate information, paranoia, and delusions.[157] One aspect of delusions, according to the psychologist, is confabulation.[158] However, the court appeared to dismiss this claim.

2. The Social Model: Analysis, Limitations, and Criticisms

Although the concept of false confessions has existed for some time, studies on causation are relatively new. While popular media show threats of violence toward suspects as common, the reality of the confession room is quite different. Indeed, the techniques discussed above advise investigators to refrain from violence.

There are a few leading scholars in the field of false confession psychology who also appear in published court decisions. These include Dr. Lawrence Wrightsman,[159] Dr. Saul M. Kassin,[160] Dr. Rich-

153. *Pecoraro III*, 286 F.3d at 446 (citing State v. Burns, 691 P.2d 297, 302 (Ariz. 1984); State v. Baker, 606 P.2d 120, 123 (Kan. Ct. App. 1980)).

154. *Id.* The court also opined that "the expert's 'might have caused' testimony would have carried little weight with the jury (quite apart from the fact that jurors are unsympathetic to users of illegal drugs), and the [S]tate would have had no difficulty procuring an expert on the other side." *Id.*

155. *Pecoraro I*, 677 N.E.2d at 892.

156. *Id.* at 891.

157. *Id.*

158. *Id.*

159. Dr. Lawrence Wrightsman is a professor of Psychology at the University of Kansas. His work in the field of false confessions includes, *inter alia*, CONFESSIONS IN THE COURTROOM (1993) (with Dr. Saul M. Kassin), *Coerced Confessions, Judicial Instructions, and Mock Juror Verdicts*, 11 J. APPLIED SOC. PSYCHOL. 489 (1980) (with Dr. Saul M. Kassin), and PSYCHOLOGY AND THE LEGAL SYSTEM (1994).

160. Dr. Saul M. Kassin is a professor of Psychology at Williams College. In addition to CONFESSIONS IN THE COURTROOM (with Dr. Lawrence Wrightsman, see above), he has published, *inter alia*, *The Psychology of Confession Evidence*, 52 AM. PSYCHOLOGIST 221 (1997); *Police Interrogations and Confessions: Communicating Promises and Threats by Pragmatic Implication*, 15 LAW & HUM. BEHAV. 233 (1991) (with Karyln McNall); *Coerced Confessions and the Jury: An ExperimentalTest of the Harmless Error Rule*, 21 LAW & HUM. BEHAV. 27 (1997) (with Holly Sukel); *On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis*, 21 LAW & HUM. BEHAV. 469 (1997) (with Katherine Neuman).

ard A. Leo,[161] Dr. Richard A. Ofshe,[162] and Dr. Ghisli Gudjonsson.[163] It does not appear in any of their literature that the commonly criticized interrogation methods utilize violence or the threat of violence. However, Dr. Leo and Dr. Ofshe opine that police-induced false confessions arise when a suspect's resistance to confession is broken down as a result of poor police practice, overzealousness, criminal misconduct, or misdirected training.[164] Additionally, interrogators sometimes become so committed to closing a case that they improperly use psychological interrogation techniques to coerce or persuade a suspect into giving a statement that allows the interrogator to make an arrest.[165]

It is helpful to note that false confessions tend to fall into three general types: voluntary, coerced-compliant, and coerced-internalized.[166] A voluntary false confession occurs without any external pressure from the police.[167] There are a number of reasons advanced for this phenomenon, ranging from a need for attention to self-punishment.[168] It may also be the simple case of an individual at-

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161. Dr. Richard A. Leo has published, *inter alia*, *Miranda and the Problem of False Confessions*, *in* THE MIRANDA DEBATE 271–82 (1998); *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266 (1996); *The Ethics of Deceptive Interrogation*, 11 CRIM. JUST. ETHICS 3 (1992). Leo and Ofshe have introduced another subtype of false confession, which is labeled a stress-compliant false confession. This is similar to a coerced-compliant confession. However, Leo and Ofshe cite two major differences between coerced-compliant and stress-compliant confessions. First, coerced-compliant confessions are caused by coercive techniques such as threats and promises. Second, the suspect may consciously decide to terminate the interrogation to escape the aversive questioning or gain a promised reward. *See* Richard A. Leo, *False Confessions: Causes, Consequences and Solutions*, *in* WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE 43 (2001) (with Dr. Richard A. Ofshe).

162. Dr. Richard A. Ofshe is a social psychologist at the University of California, Berkeley. These are some of his frequently cited publications: *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429 (1998) (with Dr. Richard A. Leo); *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 994–96 (1997).

163. Dr. Gudjonsson has written, *inter alia*, THE PSYCHOLOGY OF INTERROGATIONS, CONFESSIONS AND TESTIMONY (1992); PERSONS AT RISK DURING INTERVIEWS IN POLICE CUSTODY: THE IDENTIFICATION OF VULNERABILITIES (RCCJ RESEARCH STUDY NO. 12) (1993).

164. Leo & Ofshe, *The Consequences of False Confessions*, *supra* note 162, at 440.

165. *Id.*

166. *See* WRIGHTSMAN & KASSIN, CONFESSIONS IN THE COURTROOM, *supra* note 159, at 84–86; Ofshe & Leo, *The Decision to Confess Falsely*, *supra* note 162, at 997.

167. WRIGHTSMAN & KASSIN, CONFESSIONS IN THE COURTROOM, *supra* note 159, at 86.

168. *Id.*; *see also* ROBERT L. SADOFF, M.D., FORENSIC PSYCHIATRY: A PRACTICAL GUIDE FOR LAWYERS AND PSYCHIATRISTS 76 (1975). Dr. Sadoff writes that "mostly these people who confess to 'popular crimes' are guilt-ridden individuals looking for punishment and are only too eager to 'admit' they 'must be responsible' for the crime, and request imprisonment." *Id.*

tempting to protect a friend or relative.[169] A coerced-compliant confession, on the other hand, occurs when an individual confesses to avoid a perceived harm or to gain a reward.[170] It may also be a case of the interrogator promising freedom after admission.[171] Finally, a coerced-internalized false confession occurs where an innocent person "comes to believe he or she may have committed the crime."[172] Experts generally point to the physical and emotional condition of the defendant during the interrogation, as well as to suggestive methods used during the interrogation.[173] Some experts liken this latter category as related to the implantation of false memories.[174] Other experts consider modern interrogation techniques as designed to overcome a suspect's free will and possibly to have the suspect adopt the accusations presented.[175]

Kassin and Wrightsman, among others, utilize this typology to explain false confessions.[176] As noted in the following section, some courts have also accepted this typology to clarify testimony.[177] This Article is more concerned with coerced-compliant and coerced-internalized confessions than with voluntary false confessions. This is because voluntary false confessions, such as the case of two hundred people confessing to the kidnapping of the Lindberg baby, are based in such phenomena as "a morbid desire for notoriety."[178]

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169. WRIGHTSMAN & KASSIN, CONFESSIONS IN THE COURTROOM, *supra* note 159, at 88–89.

170. *Id.*; *see also* Ofshe & Leo, *The Decision to Confess Falsely*, *supra* note 162, at 994–96.

171. WRIGHTSMAN & KASSIN, CONFESSIONS IN THE COURTROOM, *supra* note 159, at 88–89.

172. *Id.* at 91–92.

173. *Id.*

174. *Id.*

175. *Id.*

176. *See, e.g.*, State v. Free, 798 A.2d 83 (N.J. Super. App. Div. 2002). However, it should be noted that Leo and Ofshe have altered and expanded this list to the following categories: voluntary false confessions, stress-compliant false confessions, compliant false confessions, coerced-persuaded false confessions, and noncoerced-persuaded false confessions.

177. *Id.* at 90. Here, the *Free* court analyzes jurisdictions accepting false confession psychology evidence, and compares different cases to the New Jersey Rules of Evidence.

178. WRIGHTSMAN & KASSIN, CONFESSIONS IN THE COURTROOM, *supra* note 159, at 86. Wrightsman and Kassin also suggest motives such as the unconscious need to expiate guilt over previous transgressions via self-punishment, the desire to aid and protect the real criminal, and persons who suffer from mental illness. *Id.* It is interesting that Wrightsman and Kassin separate mental illness from other categories. This separation appears to give credence to an acceptance of a biological basis for false confessions by some adherents of the social model of false confessions.

a. Coerced-Compliant Confession

Coerced-compliant confessions are rooted "in an overt, public acquiescence to a social influence attempt in order to achieve some immediate instrumental gain."[179] In their work *Confessions in the Courtroom*, Wrightsman and Kassin use prisoner of war studies from the Korean War as examples of coerced-compliant confessions.[180] Coerced-compliant confessions are sometimes caused by the fatigue, pressures, and suggestiveness of the interrogation process.[181] There are theories advanced as to why coerced-compliant confessions occur. For example, some psychologists view interrogation as a quasi-hypnotic state where police interrogation "can produce a trance-like state of heightened suggestibility."[182]

Dr. Gudjonsson developed the concept of interrogative suggestibility to explain individualized responses to police questioning.[183] In Gudjonsson's view, interrogative suggestibility is defined as "the extent to which within a closed social interaction, people come to accept messages communicated during formal questioning as the result of their subsequent behavioral response."[184] Gudjonsson suggests five interrelated components as part of the interrogative suggestibility theory:

> (1) a closed social interaction between the interrogator and the interviewee;
>
> (2) a questioning procedure that involves two or more participants;
>
> (3) a suggestive stimulus;
>
> (4) acceptance of the suggestive stimulus; and

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179. *Id.* at 88.

180. *Id.* at 89. Wrightsman and Kassin write:

> Relevant to the forced-compliant category are most of the cases of "brainwashing" of American prisoners of war. Almost 40 years ago, during the Korean War, Americans learned from reports by the North Koreans that a number of captured American military men had confessed to a number of treasonable acts and expressions of disloyalty to the United States. The news created a national scandal; commentators asked if American young men were "lacking in the moral character necessary to take a difficult and possibly dangerous stand on the basis of their principles."

Id.

181. *Id.* at 92.

182. *Id.* at 93.

183. *Id.* at 95.

184. *Id.*

(5) a behavioral response to indicate whether or not the suggestion is accepted.[185]

According to Gudjonsson, characteristics of the interviewee also affect the process of the interrogation. For persons likely to employ "avoidance coping," there may be greater possibility of suggestibility.[186] Gudjonsson claims that persons with poor memory and low intelligence are more generally suggestible.[187] Additionally, low self-esteem, lack of assertiveness, and anxiety are factors leading to suggestibility.[188] In contrast, persons who are normally suspicious and distrusting of law enforcement or other semblances of authority are less likely to be suggestible.[189] Gudjonsson created a suggestibility scale to assess a subject's responses to leading questions and negative feedback.[190] To date, this scale remains largely unused in America's courts.[191] Wrightsman and Kassin appear to believe that persons with anxiety are most likely to fall victim to suggestibility.[192]

An additional element in a coerced-compliant confession appears to be compliance.[193] Gudjonsson differentiated between compliance and suggestibility by noting compliance does not require an internal

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* at 96.

189. *Id.*

190. *Id.* The scale uses a narrative paragraph describing a fictitious mugging, which is read to the subjects. The subjects are then asked to recall all they can about the story. After a delay of about fifty minutes, a subject is asked twenty specific questions, fifteen of which are subtly misleading. After answering these, the person is informed that he or she has made a number of mistakes (even if no errors have been made), and thus it is necessary to ask each of the questions once more. The person is instructed to try to be more accurate than before. Any change in answers from the previous trial is labeled a "shift"; the extent to which people give in to the misleading questions is scored as a "yield." "Yields" and "shifts" are added together to make up a "total suggestibility" score. The measure of interrogative suggestibility appears to be independent of hypnotizability.

191. *See, e.g.*, Maj. James Agar, *The Admissibility of False Confession Expert Testimony*, 1999-AUG ARMY LAW. 26, 27–28 (1999). Agar writes that because Gudjonsson's research was largely centered on British police interrogations, his work is not applicable in United States courtrooms. British law does not have a *Miranda* equivalent, the exclusionary rule is virtually nonexistent, and police are not permitted to engage in trickery or deceit such as in the United States. *Id.* For an explanation of the scale, see, e.g., Gudjonsson, THE PSYCHOLOGY OF INTERROGATIONS, CONFESSIONS, AND TESTIMONY, *supra* note 163, at 55.

192. WRIGHTSMAN & KASSIN, CONFESSIONS IN THE COURTROOM, *supra* note 159, at 96. In 1990, Gudjonsson conducted a study using 100 alleged false confessors, with 104 other criminal defendants charged with similar offenses (all of whom had been evaluated by psychologists). The mean ages for the two groups were 29 and 34 respectively. The average I.Q. of the alleged false confessors was 80.0, significantly less than the average of 91.4 for the comparison group. The false confessors scored significantly higher on measures of suggestibility, compliance, and acquiescence.

193. *Id.*

acceptance.[194] Compliance denotes a conscious decision to carry out the behavior, whether or not he or she has agreed to do it privately.[195] However, variables found in suggestibility, such as an eagerness to please and avoidance of controversy, are common to both suggestibility and compliance.

b. Coerced-Internalized Confessions

As noted above, adherents of the social model believe a coerced-internalized confession occurs when the suspect, through fatigue, pressures, and suggestiveness, actually comes to believe that he or she committed the offense.[196] Many of the elements discussed regarding coerced-compliant confessions apply to coerced-internalized confessions.[197] However, there is an additional element where the confessor reaches a point where he fully believes in his own guilt.[198] Should this transpire, a memory alteration effectively occurs.

Most of the available human behavioral studies directed at finding the causes of false confessions are essentially extrapolative tests conducted outside of the interrogation room. For instance, Wrightsman and Kassin write of a seemingly valid experiment where subjects performed a task that required them to cross out a sample of words from a master list.[199] Then, establishing two lights as a discriminative stimuli for truth and falsity, subjects were asked general questions about themselves and were instructed to answer truthfully when the room was illuminated with a green light and to lie in the presence of an amber light.[200] In the next phase of the procedure, the experimenter announced several words taken from the initial task.[201] After some words he instructed the subjects to lie, and after other words to tell the truth, about whether they previously crossed the word out—again in the presence of a green or amber light.[202] In the final step of the procedure, subjects were asked, for each word, to recall whether they actually had or had not crossed the word out.[203] The results indicated that false statements made in the presence of the "truth" light produced more errors in the recall of actual performance than either

194. *Id.* at 97.
195. *Id.*
196. *Id.* at 98.
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.*

false statements made in the presence of the "lie" light or false statements made with no light at all.[204] Wrightsman and Kassin argue that such anecdotal reports suggest the existence of internalized false confessions, but urge caution in evaluating experiments such as the one above.[205]

Ofshe and Leo appear to label some internalized confessions as "noncoerced persuaded false confessions."[206] A noncoerced persuaded false confession is not elicited in response to coercive interrogation techniques alone.[207] It is elicited in response to the influence tactics and techniques of modern, psychologically sophisticated accusatorial interrogation, and is given by a suspect who has temporarily come to believe that it is more likely than not that he committed the offense, despite having no memory of doing so.[208] As in the case of coerced-compliant confessions, noncoerced persuaded false confessions are delivered in the "grammar of confabulation."[209] Once the persuaded false confessor is removed from the influences and pressures of the interrogation environment, the person comes to realize that he or she could not have possibly committed the crime and typically recants his or her confession.[210]

There have been several ideas advanced to combat the potential use of false confessions in the courtroom. In particular, Leo and Ofshe advocate videotaping interrogations,[211] while also calling for more widespread admissibility of expert witnesses. Others have sought to prohibit the use of confessions obtained in coercive interrogations altogether.

i. Mandatory Videotaping of Interrogation: Argument For and Against

Drs. Leo and Ofshe's argument for the mandatory videotaping of confessions utilizes Alaska and Minnesota case law as examples. At present, these states require videotaping interrogations when done at police stations. For example, in *Stephan v. State*,[212] the Alaska Supreme Court noted that the state constitution conferred a right of "electronic recording" on defendants questioned in a custodial inter-

204. *Id.*
205. *Id.* at 98–99.
206. Leo & Ofshe, *False Confessions: Causes, Consequences and Solutions*, *supra* note 161, at 43–44.
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.*
211. Leo & Ofshe, *The Consequences of False Confessions*, *supra* note 162, at 495.
212. 711 P.2d 1156 (Alaska 1985).

rogation.[213] The court further determined that federal due process does not require interrogations to be recorded.[214] Likewise, in *State v. Page*,[215] the Alaska high court recognized the state's constitutional electronic recording requirement was unique to that state.[216]

In Minnesota, the videotape requirement is rooted in case law, but a violation of the requirement does not equate to automatic suppression. For instance, in *State v. Scales*[217] the Minnesota Supreme Court held that "the parameters of the exclusionary rule applied to evidence of statements obtained in violation of these [electronic recording] requirements must be decided on a case-by-case basis."[218] The Minnesota court developed a "substantial violation" test to determine whether confession evidence must be suppressed, which is essentially rooted in a "bad faith" test of police action.[219] To date, no recording requirement is recognized either in federal law or in the law of the other forty-eight states.[220]

Leo argues that videotaping confessions is valid for three reasons. First, it creates a record of the interrogation that can be subsequently reviewed.[221] Hence, a videotaped confession may reduce the "all-too-common swearing contest" in court between police witnesses and criminal defendants.[222] While this may be a factor, courts tend to believe issues of credibility are best determined by lay testimony and the trier of fact is fully capable of determining credibility.[223] It may also lessen the chance the defendant will testify. As a result, the argument for a mandatory videotaping requirement remains an argument and not a legal application.

A second reason for videotaping confessions is that it reduces the likelihood of officer abuse during the interrogation.[224] However, observed "one-way" confessions, in which several police officers observe

213. *Id.* at 1159.

214. *Id.*

215. 932 P.2d 1297 (Alaska 1997).

216. *Id.* at 1301–03.

217. 518 N.W.2d 587 (Minn. 1994).

218. *Id.* at 592.

219. *Id.*

220. *See, e.g.*, United States v. Dumas, 207 F.3d 11 (1st Cir. 2000); Henry v. Page, 223 F.3d 477 (7th Cir. 2000).

221. Leo & Ofshe, *False Confessions: Causes, Consequences and Solutions*, *supra* note 161, at 49.

222. *Id.*

223. *See, e.g.*, United States v. Charley, 189 F.3d. 1251, 1267 (10th Cir. 2000) (stating that generally "expert testimony which does nothing but vouch for the credibility of another witness encroaches upon the jury's vital and exclusive function to make credibility determinations, and therefore does not 'assist the trier of fact' as required by [Federal Rule of Evidence] 702").

224. Leo & Ofshe, *False Confessions: Causes, Consequences and Solutions*, *supra* note 161, at 49.

the interrogation unbeknownst to the suspect, will partially fulfill that same goal.

Finally, videotaping provides law enforcement officials with the ability to monitor the quality of the interrogation process.[225] Leo opines that police, prosecutors, judges, and defense counsel will thus be more able to detect false confessions.[226] While this is true, it is also true that greater investigative efforts to corroborate confessions through the acquisition of evidence will fulfill the same goal. All too often, the culture of law enforcement "rests" a case investigation upon the attainment of a confession. As noted above, the corroboration rule exists to prevent a false confession alone from resulting in a conviction.

There are other problems with Dr. Leo's argument for videotaping confessions. For one thing, a videotape requirement will increase the chances of an ineffective interrogation. With human nature being what it is, people are more willing to talk when the discussion is perceived as a one-on-one, or even two-on-one conversation. The imposition of electronic recording equipment in the interrogation room, or even the mere knowledge of electronic recording, will likely reduce the chances of an effective discussion.

ii. Arguments For and Against Expert Witness Admissibility

Dr. Leo also argues for the increased admissibility of expert witness testimony.[227] He states that

> expert witness testimony in disputed confession cases is necessary because the traditional procedures of the adversarial system (such as opening and closing arguments, cross-examination of witnesses, cautionary instructions to juries, and so on) are not sufficient to safeguard innocent individuals against the likelihood of wrongful conviction based on unreliable confession evidence.[228]

He also opines that such expert witness testimony may reduce the number of police-induced false confessions. Primarily, Dr. Leo views the role of an expert as an educational one. That is, the expert's focus should be on assisting the trier of fact in understanding general findings and social-scientific research regarding interrogation processes, and how such processes can lead to false confessions.[229]

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225. *Id.* at 49–50.
226. *Id.*
227. *See id.*
228. *Id.*
229. *Id.* at 51. Dr. Leo proffers the following view:

Of course, the problem with more widespread admissibility of expert evidence is its potential for misuse, which unfortunately occurs all too often in American courts today.[230] As seen throughout this Article, the admission of expert evidence is guided by rules of reliability. Even with the more liberal admissibility standard under *Daubert*, it can hardly be argued that false confession psychology is accepted as scientifically reliable.[231] At best, it may be considered as specialized but unreliable knowledge.

As argued below, greater admissibility will lead to two unwanted effects. The first deals with a "battle of the experts."[232] Courts are loathe to permit dueling expert witnesses in criminal cases. However, this battle will happen precisely because of the dual problem of unreliability and the danger of something akin to "junk science." The second issue is that greater admissibility of false confession psychological evidence detracts from the central issue in the case, which is the quantity and quality of the prosecution's evidence. After all, it is the prosecution who bears the burden of proof beyond a reasonable doubt.

While it is clear that false confessions do occur, and sometimes occur because of police misconduct, evidence of the interrogation environment is "fair game." Such evidence can come in the form of a defendant's testimony, or by way of cross-examination of other witnesses. This evidence goes to the weight and credibility of the confession. In tandem with the confession corroboration rule, discussed briefly above, it may be the case that the only needed feature is an additional instruction regarding the weight the trier of fact is to accord a confession based on other evidence. Moreover, opening the courts to false confession psychology will also likely open the courts to rebuttal

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> Social science experts can aid the jury by (1) discussing the scientific research literature documenting the phenomenon of police-induced false confessions (thereby refuting the myth of psychological interrogation), (2) explaining how and why particular interrogation methods and strategies can cause the innocent to confess, (3) identifying the conditions that increase the risk of false confession, and (4) explaining the generally accepted principles of post-admission narrative analysis. By educating the jury about the existence, psychology, causes, and indicia of police-induced false confession, social science expert witness testimony at trial should reduce the number of confession-based wrongful convictions.

Id.

230. *See, e.g.*, PETER W. HUBER, GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM 2 (1992).

231. *See, e.g.*, Paul Cassell, *Protecting the Innocent from False Confession and Lost Confessions—And From Miranda*, 88 J. CRIM. L. & CRIMINOLOGY 507 (1998). Cassell critiques Leo and Ofshe's methodology in stating that "rather than haphazardly collecting individual cases, a more logical way to assess the frequency question is to take a random sample of cases and evaluate the proportion of false confessions in it . . . . There are reasonable ways to approach this task." *Id.*

232. *See, e.g.*, Silagy v. Peters, 905 F.2d 986, 1013 (7th Cir. 1990).

evidence rooted in the same field. That is, should the defense be permitted to present false confession psychology, it appears likely, as seen from the analysis below, that courts will permit profile evidence in rebuttal.

iii. Confession Corroboration Redux

Somewhat glossed over in the social model of false confessions is the need for corroboration, which is rooted in common law. Corroboration is a pivotal, but not perfect, safeguard against false confessions. Corroboration is within the understanding of the trier of fact.[233] Certainly, a defense lawyer would be remiss in failing to argue either that his client's confession was not supported by the other evidence, or that the prosecution failed to present sufficient evidence of a real confession.

iv. Other Criticisms of the Social Model

One criticism of the social model is its inability to explain why some persons fail to assert their right to silence and their right to legal counsel.[234] To date, there has been no satisfactory explanation as to why a person, who is at liberty at any time to deny investigators an interrogation, will fail to do so.[235] A person may even tell the interroga-

233. *See, e.g.*, Ayling, *supra* note 39, at 1140.

234. *See, e.g.*, Amanda L. Prebble, Note, *Manipulated by* Miranda: *A Critical Analysis of Bright Lines and Voluntary Confession Under* United States v. Dickerson, 68 U. CIN. L. REV. 555, 579 (2000). Prebble writes that there appear to be several arguments to explain *Miranda*'s marginal effect on confessions. These arguments include police violation of the rule, minimizing the *Miranda* notification, and poor defense counsel advice. Additionally, some suspects confess out of remorse. *Id.*

One argument that is absent from Prebble's article, as well as much of the psychology research in false confessions, is that suspects go into the confession room in an attempt to create a scenario of innocence, in effect placing suspicion elsewhere. However, trained police interrogators can sometimes spot and deflect these attempts. Moreover, suspects who create fictitious alibis are likely to present contradictions in their version of events.

235. *See* Paul Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387 (1996). According to Cassell, *Miranda* resulted in a 16% reduction in the confession rate, and it is responsible for lost convictions in 3.8% of all serious criminal cases. As a result, the government fails to obtain convictions in approximately 28,000 violent crime and 79,000 property crime cases each year, and is forced to settle for plea bargains on terms more favorable to criminal defendants in a similar number of cases. *Id.* at 440. Some researchers attributed this largely unexpected finding to the manner in which detectives delivered the *Miranda* warnings, while others attributed it to the failure of suspects to understand the meaning or significance of their *Miranda* rights. *Id.* (citing Michael Wald et al., *Interrogations in New Haven: The Impact of* Miranda, 76 YALE L.J. 1519 (1967)).

Some authorities disagree with Cassell's analysis. Not surprisingly, Dr. Richard A. Leo criticizes Cassell's "selectivity in citing data," methodology, and conclusions. Richard A Leo, *Miranda's Irrelevance: Questioning the Relevance of Miranda in the Twenty-First Century*, 99 MICH. L. REV. 1000, 1007–09 (2001); *see also* Welsh S. White, *What Is An Involuntary Confes-*

tor, after learning of his or her status as a suspect, a statement to the effect of, "Look, I am innocent, but I do not want to talk with you before speaking with an attorney." Additionally, this criticism can be seen as part of a greater concern regarding the social model's methodologies, which are largely based on anecdotal evidence. For instance, Professor Paul Cassell, who is perhaps the foremost critic of contemporary false confession psychology, argues that there has never been a widesweeping empirical study to justify the changes advanced by Dr. Leo and Dr. Ofshe.[236] Instead, he argues that the studies of Ofshe and Leo are based on small numbers in case studies.[237] Additionally, Dr. Kassin writes that it is impossible to determine, or even estimate, the frequency with which people confess to crimes they did not commit.[238] Likewise, although Dr Leo and Dr. Ofshe argue false confessions are frequent, no one knows precisely how frequently false confessions lead to wrongful convictions.[239] One of the major problems with the Leo-Ofshe studies is that they do not categorize "false confessions" into mental illness types. Instead, they appear to rely on selected case studies of false confessions.

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sion Now?, 50 RUTGERS L. REV. 2001, 2031 n.189 (1998) (stating that "even if Cassell's calculations deserved to be taken seriously, his conclusions would be subject to the criticism "garbage in, garbage out"); Peter Arenella, *Miranda Stories*, 20 HARV. J. L. & PUB. POL'Y 375, 380 (1997) ("Cassell has clearly exaggerated the extent to which the *Miranda* regime has hampered law enforcement.").

236. Paul Cassell, *Criminal Law: Protecting the Innocent from False Confessions and Lost Confessions—And from Miranda*, *supra* note 231, at 501. Cassell writes:

> Given this need for quantification, it is curious that the false confessions literature never provides even a ballpark estimate of the frequency of false confessions. Instead, the articles in the area, including most prominently Leo and Ofshe's foregoing work, reason solely from anecdotal examples. They present notorious illustrations of false confessions to establish that the problem exists. They then remind the reader that "no one can authoritatively estimate the rate of police induced false confessions" or that an assessment of the frequency of false confessions "is difficult to make accurately." Nonetheless, the articles swiftly assert, false confessions "threaten the quality of criminal justice in America" and are "likely . . . in a small but significant number of cases." The articles then conclude by proposing restrictions on police interrogation or the courtroom use of confessions designed to reduce the incidence of the harms from false confessions.

Id.

237. *Id.*

238. WRIGHTSMAN & KASSIN, CONFESSIONS IN THE COURTROOM, *supra* note 159, at 85.

239. Leo & Ofshe, *The Consequences of False Confessions*, *supra* note 162, at 431. In their article, Leo and Ofshe studied sixty cases of police-induced false confessions in the post *Miranda* era. *Id.* at 433. In the cases analyzed, scant commentary is provided as to psychiatric conditions, if any, suffered by the individuals. For instance, regarding one Douglas Warney, they write, "Warney, a mentally handicapped man who was suffering from AIDS-related dementia at the time of his interrogation." *Id.* at 465. There is no analysis as to how this dementia may have given rise to suggestibility.

Two final criticisms must be mentioned here, as they are analyzed throughout this Article. The first involves rebuttal. While false confession psychology adherents argue for greater expert admissibility, it appears little thought has been given to the scope of prosecution rebuttal. It may, and perhaps should, very likely be the case that the prosecution is entitled to rebut false confession psychology evidence with psychology-based profile evidence. Indeed, profile evidence is given greater reliability credence than psychology-based false confession evidence.[240] Finally, there is the risk that social model-based false confession testimony will become a "truth-meter," invading the province of the jury. While several cases discussed below deal with this issue, it is important to note that truth-seeking is primarily within the sole province of the jury.

III. BASIC RULES FOR THE ADMISSIBILITY OF EXPERT TESTIMONY

The first widely adopted application of limitations regarding the use of expert witnesses was established in *Frye v. United States*.[241] In *Frye*, the use of scientific and other expert testimony was limited in that, to be admissible, the testimony had to be based on scientific principles that were "generally accepted" in the applicable scientific community.[242] For roughly seventy years this standard was maintained in federal and state courts.[243] It tended to reflect the anticipated use of "hard science" and engineering rather than social science.[244] However, between 1923 and 1993, significant advances were achieved throughout most scientific and social science fields, somewhat blurring

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240. *See, e.g.*, Dennis P. Saccuzzo, *Still Crazy After All These Years: California's Persistent Use of the MMPI as Character Evidence in Criminal Cases*, 33 U.S.F. L. REV. 379 (1999) (noting that while profile evidence has well-founded criticisms, courts routinely admit profile test evidence).

241. 293 F. 1013 (D.C. Cir. 1923). In *Frye*, the D.C. Circuit Court considered the use of the "systolic blood pressure deception test" (polygraph evidence) as a case of first impression. The court held that "the polygraph had not yet gained such standing and scientific recognition among physiological and psychological authorities." *Id.* at 1014. *See also* PAUL GIANELLI & EDWARD J. IMWINKELRIED, SCIENTIFIC EVIDENCE 11 (3d ed. 1999).

242. *Frye*, 293 F. at 1014. The court specifically held:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while the courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

Id.

243. GIANELLI & IMWINKELREID, *supra* note 241, at 11.

244. *See, e.g.*, State v. Hall, 297 N.W.2d 80 (Iowa 1980); GIANELLI & IMWINKELREID, *supra* note 241, at 28.

the distinction between hard science and other fields.[245] This complicated *Frye*'s restrictive approach, which envisioned acceptance by a specific field,[246] given that much of the science employed in expert testimony stretches over several fields.[247] In particular, the fields of psychology and psychiatry, where statistics and models encompass a prominent role, presented challenges for admissibility under the *Frye* standard.[248] Moreover, the increased use of psychologists and psychiatrists by various federal and state law enforcement and penology assessments showed the need for greater testimonial admissibility.[249] The increased use of expert testimony in civil cases, ranging from products liability to psychological harm, showed the *Frye* admissibility standard could not be fairly applied to every issue.[250] Nonetheless, a number of states still utilize varying standards based on *Frye*.[251]

In the 1993 case *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[252] the Supreme Court set a new threshold for admissibility. In its decision, the Court rejected *Frye*'s seventy-year-old "general acceptance" requirement for admitting scientific evidence. Instead, the Court held that Federal Rule of Evidence (FRE) 702 superseded *Frye*.[253] Addi-

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245. GIANELLI & IMWINKELREID, *supra* note 241, at 28.

246. *Id.*

247. *See, e.g.*, United States v. Williams, 583 F.2d 1194, 1198 (2d Cir. 1978); *see also* Carlton Bailey, *The Admissibility of Novel Scientific Evidence in Arkansas: Does* Frye *Matter?*, 52 ARK. L. REV. 671, 683 (1999).

248. Bailey, *supra* note 247, at 683.

249. *Id.*

250. *Id.*

251. GIANELLI & IMWINKELREID, *supra* note 241, at 84–87. The jurisdictions include: Alabama (Ex parte Turner, 733 So. 2d 497 (Ala. 1998)); Arizona (State v. Tankersly, 956 P.2d 486, 491 (Ariz. 1998)); California (People v. Leahy, 882 P.2d 321, 323 (Cal. 1994)); Colorado (Lindey v. People, 892 P.2d 281, 288 (Colo. 1995)); Florida (Murray v. State, 692 So. 2d 157, 164 (Fla. 1997)); Illinois (People v. Miller, 670 N.E.2d 721, 731 (Ill. 1996)); Kansas (State v. Colbert, 896 P.2d 1089, 1097 (Kan. 1995)); Maryland (Burral v. State, 724 A.2d 65, 80 (Md. 1999)); Michigan (People v. Lee, 537 N.W.2d 233, 249 n.17 (Mich. Ct. App. 1995)), Mississippi (Young v. City of Brookhaven, 693 So. 2d 1355, 1360-61 (Miss. 1997)); Missouri (State v. Kinder, 942 S.W.2d 313, 327 (Mo. 1996)); Nebraska (State v. Freeman, 571 N.W.2d 276, 289 (Neb. 1997)); New Jersey (State v. Harvey, 699 A.2d 596, 621 (N.J. 1997)); New York (People v. Wernick, 674 N.E.2d 322 (N.Y.1996)); Pennsylvania (Commonwealth v. Blasioli, 713 A.2d 1117, 1119 (Pa. 1998)); and Washington (State v. Copeland, 922 P.2d 1304, 1315 (Wash. 1996) (en banc)).

252. 509 U.S. 579 (1993).

253. FED. R. EVID. 702 reads as follows:

> Testimony by Experts: If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

tionally, the Court found that even though the common law may serve as an aid to FRE 702's application, the strict *Frye* standards are at odds with the rule's liberal thrust and general approach of relaxing the traditional barriers to opinion testimony.[254] In essence, the Court changed the legal and substantive basis for using scientific evidence as well as the procedural approach lawyers and judges will have to take in dealing with such evidence. The Court further held that within the language of FRE 702, trial judges can adequately perform the task of ensuring that an expert's testimony rests on reliable grounds, is relevant to the task at hand, and will assist the trier of fact.[255] As a result, the trial judge now is a "gatekeeper" who determines whether the offered theory or application can assist in resolving a legal dispute. Finally, the *Daubert* Court indicated four factors that can be considered in determining whether expert testimony of this type should be considered scientifically valid for admissibility under FRE 702.[256] These four factors are (1) whether the theory or technique can be and has been tested; (2) whether the technique has been subject to peer review and publication; (3) the technique's known or potential rate of error; and (4) the level of the theory or technique's acceptance within the relevant discipline.[257]

It must be noted that Federal Rules of Evidence 702, 703, and 704 govern the admissibility of expert evidence, but, in federal courts, do so within the confines of *Daubert*. FED. R. EVID. 703 provides:

> Bases of Opinion Testimony by Experts: The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

FED. R. EVID. 704 reads:

> Opinion on Ultimate Issue:
>
> (a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.
>
> (b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

254. *Daubert*, 509 U.S. at 596–97.

255. *Id.* at 592–93.

256. *Id.* at 593–94.

257. *Id.* As a helpful aid, these factors were further summarized by the Sixth Circuit in *United States v. Bonds*, 12 F.3d 540, 542 (6th Cir. 1993) as (1) whether the theory or technique can, or has been tested; (2) whether the theory or technique has been subjected to peer review

In *Kumho Tire Co. v. Carmichael*,[258] the Court applied its *Daubert* rationale to nonscientific, technical, and other specialized knowledge.[259] Essentially, *Kumho* extends the admissibility threshold of *Daubert* to a variety of quasi-scientific and nonscientific fields.[260] In *Kumho Tire*, the Court declared that judges serve as gatekeepers for *all* expert testimony, not just scientific evidence.[261] This ended the distinction between "scientific" and "nonscientific" expert testimony under FRE 702.[262] The Court stated that trial judges "may" use the *Daubert* factors in arriving at a decision to find expert testimony reliable.[263] The Court emphasized, however, that the *Daubert* factors were not a checklist or a test.[264]

Social science is but one field subject to a *Daubert* analysis, and it must be noted that the proponent of the expert testimony bears the burden of persuading the court that such testimony covers all four factors. As previously noted, false confession evidence falls into two general categories, the medical model and social model. The study of interrogation conditions and its correlation to false confessions is rooted in social science. Psychiatric conditions leading to a character for malleability tend to be more a hybrid of social and hard science, with an emphasis on the latter.

It should be noted that while false confession expert evidence is considered in light of evidentiary rules, it appears that the jurisdictional distinction between *Frye* and *Daubert* has only a minimal impact on the question of admissibility. It may be the case that other issues outweigh the *Daubert* and *Frye* distinction. It may also be the case

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and publication; (3) the known or potential rate or error in using a particular scientific technique and the standards controlling the technique's operation; and (4) whether the theory or technique has been generally accepted in the particular scientific field.

258. 526 U.S. 137 (1999).

259. *Id.* at 141–42. In *Kumho Tire*, the Court stated as follows:

> We conclude that *Daubert*'s general holding setting forth the trial judge's general "gate-keeping" obligation applies not only to testimony based on scientific knowledge, but also to testimony based on "technical" and "other specialized knowledge." *See* FED. R. EVID. 702. We also conclude that a trial court may consider one or more specific factors that *Daubert* mentioned when doing so will help determine that testimony's reliability. But, as the Court states in *Daubert*, the test of reliability is "flexible" and *Daubert*'s list of specific factors neither necessarily nor exclusively applies to all experts or in every case. Rather, the law grants a district court the same broad latitude when it determines how to determine reliability as it enjoys in respect to its ultimate reliability determination.

Id.

260. Edgar Garcia-Rill & Erica Beecher-Monas, *Gatekeeping Stress: The Science and Admissibility of Post-Traumatic Stress Distorder*, 24 U. ARK. LITTLE ROCK L. REV. 9, 29 (2001).

261. Agar, *supra* note 191, at 34 (1999).

262. *Id.*

263. *Id.* (citing *Kumho Tire*, 526 U.S. at 174).

264. Agar, *supra* note 191, at 34 (citing *Kumho Tire*, 526 U.S. at 147).

that courts admit or suppress false confession expert evidence based on a wide or narrow reading of each of these opinions.

IV. FALSE CONFESSION TESTIMONY: THE STATE OF COURTS TODAY

Federal and state courts have responded to the use of expert testimony in four ways that can be categorized. Some courts have prohibited the use of false confession expert evidence altogether. These courts generally fall into four categories. The first category involves courts holding that such evidence invades the province of the trier of fact.[265] The second category involves courts holding that proffered false confession testimony, particularly in the social model, fails to meet an expert admissibility threshold.[266] As a third category, some courts have permitted the use of false confession expert evidence but only to the point of describing general interrogation conditions generally thought to produce false confessions.[267] A fourth category involves court decisions permitting psychiatrists, and sometimes psychologists, to testify as to a defendant's mental illness that is relevant to accepting and adopting information provided to him during the interrogation.[268] Although this phenomenon is called suggestibility, for purposes of this Article it will be referred to as a "character of malleability." Only in a few published cases do the courts either establish a background qualification threshold for the testifying expert, or estab-

265. *E.g.*, State v. Cobb, 43 P.2d 855 (Kan. Ct. App. 2002). In *Cobb*, the Kansas Court of Appeals, reviewing the prosecution's cross-appeal, held Dr. Leo's testimony regarding false confessions violated the province of the jury. At trial, Dr. Leo had been permitted to testify that the "Reid technique" was inherently coercive. Specifically, Leo was concerned with the use of embellishment and the police confronting Cobb with what they characterized as irrefutable evidence of his guilt. *Id.* at 861. Similarly, in *State v. Davis*, a Missouri court held that Dr. Leo's testimony regarding interrogation techniques violated the province of the jury. 32 S.W.3d 603 (Mo. App. E.D. 2000). Additionally, the court held cross-examination of police witnesses, as well as the defendant's right to testify, permits an adequate means for bringing forth the interrogation conditions before the jury. *Id.* at 609.

A Maine court also addressed the instant issue in *State v. Tellier*, 526 A.2d 941 (Me. 1987). In *Tellier*, the defendant attempted to introduce evidence from Dr. Steven Penrod, a psychologist and professor specializing in false confessions, that Tellier's interrogation and subsequent confession to murder were consistent with several of the factors found in false confessions. Furthermore, the defense proffered, Dr. Penrod would state no specific opinion as to whether Tellier's statements were true or false, but rather that false confessions in general occur under certain known circumstances. The trial court suppressed this testimony, and its decision was upheld by the state supreme court. *Id.*

266. *E.g.*, People v. Rivera, 777 N.E.2d 360 (Ill. App. Ct. 2001) (with little comment, upholding trial judge's determination that Dr. Ofshe's testimony would not meet the general acceptance test under *Frye*).

267. *E.g.*, Callis v. State, 684 N.E. 223 (Ind. Ct. App. 1997).

268. *E.g.*, United States v. Shay, 57 F.3d 126 (1st Cir. 1995); United States v. Corey, 625 F.2d 704 (5th Cir. 1980); State v. Burns, 691 P.2d 297 (Ariz. 1984).

lish limits as to the prosecution's scope of rebuttal.[269] In most cases, although a single issue leads to acceptance or denial of psychologist or psychiatrist testimony, the decisions revolve around two or more of the issues discussed in this paragraph.[270] As the reader will note, the "medical model" remains the basis for acceptance in several of these cases.[271]

A. *Evidence Invading the Truth-Seeking Province of the Trier of Fact: The Tenth Circuit and Minnesota Examples*

Generally, witnesses are not permitted to testify as to the reliability of confessions, or, for that matter, the reliability of statements made by other witnesses.[272] Such testimony is in itself unreliable and invades the truth-seeking province of the trier of fact.[273] However, there are, as noted above, instances where expert testimony is admissible for a specific issue that a lay witness could not testify to. Regarding false confession testimony, some jurisdictions find that any psychology-based expert evidence regarding interrogation conditions is either irrelevant or invasive of the truth-seeking province of the trier of fact. Two examples of this view are analyzed below.

1. *United States v. Adams*

In *United States v. Adams*, the Tenth Circuit was confronted, in part, with a trial court's decision to prohibit a psychologist from testifying as to the defendant's character for malleability.[274] Initially, the defendant, a convicted felon, confessed to the Wichita police that he illegally possessed a firearm.[275] While the defense did not refer the court to coercive aspects of the interrogation, defense counsel did argue that Adams possessed a character trait that raised doubts as to the confession's credibility. Specifically, the defense claimed Adams suffered from a "neurocognitive impairment and dependent personality

269. United States v. Stitt, 250 F.3d 878, 897-98 (4th Cir. 2001); United States v. Hall, 165 F.3d 1095, 1117 (7th Cir. 1999).

270. For example, in *United States v. Adams*, 271 F.3d 1236 (10th Cir. 2001), the court relied on concerns about the lack of a well-defined psychiatric disorder, but ultimately rested its decision on the premise that the particular testimony would invade the province of the trier of fact. *Id.* at 284.

271. *Shay*, 57 F.3d at 126; People v. Parks, 579 P.2d 76 (Colo. 1978).

272. *See, e.g.*, Flynn v. State, 847 P.2d 1073 (Alaska Ct. App. 1993).

273. *See, e.g.*, Hutton v. State, 663 A.2d 1289 (1993) (Rodowski, J., concurring).

274. 271 F.3d 1236, 1240–42 (10th Cir. 2001). Part of the trial court's decision to suppress expert testimony was a result of the defense's late disclosure of the evidence to the prosecution. *Id.* While this issue is an important discovery matter, it is not relevant to this Article.

275. *Adams*, 271 F.3d at 1240. Adams was convicted under 18 U.S.C. § 922(g)(1). *Id.*

disorder."[276] Adams offered this evidence through the testimony of a psychologist who had reviewed Adams' background and held sessions with him.[277] The defense's theory rested on the premise that Adams' condition increased the likelihood that he would lie to please the police.[278]

Adams argued both at trial and on appeal that suppression of the psychologist's testimony violated the basic tenets of *Crane v. Kentucky*.[279] Both the trial court and appellate court found that the credibility of witnesses, including the defendant, was not an appropriate subject for expert testimony.[280] The Tenth Circuit did suggest that a defined psychiatric disorder might open the door to expert testimony regarding the credibility of the confession.[281] It is important to note that Adams did not raise a defined psychiatric disorder as part of his defense. However, the Tenth Circuit rested its decision on the well-settled premise that the significance of explanations for why a person would confess is something that "a jury is capable of resolving without expert testimony."[282]

2. Minnesota

In *Bixler v. State*,[283] the Minnesota Supreme Court reversed a lower court's decision to permit false confession evidence. Defendant Bixler was a mildly retarded male who was initially suspected of sexually abusing his child.[284] The police interrogated Bixler the day after the initial complaint was filed.[285] Before questioning Bixler, the police interviewed his wife regarding his condition and personal habits.[286] Following this interview, the police interrogated Bixler after reading him his *Miranda* rights. According to police testimony, Bixler under-

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276. *Id.* at 1244.

277. *Id.*

278. *Id.* However, Adams initially told the police he lied to protect his girlfriend. *Id.*

279. *Id.* at 1244; *see supra* notes 45–54 and accompanying text for a review of the *Crane* facts and holding.

280. *Id.* at 1245.

281. *Id.* at 1246. The court distinguished *Adams* from United States v. Shay, 57 F.3d 126 (1st Cir. 1995), in which the defendant claimed his confession was the product of a mental disorder characterized by an extreme form of pathological lying. *Id.*

282. *Id.*

283. 582 N.W.2d 252 (Minn. 1998).

284. *Bixler*, 582 N.W.2d at 253. Bixler was mentally retarded due to a brain injury, and acted as an adolescent. *Id.*

285. *Id.*

286. *Id.* Bixler apparently had a habit of picking scabs off his body and placing them in his mouth. Ms. Bixler discovered a scab in the clitoral area of their two and a half-year old daughter. Ms. Bixler then became convinced that her husband placed the scab in her daughter while performing an act of oral sex. *Id.*

stood the reason for the interview.[287] The interrogation took place at the police station.[288] The police, while interrogating Bixler, told him that in order to get help with his personal problems, which included a lack of sex with his wife, "he would have to admit he did 'it.'"[289] Bixler then provided a detailed statement referencing oral sex with his daughter.[290] After a second *Miranda* warning, Bixler agreed to have his confession taped.[291] At trial, the defense proffered the testimony of a psychologist who had examined Bixler and concluded that he possessed a character trait of malleability.[292] Counsel also represented that the psychologist would testify regarding interrogation techniques.[293] The trial court refused to allow the psychologist's testimony regarding false confessions. This decision was overturned by the intermediate appellate court,[294] which concluded that *Crane v. Kentucky* all but mandated admissibility.[295]

However, on appeal, the Minnesota Supreme Court held that *Crane* did not "open the gates" to expert testimony regarding interrogations.[296] The court reasoned that such evidence is "nothing more than a composite of personal characteristics that might render an individual wanting to please an authority figure, and having far less scientific specificity than [a defined mental illness]."[297] As a result, the state supreme court reversed the intermediate appellate court's decision.

In *State v. Ritt*, the Minnesota Supreme Court held that expert evidence regarding the interrogation environment invades the province of the jury.[298] The defendant, Kelly Ritt, was convicted of murdering her developmentally disabled daughter by setting fire to her house.[299]

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287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.* at 254. According to Bixler, he was thirty-ones years old, with a ninth-grade education. He further testified that he only admitted to abusing his daughter because the police promised him treatment for other problems. *Id.*

293. *Id.*

294. Bixler v. State, 568 N.W.2d 880 (Minn. Ct. App. 1997).

295. *Id.* at 884.

296. Bixler v. State, 582 N.W.2d 252, 255 (Minn. 1998).

297. *Id.*

298. 599 N.W.2d 802 (Minn. 1999). On *habeas* review, the federal district court found that the Minnesota Supreme Court's upholding of the state trial court's decision to bar expert testimony did not violate *Crane v. Kentucky*. Ritt v. Dingle, 142 F. Supp. 2d 1142, 1145 (D. Minn. 2001).

299. *Ritt*, 599 N.W.2d at 804. The daughter was born with cytomegalovirus, which affected her heart, liver, spleen, hearing, eyesight, and brain. She was fed through a tube and was under constant care. *Id.*

Prior to formal police questioning, Ritt provided some information regarding the condition of the home to a fire marshal.[300] During later police questioning, Ritt was informed that "she was free to go at any time" and that "she was not under arrest."[301] Ritt told the detective that she believed her daughter caused the fire by tossing an afghan rug out of her crib and onto an electric heater. However, when her statements were found to be inconsistent with the fire marshal's report, the detective notified Ritt of her rights under *Miranda* and began to question her further.[302] This additional questioning, preserved on videotape, showed Ritt admitting that she threw the afghan rug on the electric heater.[303] In preparing for Ritt's interrogation, the police formulated a plan based in part on past training in the Reid and Inbau technique.[304]

At trial, the defense moved to suppress Ritt's confession on the grounds that it was given involuntarily.[305] The defense also sought testimony from an expert witness, Dr. Ralph Underwager.[306] Counsel cited *Crane* to support the admissibility of Dr. Underwager's testimony.[307] The court denied both the suppression motion and the admission of any expert testimony regarding the interrogation.[308] Ritt stated that Dr. Underwager would testify that psychological coercion was present during the interrogation.[309] The trial court concluded Dr. Underwager's testimony exceeded the scope of Minnesota Rule of Evidence 702 and posed a danger of creating confusion.[310]

On appeal, the state supreme court agreed that Ritt's confession was voluntary and upheld its admission. Additionally, the court ana-

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300. *Id.* at 805. This interview occurred in an interrogation room at the police station. *Id.*

301. *Id.* at 806. The detective interviewing Ritt was not in uniform, and he did not carry a firearm. However, the door to the interview room was shut because of noise in the adjacent hallway. *Id.*

302. *Id.* at 807.

303. *Id.* The police also interviewed another daughter and ascertained that Ritt had closed the bedroom door to her disabled daughter's room after the fire started. Furthermore, forensic chemical analysis indicated the fire was caused by the afghan rug being drenched in nail polish remover, which is a highly flammable substance. Finally, Ritt had made a series of inculpatory statements to neighbors about her displeasure toward her disabled daughter. *Id.*

304. *Id.*

305. *Id.* at 808. Ritt argued her statement was "the product of a technique of psychological interrogation that can and does induce innocent people to confess." *Id.* She further argued that "the Reid technique of interrogation systematically alters the suspect's perception of reality through an elaborate web of implicit threats and promises until the suspect believes the confession is the best alternative, even though he or she is innocent of the crime." *Id.*

306. *Id.*

307. *Id.* at 811–12.

308. *Id.* at 808.

309. *Id.*

310. *Id.*

lyzed its prior limitations on expert testimony.[311] The court noted that as a general rule expert testimony is helpful and admissible only "if it explains a behavioral phenomenon not within the understanding of an ordinary lay jury, such as battered woman syndrome or the behavior of sexually abused children."[312] In this case, the court found that a trier of fact could form its own intelligent decisions regarding the voluntariness of Ritt's interrogation.[313] The court then adopted the trial court's rationale that expert evidence regarding false confessions interferes with the truth-finding process of the jury.[314] The court concluded that while *Crane* permits a defendant to present a complete defense, the Court in *Crane* did not speak to evidentiary limitations under the expert evidence rules.[315] Thus, to date, Minnesota appears to hold that false confession evidence rooted in the social model is inadmissible.

B. Expert Evidence Failing to Meet a Frye *or* Daubert *Standard of Admissibility: The New Jersey and Court of Appeals for the Armed Forces (C.A.A.F.) Examples*

It has been noted that there appears to be little correlation between *Frye* and *Daubert* jurisdictions regarding the admissibility of false confession expert evidence. Below are two examples where courts have found psychological review of interrogation evidence incompatible with the requirements of *Frye* or *Daubert*. Throughout this Article there are examples where courts conclude that even though such evidence otherwise qualifies as specialized knowledge, it is nevertheless precluded because the social model does not qualify on the basis of reliability. However, it should be noted that cases exist where the proffered expert psychologist was found not to possess the requisite degree of expertise for admissibility, without comment from the court on the social model of false confessions.[316] Below are two court decisions analyzing the threshold issue of reliability.

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311. *Id.*

312. *Id.* at 811 (citing State v. Hennum, 441 N.W.2d 793 (Minn. 1989)).

313. *Id.*

314. *Id.* at 812. The court stated its reluctance to allow experts to testify about matters that are generally for the jury's determination and are susceptible to cross-examination. *Id.* (citing Bixler v. Minnesota, 582 N.W.2d 252 (Minn. 1998)). In *Bixler*, the Minnesota Supreme Court held that the trial judge's conclusion that expert false confession evidence failed Minnesota Rule of Evidence 702 was legally sound. The court further found that the exclusion of expert evidence on false confessions does not violate a defendant's right to put forth a defense as required by the Sixth and Fourteenth Amendments. *Id.*

315. *Id.*

316. *See, e.g.*, Beltran v. State, 700 So. 2d 132 (Fla. Dist. Ct. App. 1997); State v. Kolb, 930 P.2d 1238 (Wyo. 1996); State v. Tellier, 526 A.2d 941 (Me. 1987).

1. New Jersey

As noted above, several cases involve more than one issue regarding expert evidence and false confessions. For example, in *State v. Free*, a New Jersey appellate court recognized that a confession is generally assumed to be reliable.[317] The court also took note of numerous cases in which people "were erroneously convicted and imprisoned on the basis of persuasive confessions to crimes they did not commit."[318] However, this court further recognized that while it is impossible to estimate the statistical frequency of false confessions, modern police interrogation techniques are psychologically powerful.[319]

In *Free*, the suspect confessed to murder after a seventeen-hour interrogation.[320] The trial court, in permitting the defense testimony of Dr. Kassin, noted the compelling length of Free's interrogation.[321] The prosecution, on a direct appeal of the trial court's ruling, objected on the basis that such evidence invades the province of the jury.[322] Additionally, the prosecution argued that false confession evidence was not sufficiently reliable for admissibility under New Jersey's expert evidence rules.[323]

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317. 798 A.2d 83, 84 (N.J. Super. Ct. App. Div. 2002).

318. *Free*, 798 A.2d at 84. The court specifically noted, "Recent DNA exoneration cases in the Untied States have confirmed that the elicitation of false confessions continues unabated. Among the first sixty-two prisoners exonerated by DNA evidence, fifteen had given full or partial confessions." *Id.*

319. *Id.*

320. *Id.* According to the court, Patrick Free was taken into custody on August 1, 1998, at 5:18 P.M., and orally confessed on tape at 10:29 A.M. the following day. During the period between his intake and confession, he was interrogated by a team of investigators and tested on a polygraph. He consented to be tested by polygraph and to further questioning based on the results of that test. According to police records, he first confessed to the murder at 4:39 A.M. However, he provided a revised statement at 6:02 A.M., and a third statement at 10:02 A.M. On several occasions, he was interrogated by four detectives at the same time. *Id.*

321. *Id.* At trial, Free offered testimony from Dr. Kassin, who testified in a pretrial motion *in limine* that false confessions do occur as a result of police interrogations. The state countered this testimony with a psychiatrist, Dr. Michael Welner, who testified that Dr. Kassin's studies (among others) on false confessions lacked reliable scientific foundation. While he agreed the general typology of false confessions (voluntary false, coerced-compliant, and coerced-internalized) may serve as a useful description of the process, he acknowledged that there has never been an acceptable predictor as to whether a confession is true, false, or questionable. *Id.* In addition, the trial court did not find Dr. Kassin's evidence based in science, but rather accepted it as "specialized knowledge." *Id.*

Interestingly, it was Dr. Kassin who earlier wrote that it is impossible to know the frequency and statistical relevance of false confessions. The court appeared to adopt Dr. Kassin's *pretrial* testimony as a reason for denying his *trial* testimony before the trier of fact.

322. *Id.*

323. *Id.*

The appellate court initially noted a defendant's right to present to the trier of fact evidence relative to the credibility of his confession.[324] The court also acknowledged that other jurisdictions permit psychological testimony on the credibility of a confession.[325] However, the court found that in other jurisdictions, expert psychological testimony was admissible only in cases where the defendant had a mental disorder relevant to the confession.[326] In *Free*, the defendant wanted to present generalized psychological evidence regarding police interrogation techniques.[327] The appellate court, siding with the prosecution, found that the trial court erred in its application of the New Jersey Rules of Evidence to expert testimony.[328] The appellate court concluded that Dr. Kassin could not meet the threshold requirements for expert testimony.[329]

In part, the court appeared to consider expert social science-based evidence regarding interrogations as too amorphous to meet a "general acceptance" requirement.[330] New Jersey maintains the original *Frye* standard of admissibility, and the court recognized its restrictive approach.[331] The court did not foreclose the possible admissibility of expert psychiatric or psychological testimony as to a pertinent condition of the defendant, such as a mental disorder, that pertained to his confession.[332] However, Free did not advance a specific mental illness as a defense.[333]

Additionally, the court recognized that under New Jersey Rule of Evidence 702, the nature of the expert testimony offered "must be such as will assist the trier of fact to understand the evidence or to determine a fact in issue."[334] This wording, as well as the logic of *Bixler*

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324. *Id.* (citing Crane v. Kentucky, 476 U.S. 683, 690 (1986)).

325. *Id.*

326. *Id.*

327. *Id.*

328. *Id.* The court cited to New Jersey Rule of Evidence 702, which reads as follows: "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." N.J. R. EVID. 702.

329. *Free*, 798 A.2d at 83.

330. *Id.*

331. *Id.* at 84 (citing State v. Spann, 617 A.2d 247 (N.J. 1993)). In *Spann*, the court held, "The general acceptance by the relevant scientific community test established in *Frye*, substantially is still the law in New Jersey." *Id.* The court in *Free* also cited to *State v. Harvey*, 699 A.2d 596 (N.J. 1997). In *Harvey*, the court held, "[I]n criminal cases we continue to apply the general acceptance or *Frye* test for determining the scientific reliability of expert testimony." *Id.*

332. *See id.*

333. *Id.*

334. *Id.*.

and *Ritt*, informed the court's holding that expert psychology-based testimony offered little to assist the understanding of the trier of fact.

2. *United States v. Griffin*

In *United States v. Griffin*, the United States Court of Appeals for the Armed Forces (C.A.A.F.) held that the trial court did not err when it excluded false confession evidence.[335] Griffin was initially accused by his wife of molesting his daughter in 1991 at Whiteman Air Force Base (AFB), Missouri.[336] After an investigation, it was determined that his wife's allegations were unsubstantiated. In 1994, Griffin received orders to report to Minot AFB, North Dakota.[337] As part of this duty transfer, he was required to update his security clearance, which included a polygraph examination.[338] During the polygraph examination, Griffin's answers regarding the incident revealed some deception on his part. During a post-examination session, Griffin admitted to an investigator that his daughter "touched his erect penis."[339] On this basis, Griffin was charged with two false official statements,[340] indecent liberties with his daughter,[341] and communicating a threat.[342]

At trial, the defense sought to suppress Griffin's statements on the grounds that they were coerced. The defense attempted to introduce testimony from Dr. Rex Frank, a psychologist, regarding "false confessions" and "coercion in interrogations."[343] According to the court, the sum total of Dr. Frank's pretrial work consisted of the fol-

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335. 50 M.J. 278, 282 (A.F. Ct. Crim. App. 1999).

336. *Id.*

337. *Id.*

338. *Id.* Although polygraph examinations are common during security clearance reviews, *Miranda* rights are not generally given since the purpose is related to national security fitness, rather than criminal investigation. Instead, polygraph subjects are provided with "privacy act rights," and are informed of the purpose of the exam and the voluntary nature of the exam.

339. *Id.*

340. *Id.* (noting that false official statements are punishable under Article 107 of the Uniform Code of Military Justice, 10 U.S.C. § 907 (1998)).

341. *Id.* at 279 (stating that indecent liberties with a child are punishable under Article 134, paragraph 87 of the Uniform Code of Military Justice, 10 U.S.C. § 934).

342. *Id.* (noting that communicating a threat is punishable under Article 134, paragraph 110 of the Uniform Code of Military Justice, 10 U.S.C. § 934)).

343. *Id.* at 281. At the time of *Griffin*, Dr. Frank's background in false confessions was less compelling than that of Dr. Ofshe or Dr. Leo. According to the court:

> In 1993 [Dr. Frank] began studying areas of false confessions and coercion in interrogations. He examined about twenty years' worth of research materials, including a study of 350 cases, conducted in 1987, where suspects confessed but were later determined to be innocent based on other evidence. Of those 350 cases, the study concluded that 49 involved coerced confessions. He testified that there was a problem with the study because "they did not differentiate between the issue of coercion and the issue of torture in police interviews that resulted in a confession."

Id.

lowing: Dr. Frank "spent a total of only six hours with [Griffin]," interviewed the special agent that took Griffin's statements, interviewed an unrelated person who had been interviewed by the agent on a former occasion, and listened to an interview of Griffin's spouse.[344] Dr. Frank testified during a pretrial motion hearing to determine admissibility. Based on his examination of Griffin, Dr. Frank concluded that Griffin's confession was consistent with a coerced-compliant confession.[345] What makes this case different from the others discussed in this Article is the fact that the prosecution countered Dr. Frank with a psychologist who testified that the subject area of false confessions "has not reached scientific acceptability."[346] The trial judge held that false confession psychology evidence was not proper subject matter for expert testimony and that the proffered evidence was more likely to confuse than help the trier of fact.[347] Additionally, the trial judge held that Dr. Frank's evidence had little probative value.[348]

On appeal, the C.A.A.F. reviewed Military Rule of Evidence (MRE) 702, the military court companion rule to FRE 702. Additionally, the C.A.A.F. was bound by *Daubert* as well as *United States v. Houser*,[349] a military law counterpart to *Daubert*. In *Houser*, the C.A.A.F. (then known as the U.S. Court of Military Appeals) set out six factors that must be satisfied by the proponent of the expert testimony. These factors include (1) the qualification of the expert; (2) the subject matter of the expert testimony; (3) the basis for the expert testimony; (4) the legal relevance of the evidence; (5) the reliability of the evidence; and (6) the probative value outweighing the other considerations outlined in MRE 403.[350] The C.A.A.F. concluded that an expert witness may not testify as "a human lie detector."[351] While the court did not create a *per se* rule prohibiting psychological testimony regard-

344. *Id.* at 282. In terms of assessing Griffin's test scores, Dr. Frank concluded Griffin was a "highly compliant individual."

345. *Id.* Dr. Frank did admit that psychologists have no scientific means of determining whether a confession is true or false. He further testified that psychologists can only "understand some characteristics that make a person vulnerable to provide information which is erroneous." *Id.*

346. *Id.* The prosecution called Lt. Colonel Nancy Slicner, a licensed psychologist with a doctorate in psychology, who was the Chief of the Air Force's Behavioral Science Unit at the Air Force Office of Special Investigations. She testified regarding several variables that render generalized conclusions unreliable. These variables include the interviewer, the interview environment, and the psychology and personality of the person being interviewed. She further testified that no accepted studies show a statistically significant correlation between a specific personality trait and the likelihood of somebody falsely confessing. *Id.*

347. *Id.*

348. *Id.*

349. 36 M.J. 392, 397–400 (C.M.A. 1993).

350. *Id.* at 397.

351. *Id.*

ing false confessions, it appeared to be concerned with the issue of scientific credibility. The Air Force Court of Criminal Appeals had previously held that Dr. Frank's testimony "did not have the necessary reliability to help the trier of fact" and that his methods lacked reliability under the *Daubert* factors for admissibility.[352] The C.A.A.F. did not differ from this conclusion in its review of the lower courtFederal and state jurisdictions rarely view military case law as persuasive authority, but *Griffin* may be an exception. Like *Scheffer*,[353] which involved polygraph evidence and also originated in an Air Force court-martial, *Griffin* provides guidance to jurisdictions in reviewing both an expert's qualifications to testify and in assessing the reliability of false confession psychology. While *Griffin* did not involve psychiatric testimony, it presents a solid framework for limiting false confession evidence to that which is based in the narrow purview of the medical model.

C. Use and Limits of Expert Testimony on Interrogation Conditions: The Seventh Circuit and Indiana Examples of Reliance on a Social Model

False confession theory, in part, analyzes interrogation techniques and conditions thought to cause people to adopt the allegations against them as truthful. As noted above, there is a small, albeit growing body of studies in this field.[354] Interrogation conditions are necessarily viewed on a social model because of the prevalence of statistical correlations between techniques and admissions. Two examples below provide context to the social model's use.

1. *United States v. Hall*

In *United States v. Hall*, the Seventh Circuit ultimately permitted evidence as to the coerciveness of general interrogation conditions.[355] *Hall* actually consists of two published appellate cases and one published trial decision reflecting a series of appeals and cross-appeals.[356] Hall was suspected of murdering Jessica Roach, a fifteen-year-old girl

352. United States v. Griffin, 1997 WL 517002, at **10–11 (A.F. Ct. Crim. App. Aug. 11, 1997).

353. United States v. Scheffer, 523 U.S. 303 (1998); *see supra* notes 57–69 and accompanying text for the facts and holding of *Scheffer*.

354. Section III of this Article provides an overview of false confession studies.

355. 93 F.3d 1337 (7th Cir. 1996) [hereinafter *Hall I*].

356. *Hall I*, 93 F.3d at 1337; United States v. Hall, 974 F. Supp. 1198 (C.D. Ill. 1997) [hereinafter *Hall II*]; United States v. Hall, 165 F.3d 1095 (7th Cir. 1999) [hereinafter *Hall III*].

in Vermillion County, Illinois, in 1993.[357] He was also suspected of following other girls in his van during the same period as the murder.[358] Moreover, Hall was previously interrogated by another police department in Indiana regarding the disappearance of a female college student in 1993.[359] In March 1994, a Wabash County, Indiana, detective advised him to seek help at a mental health clinic, which Hall did.[360] The detective was able to garner a basic assessment of Hall from the clinic, and this assessment was shared with local law enforcement agencies.[361]

In November 1994, a detective summoned Hall to the Wabash police station for an interview with a detective from Vermillion County.[362] Although Hall was initially questioned about stalking two girls in Vermillion County, the questioning progressed to the topic of Jessica Roach.[363] Over a two-day period, which included a polygraph examination and FBI interrogation, Hall confessed to murdering Jessica Roach.[364] The interrogation was not electronically recorded, but according to agent notes, Hall provided a detailed confession.[365] At trial, the defense had both a psychologist and a psychiatrist testify as to Hall's mental and emotional problems.[366] Hall also sought expert testimony from Dr. Ofshe as to the coercive nature of the interrogation.[367] However, Dr. Ofshe's testimony was not admitted by the trial court.[368]

In *Hall I*, the Seventh Circuit first assessed Dr. Ofshe's proffered testimony in light of *Daubert*. The court noted Dr. Ofshe's credentials, his methodology, and his conclusions.[369] His methodology, the court noted, was based in social science.[370] The court acknowledged that both social science and psychology pose "both analytical and

357. *Hall I*, 93 F.3d at 1339. The victim was found in a farm field after being run over by a combine. As a result, the autopsy was inconclusive as to the cause of death. *Id.*

358. *Id.* According to the court, Hall had a habit of stalking teenage girls. There were several instances of stalking that Hall admitted to. *Id.* at 1339–40.

359. *Id.*

360. *Id.*

361. *Id.*

362. *Id.*

363. *Id.*

364. *Id.*

365. *Id.* at 1341.

366. *Id.*

367. *Id.* The district court rejected Dr. Ofshe's testimony in its entirety on the basis that "it would add nothing to what the jury would know from common experience." Moreover, the district court did not permit the psychologist to testify as to Hall's character trait for suggestibility as it would invade the province of the jury. *Id.*

368. *Id.*

369. *Id.*

370. *Id.*

practical difficulties for courts attempting to apply FRE 702."[371] However, the court reasoned that disorders do exist, and Hall's confession went to the heart of the prosecution's case.[372] The court found it problematic that the district court did not conduct a *Daubert* hearing as to Dr. Ofshe's proffered testimony and remanded the case.[373] It is worth noting that the court appeared concerned that the Vermillion County police obtained a confession from another individual who claimed to have killed Jessica Roach.[374]

On remand to the district court,[375] the prosecution objected to Dr. Ofshe's testimony on the basis of *Daubert*.[376] The district court first analyzed a tension within *Daubert* between scientific and specialized knowledge. The district court also distinguished between "hard science" and "specialized knowledge."[377] The court further set a requirement for social science testimony, which necessitated that the expert testify, *inter alia*, as to the longevity or the particular field, the literature written about the subject, the methods of peer review, the

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371. *Id.* (citing Robert C. Showalter, *Distinguishing Science from Pseudo-Science in Psychiatry: Expert Testimony in the Post-Daubert Era*, 2 VA. J. SOC. POL'Y & L. 211 (1995)).

372. *Id.* at 1343. The court analogized to a hypothetical case involving an intent offense centered on abusive language where the defendant suffered from Tourette's Syndrome but was unable to present psychiatric testimony. *Id.* The court also noted that Hall's confession consisted of a police agent writing Hall's statements for him, and then getting Hall to sign the confession. The court appeared to be concerned with the lack of corroborative evidence linking Hall's confession to the actual murder of Jessica Roach. *See id.*

373. *Id.* The court determined,

> Properly conducted social-science research often shows that commonly held beliefs are in error. Dr. Ofshe's testimony, assuming its scientific validity, would have let the jury know a phenomenon known as false confessions exists, how to recognize it, and how to decide whether it fits the facts of the case being tried.

Id.

374. *Id.* at 1340. It must be noted that this confession was not the product of an interrogation, but rather a volunteered statement in which apparently no party placed any credence. *Id.*

375. *Hall II*, 974 F. Supp 1198.

376. *Id.*

377. *Id.* (citing Berry v. City of Detroit, 25 F.3d 1342, 1349–50 (6th Cir. 1994)). In *Berry*, the court viewed the distinction as follows:

> The distinction between scientific and nonscientific expert testimony is a critical one. By way of illustration, if one wanted to explain to a jury how a bumblebee is able to fly, an aeronautical engineer might be a helpful witness. Since flight principles have some universality, the expert could apply general principles to the case of the bumblebee. Conceivably, even if he had never seen a bumblebee, he still would be qualified to testify, as long as he was familiar with its component parts. On the other hand, if one wanted to prove that bumblebees always take off into the wind, a beekeeper with no scientific training at all would be an acceptable expert witness if a proper foundation were laid for his conclusions. The foundation would not relate to his formal training, but to his firsthand observations. In other words, the beekeeper does not know any more about flight principles than the jurors, but he has seen a lot more bumblebees than they have.

Berry, 25 F.3d at 1349–50.

quantity of observational or other studies in that field, and the general consensus or debate in the field as to what the raw data means.[378] The court noted a number of academic treatises on social science and concluded Dr. Ofshe's testimony was admissible under FRE 702 because of the liberal nature of *Daubert*.[379] The district court then held that Dr. Ofshe's testimony, while not scientific, could be admissible as specialized knowledge.[380] However, the court limited Dr. Ofshe's testimony to the correlation between false confessions and various factors believed to be linked to them.[381] He was not permitted to testify about matters of causation, and he was specifically forbidden to testify that the interrogation methods caused Hall to falsely confess.[382] Moreover, Dr. Ofshe was prohibited from testifying with regard to any of Hall's post-confession statements of further guilt on direct examination.[383] Finally, the court prohibited Dr. Ofshe from testifying as to Hall's psychological or psychiatric impairments.[384] Hall was once more convicted after retrial.[385]

As a result of Hall's retrial and conviction, several new issues arose in his next appeal.[386] However, the court appeared little concerned about the district court limiting Dr. Ofshe's testimony. One important issue involved the scope of rebuttal to false confession testimony. At trial, Hall was permitted to introduce expert psychiatric testimony as to certain personality disorders that made him more susceptible to suggestion and eager to please.[387] In rebuttal, the prosecution introduced an expert to testify that those same characteristics associated with Hall's particular personality disorders are often found in sex offenders.[388] The court held there was no abuse of discretion in this rebuttal.[389]

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378. *Hall II*, 974 F. Supp. at 1198.

379. *Id.* at 1200.

380. *Id.*

381. *Id.*

382. *Id.*

383. *Id.*

384. *Id.*

385. *Hall III*, 165 F.3d at 1095.

386. *Id.* These issues included hearsay admission, expert evidence, and the prosecutor's opening statement.

387. *Id.* at 1117.

388. *Id.*

389. *Id.* The court stated, "It is well established that the admission of rebuttal lies within the discretion of the trial court and appellate courts will not interfere with the trial court's ruling unless there is a clear abuse of discretion." *Id.* (citing Mercado v. Ahmed, 974 F.2d 863, 872 (7th Cir. 1992)).

Proponents of false confession admissibility under the social model view *Hall* as a landmark decision.[390] While this may be true to the jurisdictions *Hall* has influenced, its holding is tenuous given the gatekeeper role of trial judges. Moreover, as noted above, a survey of case law indicates courts are reticent to permit evidence of interrogation psychology because it invades the province of the trier of fact. Additionally, *Hall* appears to open the door for profile testimony during rebuttal. Profile evidence is likely to be admissible as rebuttal to social model-based testimony as well.[391] This is because the defense is essentially presenting to the trier of fact psychological evidence of the defendant's innocence. This is significant to a defendant's tactical choices at trial, as certain profile methodology has greater acceptance both in psychiatry and psychology.[392] Few defense counsel want a situation where the prosecution is permitted to introduce expert evidence to the effect the defendant shares common characteristics associated with people who tend to commit the charged offense.

2. Indiana: *Miller v. State*

In *Miller v. State*, the Indiana Supreme Court ruled that interrogation techniques may be a proper area for expert testimony.[393] Miller was initially suspected of murder, but prior to any interrogation, his name and description appeared on the television news.[394] On learning this fact, Miller went to the local police station to assert his innocence.[395] He arrived at 5:30 P.M. and was placed alone in a locked interview room.[396] After two hours, a detective began gathering background information while interviewing Miller.[397] Miller was provided

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390. WRIGHTSMAN & KASSIN, CONFESSIONS IN THE COURTROOM, *supra* note 159, at 92.

391. *See, e.g.*, United States v. Stitt, 250 F.3d 878, 897–98 (4th Cir. 2001). In *Stitt*, the court defined rebuttal evidence for the penalty stage of trial:

> Both the definition of rebuttal evidence and the precedent in this Circuit make clear that, when otherwise inadmissible, rebuttal evidence must be reasonably tailored to the evidence it seeks to refute. Rebuttal evidence is defined as "evidence given to explain, repel, counteract, or disprove facts given in evidence by the opposing party."

Id.

392. *See, e.g.*, People v. Stoll, 783 P.2d 698 (Cal. 1989); Paul R. Lees-Hayley, *Psychodiagnostic Test Usage by Forensic Psychologists*, 10 AM. J. FORENSIC PSYCH. 25 (1992) (listing frequency of various tests conducted by psychologists).

393. 770 N.E.2d 763 (Ind. 2002).

394. *Miller*, 770 N.E.2d. at 768.

395. *Id.*

396. *Id.* From time to time, a detective entered the room and asked Miller "if he needed anything." *Id.*

397. *Id.*

with a *Miranda* advisement early in the interview.[398] For a time, Miller denied any involvement in the murder and denied even being near the victim's office.[399] However, the detective provided Miller with "evidence" that he was seen outside the victim's office and that Miller's fingerprints had been found in the victim's office.[400] The detective even told Miller that the victim died of natural causes.[401] None of this was true, though a witness did see Miller in the victim's building.[402] The detective went so far as to suggest that the victim could have died from an accident involving Miller.[403] At 1:45 A.M., Miller told the detective that he accidentally killed the victim.[404] Miller then agreed to have his statement recorded, at which time Miller acknowledged his *Miranda* rights and waived them.[405] Once more, Miller provided an oral statement admitting the victim died in his presence.[406] At no time did Miller appear to be intoxicated or under medication.[407] He was forty years old and employed, but later it was discovered that he suffered slight mental retardation.[408] In fact, Miller had a prior record which suggests he had knowledge of the criminal justice system.[409] At trial, the court found Miller's confession voluntary and excluded testimony from Dr. Ofshe regarding interrogation

398. *Id.* When Miller initially denied being at the apartment house where the victim was murdered, which was contrary to the information contained in the police investigation, the detective provided Miller with an advisement of *Miranda* rights, both orally and in writing. *Id.*

399. *Id.*

400. *Id.*

401. *Id.*

402. *Id.*

403. *Id.* At approximately 1:00 A.M., Miller and the detective took a break, at which time Miller was provided with a soda and the opportunity to use the restroom. *Id.*

404. *Id.* at 769. According to the court, Miller told the detective that he encountered the victim in her office on the night of her death, and that he pushed the door open to her office. Miller further stated that she told him to "get the hell out," and that she started to back up and fall. In addition, Miller maintained that the victim's injuries occurred when he attempted to catch her. *Id.*

405. *Id.* Miller's confession was captured on videotape. *Id.*

406. *Id.*

407. *Id.* On videotape, Miller stated that he entered the apartment house to contact an acquaintance. When he failed to find the acquaintance, he saw the victim standing in her office door, closing the door. Miller then went to find another acquaintance and again saw the victim, closing the office door a second time. When he approached her and opened the door, she told him to "get out of here." She then fell down the stairs. *Id.* However, when the detective confronted Miller with evidence that the victim had been raped, Miller responded, "Well, she wasn't raped by me, sir. I wouldn't, you know, do nothing like that to no older lady." *Id.*

408. *Id.*

409. *Id.*

conditions.[410] The trial court did not prohibit Miller from cross-examining detectives as to the conditions of the interrogation.[411]

On appeal, the Indiana Supreme Court began its analysis by suggesting that a trial court's determination of a confession's voluntariness does not preclude the defense from challenging its weight and credibility.[412] The court then held that the content of Miller's interrogation was not a proper matter for exclusion.[413] The court concluded that Dr. Ofshe's testimony "would have assisted the jury regarding the psychology of relevant aspects of police interrogation of mentally retarded persons, topics outside common knowledge and experience."[414]

However, the court did acknowledge that some if this evidence might violate Indiana's prohibition against opinion testimony as to the truth or falsity of a defendant's statements.[415] Also, the court did not assess whether Dr. Ofshe's testimony could withstand all expert admissibility rules, including the "scientific" basis on which it was based. Thus, *Miller* is of value only as an example where a court held expert evidence regarding generalized interrogation psychology would be helpful to the trier of fact and did not, *per se*, invade the truth-seeking province of the tier of fact. It is important to distinguish *Miller* from other cases, as the court noted the confession constituted the overwhelming weight of the prosecution's case.[416]

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410. *Id.* at 770. The prosecution initially filed a motion *in limine* seeking to exclude all testimony regarding the interrogation process as well as the truthfulness of the defendant's statements/confession. *Id.*

Dr. Ofshe was offered as an expert in the field of "social psychology of police interrogation and false confessions." The trial court first heard Dr. Ofshe's testimony out of the presence of the trier of fact. He identified two principal features of analyzing police interrogation: evidence ploys and minimization. He also testified with regard to the significance of the friendly behavior of the detective. Dr. Ofshe concluded that the interrogation was designed on psychological principles to "drive a suspect's confidence down to the point where they think it is virtually certain that they will be arrested, tried, and convicted." *Id.* at 770–71.

411. *Id.*

412. *Id.* at 772.

413. *Id.*

414. *Id.* at 774.

415. *Id.* The Indiana Court of Appeals had earlier dealt with the issue of Dr. Ofshe's testimony invading the province of the trier of fact in *Callis v. State*, 684 N.E.2d 233 (Ind. Ct. App. 1997). *Id.* at 773. In *Callis*, Dr. Ofshe's testimony was limited to generalized psychological evidence regarding interrogations. On appeal, Callis asserted this limitation was cause for reversible error. The court disagreed and sustained Callis's conviction.

416. *Miller*, 770 N.E.2d at 773.

D. Expert Testimony Involving a Defendant's Character for Malleability: The First Circuit, Florida, and Nebraska Embrace the Medical Model

Specific psychiatric conditions may be relevant to the credibility and weight the trier of fact must place on the confession. However, to date, there is little legal consensus as to which condition is relevant to credibility determinations. Certainly, specific mental illnesses listed in the DSM IV[417] may give rise to a character for malleability (or suggestibility) in the interrogation setting. For instance, courts have found it error to suppress evidence of anxiety conditions[418] and long-term substance induced blackout impairments.[419] Likewise, some conditions, such as diminished mental capacity, have not been found relevant to the question of a confession's credibility.[420] Because of a lack of general consensus regarding specified mental illnesses linked to malleability, little persuasive guidance exists for admissibility issues. However, two examples analyzed below utilize the medical model in determining a specific mental illness relevant to weight and credibility.

1. *United States v. Shay*

In *United States v. Shay*, the First Circuit held that where a defendant suffered from a well-recognized mental disorder, the district court erred when it suppressed psychiatric testimony.[421] Shay was initially arrested because his father discovered a "suspicious package" under his vehicle and called the police.[422] While the police examined this package, it exploded, killing one police officer and injuring another.[423] Although Shay initially made inculpatory statements to the police, he made a number of conflicting statements to the media as well as to his friends. For example, Shay told the police that "he was sorry about it and wished he could turn back the hands of time."[424] Shay also told reporters he knew who planted the bomb, but only after the fact.[425] Finally, Shay bragged to a cellmate that "he was the boom-

417. *See supra* note 143 for an explanation of the DSM IV.

418. *See, e.g.*, People v. Parks, 579 P.2d 76 (Colo. 1978). In *Parks*, the court held that expert psychiatric testimony regarding the defendant's mental ability to make free and intelligent decisions at the time of his or her arrest is generally relevant to the issues before the court. *Id.*

419. *See, e.g.*, State v. Whitton, 770 So. 2d 844 (La. Ct. App. 2000). However, there are cases in which the court found that a specific illness was not relevant. *See, e.g.*, People v. Page, 2 Cal. App. 4th 161 (1991).

420. *See, e.g.*, People v. Howard, 575 N.W.2d 16 (Mich. Ct. App. 1997).

421. 57 F.3d 126 (1st Cir. 1995).

422. *Shay*, 57 F.3d at 128.

423. *Id.*

424. *Id.*

425. *Id.*

boom man," and was the one "who killed the Boston Cop."[426] He was charged as part of a conspiracy to kill his father.[427]

At trial, the defense attempted to argue that Shay's statements were unreliable for three reasons. First, Shay suffered from a compulsive need to gain attention, and as a result, he created grandiose stories.[428] Several lay witnesses were permitted to testify as to this trait.[429] Second, the defense argued that Shay's statements were conflicting and did not match the facts of the case.[430] Again, the defense was able to present evidence of this to the jury in the form of lay witness testimony. Finally, the defense sought to offer testimony from Dr. Robert Phillips, a psychiatrist, to the effect that Shay suffered from a recognized mental disorder known as *pseudologia fantastica*.[431] The district court, however, suppressed Dr. Phillips's testimony, ruling that it would be likely to mislead the trier of fact and delve into inadmissible areas, such as an ultimate issue.[432]

The First Circuit remanded the case. In its opinion, the appellate court first examined the psychiatric condition or mental illness that Shay suffered from.[433] According to the court, *pseudologues* represent fantasies as real occurrences that often involve dramatic, grandiose, and exaggerated events.[434] The court also opined that it might not be necessary for Shay to testify in order to avail himself of this defense.[435] The court then conducted an analysis under both FRE 702 and *Daubert*, and found that the district court had abused its discretion by preventing Dr. Phillips from testifying. The court also found that Dr. Phillips's testimony would have provided the jury with counterintuitive testimony.[436] The finding that Dr. Phillips's testimony would provide counterintuitive evidence to the trier of fact was based on the proposition that a person with Shay's diagnosis might make

426. *Id.*

427. *Id.* The prosecution's theory was that Shay and a friend named Alfred Trenkler conspired to kill Shay's father by manufacturing the bomb and placing it under his father's car. *Id.*

428. *Id.*

429. *Id.*

430. *Id.*

431. *Id.* The court recognized that *pseudologia fantastica* is categorized as a factitious disorder in the DSM III-R and is sometimes referred to as Munchausen's Disease. Further, it is a variant of lying that is often characterized as an extreme form of pathological lying. *Id.*

432. *Id.* at 130 n.2.

433. *Id.* at 134.

434. *Id.* at 129 n.1 (citing Charles W. Dithrich, *Pseudologia Fantastica, Dissociation, and Potential Space in Child Treatment*, 72 INT. J. PSYCHO. ANAL. 657 (1991)).

435. *Id.* at 134. Here, the court reasoned that under FRE 806, a declarant's out-of-court statement "opened the door" to the declarant's credibility. *Id.* The court acknowledged FRE 806 does not include statements admitted under FRE 801(d)(2)(A) (party admissions), and simply put forth an analogy for the admissibility of credibility evidence. *Id.*

436. *Id.*

statements against their interest for reasons other than the truth.[437] The court further held that such evidence would significantly buttress Shay's testimony that he lied about conspiring to kill his father.[438] The First Circuit did not expressly hold that Shay had an absolute right to Dr. Phillips's testimony. Rather, the court held that if, on remand, the lower court decided that Dr. Phillips' testimony was admissible under FRE 403, then exclusion of his testimony could not constitute harmless error.[439] This holding was premised on the centrality of Shay's inculpatory statements to the prosecution's case.[440]

2. *Carter v. State*

In *Carter v. State*, a Florida appellate court reversed a murder conviction on the basis that the trial court had erroneously suppressed evidence in the form of expert witness testimony regarding a false confession.[441] In this case, the defense sought to introduce testimony from Dr. Robert Defrancisco, a psychologist, regarding the defendant's mental status at the time of his confession.[442] At trial, Carter testified as to the conditions of his interrogation.[443] His description differed significantly from the description given by the police interrogator. Carter proffered that, through the psychologist's testimony, it would be established that Carter was only moderately literate with an I.Q. of seventy-nine and a sixth-grade reading level,[444] that his short-term memory was significantly below average, and that he had subnormal comprehension.[445] The psychologist would further testify that Carter suffered from bipolar disorder and manic depression, and that Carter had a history of alcohol abuse.[446] Based on this testimony, the defense intended to attack the voluntariness of the confession before the trier of fact.[447] Finally, the defense also offered to demonstrate Carter's lack of comprehension through the Grisso Test.[448] As a result of the

437. *Id.* at 133.

438. *Id.*

439. *Id.* at 134.

440. *Id.* n.7. The court stated, "Here the statements at issue were vital to the government's case. The district court acknowledged the importance of the statements to the government's case at a side bar conference on the fourteenth day of trial when it observed that without Shay Jr.'s statements, 'the government would be sunk.'" *Id.*

441. 697 So. 2d 529 (Fla. Dist. Ct. App. 1997).

442. *Id.* at 534.

443. *Id.* at 531.

444. *Id.* at 532.

445. *Id.*

446. *Id.*

447. *Id.*

448. *Id.* Designed by Dr. Tom Grisso, the Grisso Test is intended to assist a forensic expert in determining whether a juvenile who has waived his rights actually comprehended (1)

prosecution's motion *in limine*, the trial court suppressed all psychological testimony at trial.[449]

On appeal, a Florida appellate court concluded that this suppression of expert evidence constituted reversible error "primarily because the prosecution argued the bulk of its case from Carter's confession weighing the testimony of the investigators against that of Carter."[450] While the case does not provide a detailed analysis of the issues related to the admissibility of expert testimony, it does illuminate two recurring themes found in cases where false confession expert testimony is permitted. First, the defendant possessed a specific mental illness—in this case, bipolar disorder and manic depression. Thus, the testimony was rooted in a medical model rather than a social model. Second, the defendant testified in his own defense. It must be reiterated, however, that Carter challenged the voluntariness of his confession rather than proclaiming a false confession. Accordingly, this holding appears to be closer to the holding of *Crane v. Kentucky*, rather than cases that involve a simple challenge to the credibility of a confession.

3. *State v. Buechler*

In *State v. Buechler*, the defendant was charged with murder.[451] Specifically, the prosecution alleged that the defendant killed a drug distributor after receiving marijuana from him.[452] The evidence

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what was being said, as well as (2) the significance and implications of the statement of *Miranda* rights. Anticipating the State's objection to Dr. Defrancisco's opinions, the trial court allowed a voir dire examination, during which the expert indicated that the Grisso Test is not a commonly used, nationally-recognized test, and that the defense's attempt to use the Grisso Test results to challenge the appellant's ability to comprehend his *Miranda* rights was "very unusual." The appellate court, in turn, held, "[W]e conclude that, with respect to the Grisso Test results, the trial court properly found that the defense had not laid an adequate foundation to satisfy the requirements of *Frye* . . . ." The State's objection was sustained, and Dr. Defrancisco was not allowed to opine as to whether the appellant had knowingly and voluntarily waived his rights. *Id.* at 533.

449. *Id.* at 533.

450. *Id.* The court noted that "[t]he exclusion of Dr. Defrancisco's testimony deprived the jury of relevant, material information that could have helped them to gauge the appellant's credibility and to decide how much weight to give the evidence relating to the waiver of rights form and the incriminating statements." *Id.*

451. 572 N.W.2d 65 (Neb. 1998).

452. *Id.* at 68. The State's theory of Buechler's guilt rested on his confession. Buechler admitted to driving Efrain Hernandez and Andrew Requejo in his pickup. During this drive, Hernandez "made fun" of Buechler's driving and, at some point, Buechler stopped the truck and shot Hernandez. Buechler further confessed that he shot Hernandez in the left eye, but denied shooting him in the body. The pathologist was unable to verify where Hernandez was shot because of the decomposed state of Hernandez's body. In fact, over a year had elapsed from the murder to the recovery of the body. Furthermore, after-the-fact witnesses provided conflicting

against defendant Buechler consisted of a videotaped confession as well as statements that were made by a co-conspirator. At the time of the confession, Buechler was a "daily heavy user of methamphetamine, cocaine, and marijuana."[453] A clinical psychologist that was retained by the defense conducted a mental health examination of Buechler and diagnosed him with major depression disorder, attention deficit disorder, anxiety disorder, and paranoid personality disorder.[454] In addition, the psychologist opined that Buechler was "in the throes of methamphetamine withdrawal" at the time of his confession.[455] The psychologist reviewed Buechler's videotaped confession and was set to testify that Buechler was in "a suggestible state."[456] The prosecution succeeded in suppressing the psychologist's testimony.

The Nebraska Supreme Court, relying on both *Shay* and *Hall III*, concluded that it was reversible error to suppress the psychologist's testimony.[457] The court first began its analysis under *Crane* and determined that such evidence goes to the heart of the right to conduct a defense. The court then reviewed Nebraska's four-part test for determining expert admissibility.[458] The court further noted that Buechler had testified at trial.[459] The Nebraska court then reviewed a number of other state jurisdictions and concluded that the trial court had abused its discretion in suppressing the expert testimony.[460] The court noted that the psychologist's testimony was not proffered to tell "the jury how to decide the case or what result should be reached on any issue to be resolved by it, but, rather, to explain Buechler's mental state at the time of the recorded confession."[461] The Nebraska Supreme Court also appeared to find a lack of evidence interlocking Buechler's confession to the actual murder.[462] As a result, the court

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testimony as to statements made by both Buechler and Requejo. At some point after confessing, Buechler claimed Requejo shot Hernandez. *Id.*

453. *Id.* at 68.

454. *Id.* at 71.

455. *Id.*

456. *Id.*

457. *Id.*

458. *Id.* at 72. This test, which mirrors *Daubert*, is as follows: (1) Does the witness qualify as an expert?; (2) Is the testimony relevant?; (3) Will the expert's testimony assist the trier of fact to understand the evidence or determine a controverted factual issue?; and (4) Should the expert's testimony be excluded because its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or needless presentation of cumulative evidence? *Id.*

459. *Id.* at 69.

460. *Id.* The court reviewed *Carter v. State*, 697 So. 2d 529 (Fla. Dist. Ct. App. 1997), discussed above, and *People v. Gilliam*, 670 N.E.2d 606, 619 (Ill. 1996), also discussed above.

461. *Id.* at 73.

462. *Id.* at 74. The court noted, "As there was no physical evidence tying Buechler to the murder, the strongest evidence of the State's case was Buechler's recorded confession, which was

determined that the psychologist's testimony was an essential part of Buechler's defense, and would have assisted the jury in determining the crucial issue of Buechler's credibility at trial.[463] Finally, the court concluded that its decision was not that Buechler had falsely confessed, but rather that a jury was entitled to make that judgment.[464]

V. HYPOTHETICAL SCENARIO

At 4:30 A.M. on a cold winter morning in the city of Anytown, U.S.A., Jane Doe awoke to find a strange man in her bedroom. He assaulted and raped her. However, because of a medical condition caused by a side-effect of a prescription drug, he was unable to ejaculate, leaving no DNA. When she asked him if her husband is "in on it," he replies no. The assailant stabbed Mrs. Doe and beat her over the head with a frying pan. The pan was dented as a result. Mrs. Doe was fortunate to have survived this ordeal. Her husband, who had been out of the house consuming alcohol, discovered her later that morning. Based on Mrs. Doe's explanation to the police, as well as an interview from the husband, they suspect a family friend, John M. This results in the arrest of John M., who adamantly denies having anything to do with the assault. After some time, John M. is released and the police continue their investigation, now focusing their efforts on a neighbor, Scott D.

In preparing to question Scott D., the police interview his former employer and discover that Scott D. was fired for his poor work ethic, and made a suicidal gesture as a result of his termination. Additionally, Scott D. was recently divorced; his ex-wife provided investigators with information about his childhood that she had learned during a marital counseling session. This information included a history of child abuse as well as fantasies of beating women. She also mentioned that Scott D. was taking a drug and had a sexual dysfunction. Scott D. was a high school graduate with below-average grades who had failed two community college courses. He was also active in a local church group, but many of his contemporaries found him immature. Finally, Scott D. had worked three summers as an auxiliary sheriff at a widely used state park. In that job, he had arrest authority. During a later psychological assessment it was determined that his I.Q. level was in the mid 80s.

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not entirely consistent with the pathologist's findings. The autopsy findings belied Buechler's claims that he shot the victim in the head and that he had not shot him in the body." *Id.*

463. *Id.*

464. *Id.*

The investigators constructed Scott D.'s interrogation based on this information. The station had a preset room and the investigators utilized a thematic approach. Scott D. voluntarily arrived at the police station and waived his *Miranda* rights after they were read to him. In fact, he told the police that he was familiar with his rights, and would be happy to talk with them. For an hour, the investigators and Scott D. engaged in small talk. He gave no indication that he was even remotely involved in the rape and assault on Jane Doe. However, after a break in the discussion, the investigators began talking to Scott D. about his troubled background. The investigators spent an hour talking with him regarding his whereabouts on the night Jane Doe was victimized. He claimed to have been out of town at a party. The investigators also made statements to the effect that Mrs. Doe might have even had it coming to her. He did not respond to these comments, but appeared to listen to them. After an hour, Scott D. asked to use the restroom and was permitted to do so.

Upon his return, the demeanor of the interrogation changed to a more accusatory tone. One investigator told Scott D. that a corner gas station videotape caught him driving out of the neighborhood. This was untrue. The investigator also told him, "Scott, I know you told us you would never do something like that, and I think you are generally a good guy, but I think it's time to tell us the truth." The investigator then "placed" Scott D. in Jane Doe's bedroom and asked him, "What did you do next?" At this point, Scott D. told the investigators, "I did it." He then provided a confession that detailed the type of knife and frying pan used. He also told the investigators that after the assault, he had sold his car and burned his clothes. The police were able to recover his car, but it had been thoroughly cleaned by the purchaser.

At trial, the court found Scott D.'s confession to be voluntary. It also found the confession to be sufficiently corroborated. However, the jurisdiction had never expressly ruled on the admissibility of false confession expert evidence under either the social model or medical model. The defense sought to introduce false confession testimony from a psychologist who had published in the field. The defense also sought to introduce psychiatric testimony, alleging Scott D.'s childhood abuse left him with diminished capacity and openness to suggestibility. The defense further argued the right to a complete defense under *Crane v. Kentucky*, and cited the court to *Hall III*. The prosecution objected to both experts, arguing that the investigators' use of the Reid technique did not "open the door" to an expert, nor did Scott D.'s mental condition correlate to a significant character for suggesti-

bility. The prosecution also articulated opposition based on reliability and invasion of the province of the trier of fact.

Before conducting a *Daubert/Frye* analysis, the trial judge mulled over three possible outcomes. The first potential outcome was to deny the defense's evidence altogether based on reliability and traditional trier of fact principles. The second possible outcome was to permit the defendant to use the psychiatric testimony, provided the prosecution could, in rebuttal, present relevant profile evidence. Additionally, under the second option, the false confession "social model" evidence would be inadmissible. The third potential outcome rested on the defendant testifying, followed by a relevancy determination for both the social model evidence and the psychiatrist's testimony. However, should the defense use one or both expert witnesses, the prosecution would then be permitted to rebut with relevant profile evidence. The judge then proceeded to hold that social model evidence, because of its grossly inexact nature, could not assist the trier of fact any more than lay testimony could.

VI. CONCLUSION

In this Article, a three-dimensional context for false confession evidence has been analyzed. These dimensions include concepts of admissibility, the right to a complete defense, and various case law examples.

There are a myriad of tensions regarding the admissibility of expert testimony. The right of a defendant to present evidence bearing on the credibility of his or her confession is subject to evidentiary limitations. One salient limitation is that any expert evidence presented must have some standard of reliability, even when the evidence is admitted as "other specialized knowledge." A defendant not suffering from a narrow list of significant mental illnesses may have to choose between either testifying or denying himself expert evidence regarding credibility. This expert evidence may, and should, be suppressed where the defendant's confession is supported by other facts related to the charged offenses. That is, the greater the corroboration, the less a reason for admitting false confession evidence before the trier of fact.

Additionally, there is a tension between the two models of false confession. The medical model is more likely to be accepted because of its defined scientific basis. It should be seen as inherently more reliable. The social model exists in a vacuum. Despite the research of Ofshe, Leo, Gudjonsson, Kassin, and Wrightsman, it does not appear that there is a statistical crisis of false confessions. Moreover, their potential testimony is likely to invade the truth-finding province of the

trier of fact. Courts are well situated to deny the social model adherents' testimony for these two reasons alone. However, a third reason exists. Absent the defendant testifying as to the interrogation conditions specifically overcoming his will, there is little relevancy to social model testimony. Even where the defendant testifies, social model testimony should not be permitted. Indeed, the value of the social model is not that it gives rise to greater expert admissibility as to interrogation psychology. Rather, social model studies should influence courts in permitting testimony specific to a defendant that is based on reliable and medically accepted mental illness directly correlative to suggestibility. While the number of mental illnesses should be narrow, such a model reflects the goals of justice and fairness in criminal law. And, when such testimony is permitted, it seems clear that the right of rebuttal would include profile evidence as to the defendant's guilt, because that inclusion reflects the same goals.