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PSYCHOLOGICAL POLICE INTERROGATION METHODS: PSEUDOSCIENCE IN THE INTERROGATION ROOM OBSCURES JUSTICE IN THE COURTROOM

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Interrogation . . . takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation room.[1]

[I]nterrogations . . . must be conducted under conditions of privacy . . . . They also frequently require the use of psychological tactics and techniques that could well be classified as "unethical," if evaluated in terms of ordinary, everyday social behavior.[2]

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[1] Miranda v. Arizona, 384 U.S. 436, 448 (1966).

[2] FRED E. INBAU, JOHN E. REID, JOSEPH P. BUCKLEY & BRIAN C. JAYNE, CRIMINAL INTERROGATION AND CONFESSIONS xi–xii (Jones & Bartlett 4th ed. 2004).

I. Introduction

Forty years after *Miranda v. Arizona*, there is still "a gap in our knowledge as to what in fact goes on in the interrogation room."[3] Most people are unaware that police routinely employ unethical and "pseudoscientific"[4] psychological interrogation methods in order to obtain confessions[5] from criminal suspects.[6] Most people, including many judges and lawyers, are also unaware that these interrogation methods obscure the search for justice in the courtroom.[7] This article examines the modern psychological interrogation process that too often produces inaccurate, misleading, and even false admissions and confessions.[8]

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[3] *See Miranda*, 384 U.S. at 486.

[4] *See* Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U.L. REV. 979, 986 (1997).

[5] This article uses the terms "confession" and "admission" interchangeably. However, these terms have distinct meanings. *Black's Law Dictionary* explains: "A confession is a statement admitting . . . all facts necessary for conviction of the crime. An admission, on the other hand, is an acknowledgement of a fact or facts tending to prove guilt which falls short of an acknowledgement of all essential elements of the crime." BLACK'S LAW DICTIONARY 205 (abr. 6th ed. 1991) [hereinafter BLACK'S]; *see also* MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 304(c) (2005) [hereinafter MCM].

[6] *See* Jacqueline McMurtrie, *The Role of the Social Sciences in Preventing Wrongful Convictions*, 42 AM. CRIM. L. REV. 1271, 1282 (2005).

[7] *See* Andrew E. Taslitz, *Convicting the Guilty, Acquitting the Innocent: The ABA Takes a Stand*, 19 CRIM. JUST. 18 (2005).

> Estimates of the extent to which false confessions contribute to wrongful convictions vary, with some estimates attributing close to one-fourth of all convictions of the innocent partly to false confessions. These false confessions take place despite the giving of *Miranda* warnings and despite the modern decline of extreme tactics like those of the "third degree."

Id. (citations omitted); *see* McMurtrie, *supra* note 6, at 1273–74; *see also* REPORT OF THE [ILLINOIS] GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT 40, 96, 111 (2002) [hereinafter GOVERNOR'S COMMISSION] (describing the need for increased training on interrogation methods and the causes of false confession), *available at* http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/index.html.

[8] *See generally* Saul M. Kassin & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature & Issues*, 5 PSYCHOL. SCI. IN PUB. INTEREST 33 (2004) (scrutinizing the interrogation process from the pre-interrogation interview through *Miranda* warnings, interrogation tactics, and why people confess); Ofshe & Leo, *supra* note 4, at 986–1001 (providing detailed description of how police elicit true and false confessions). Even though some of the techniques discussed herein may be used during intelligence interrogations, the focus of this article is limited to police interrogation methods used with an eye toward criminal prosecution.

Thanks to the work of such groups as the *Innocence Project*,[9] we now know that false confessions are a leading cause of wrongful convictions.[10] False confessions were a significant contributing factor in more than twenty-five percent of the 208 wrongful convictions thus far uncovered by the *Innocence Project*.[11] Furthermore, these and other proven false confessions represent "the mere tip of a much larger iceberg."[12] Most wrongful convictions and a concomitant number of false confessions are never exposed.[13] Even with growing evidence of the false confession problem, most people continue to believe that a person would never "confess" to a crime he did not commit.[14] Expert assistance and expert testimony is therefore necessary to educate lawyers, judges, and panel members on the interrogation process and to

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[9] *See* Innocence Project, http://www.innocenceproject.org/ (last visited Nov. 15, 2007).

[10] *See* Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 544 (2005); Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 905 (2004); Thomas P. Sullivan, *Preventing Wrongful Convictions*, 86 JUDICATURE 106, 108 (2002), *available at* http://www.jenner.com/files/tbl_s20Publications/RelatedDocumentsPDFs1252/398/Judicature1102.pdf. The *Innocence Project* provides several examples of proven wrongful convictions resulting from false confessions. *See* Innocence Project, Know the Cases, Search Profiles, http://www.innocenceproject.org/know/Search-Profiles.php# (last visited Nov. 15, 2007). Many more examples of false confessions are available through the news media. For example, in July 2002, eighteen-year-old high school graduate Jorge Hernandez falsely admitted to raping a ninety-four year old woman in Palo Alto, California. *See 60 Minutes: A True Confession?* (CBS television broadcast Feb. 29, 2004), transcript available at http://www.cbsnews.com/stories/2004/02/26/60minutes/main602401.shtml. During his interrogation by the Palo Alto police, Hernandez repeatedly denied involvement in the rape. *Id.* However, police interrogators used false evidence ploys against Hernandez to convince him to confess. *See id.* Interrogators lied to Hernandez telling him that they had found his fingerprints at the crime scene and they "suggested they had surveillance tape of him at the crime scene." *Id.* Next, the police interrogators suggested to Hernandez that he might not remember the incident because he was drunk on the night in question. *Id.* Doubting his own memory of the night in question, Hernandez eventually gave a taped statement in which he admitted, "I'm going to be a man and I want to say I was drunk, maybe. I was drunk, and I was under the influence of alcohol, and I just don't remember doing that. I probably did it and I just don't remember the next day doing it." *Id.* Hernandez spent nearly a month in jail until DNA evidence proved he was not the rapist. *See* Bay City News Service, *Suit Claims 2002 Arrest Was Racially Motivated*, PALO ALTO WKLY. ONLINE, July 18, 2003, http://www.paloaltoonline.com/weekly/morgue/2003/2003_07_18.digest18.html.

[11] Innocence Project, Understand the Causes, False Confessions, http://www.innocenceproject.org/understand/False-Confessions.php (last visited Nov. 15, 2007).

[12] *See* Kassin & Gudjonsson, *supra* note 8, at 34 (citing then-unpublished manuscript which was later published at Gross, *supra* note 10).

[13] *See id.*

[14] *See* Drizin & Leo, *supra* note 10, at 908–09.

explain the counter-intuitive notion that under certain circumstances, people do confess to crimes they did not commit.[15]

The military justice system has traditionally looked upon the use of so-called false confession experts with skepticism.[16] For example, in *United States v. Bresnahan*, a three-to-two majority of the United States Court of Appeals for the Armed Forces (CAAF) upheld a military judge's ruling that there was no necessity[17] for expert assistance in that case.[18] The military judge denied the defense request for expert assistance even after the defense counsel demonstrated that the interrogator had employed psychological interrogation methods against the accused.[19] The majority holding in *Bresnahan* arises from a stubborn skepticism toward the use of false confession experts[20] and is an example of the need to inform judges of the pseudoscience underlying modern

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[15] *See* McMurtrie, *supra* note 6, at 1273–74.

> Courts traditionally tended to exclude scientific evidence from expert witnesses in [the area of false confessions], primarily on the basis that the testimony addressed matters within the common understanding of jurors, was confusing, or that it invaded the province of the jury to make credibility determinations. . . . However, with the increased awareness of the role that . . . false confessions . . . play in convicting the innocent, a new trend is developing regarding the admissibility of expert testimony. Courts have more recently acknowledged that the research of social scientists in . . . [false confessions] contains findings that are counter-intuitive and therefore expert testimony can assist the trier of fact.

Id. (citations omitted).

[16] *See* United States v. Bresnahan, 62 M.J. 137 (2005); United States v. Griffin, 50 M.J. 278 (1999).

[17] *See Bresnahan*, 62 M.J. at 142. The *Bresnahan* majority reiterated the applicable test:

> We apply a three-part test to determine whether expert assistance is necessary. The defense must show: (1) why the expert assistance is needed; (2) what the expert assistance would accomplish for the accused; and (3) why the defense counsel were unable to gather and present the evidence that the expert assistance would be able to develop. A military judge's ruling on a request for expert assistance will not be overturned absent an abuse of discretion.

Id. at 143 (citations omitted).

[18] *See id.* at 139.

[19] *See id.* at 148–49 (Erdmann, J., and Effron, J., dissenting).

[20] *See* McMurtrie, *supra* note 6, at 1273–74.

psychological interrogation methods and the unreliable courtroom evidence those methods produce.[21]

The CAAF should adopt a more enlightened view of police interrogation methods.[22] A more informed justice system would recognize the underlying necessity for expert assistance when law enforcement obtains a confession through the use of psychological interrogation methods.[23] The CAAF majority should adopt a position similar to the "colorable showing" test suggested by the dissent in *Bresnahan*.[24] Once the defense has made a "colorable showing" that police interrogators used psychological interrogation methods against an accused, the court should acknowledge the necessity for expert assistance and direct the Government to appoint the expert.[25]

Section II of this article reviews the growing literature on proven false confessions and identifies an important role for experts in educating judges, lawyers, and panel members. In the past, skeptics have questioned the empirical basis for expert testimony in this area.[26] The skeptics, however, can no longer ignore or dismiss the growing number of proven false confessions and the resulting wrongful convictions.[27] Recent studies of the false confession problem demonstrate that false confession theory is reliable and that expert assistance is often necessary to analyze and explain psychological interrogation methods.[28]

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[21] *See id.* at 1274 ("First, it is essential that 'obdurate' lawyers and judges address their preconceptions about the social sciences and educate themselves about the findings of applied psychology.").
[22] *See id.*
[23] *See id.* ("By incorporating lessons learned from the research of social science, we can improve the administration of justice and guard against conviction of the innocent.").
[24] *Bresnahan*, 62 M.J. at 148 (Erdmann, J., and Effron, J., dissenting) ("Although Bresnahan's confession was voluntary and therefore admissible at trial, the defense counsel made a colorable showing that there was a reasonable possibility she could raise doubt in the members' minds as to the reliability of that confession.").
[25] *See* UCMJ art. 46 (2005) ("The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence . . . ."); MCM, *supra* note 5, R.C.M. 703(d) ("[T]he military judge . . . shall determine whether the testimony of the expert is relevant and necessary . . . . If the military judge grants a motion for employment of an expert . . . the proceedings shall be abated if the Government fails to comply with the ruling.").
[26] *See, e.g.*, Major James R. Agar, *The Admissibility of False Confession Expert Testimony*, ARMY LAW., Aug. 1999, at 26.
[27] *See* McMurtrie, *supra* note 6, at 1273–74.
[28] *See* Elizabeth F. Loftus, *The Devil in Confessions*, 5 PSYCHOL. SCI. IN PUB. INTEREST i, ii (2004); *see also* Sullivan, *supra* note 10, at 120.

Section III describes the pseudoscientific psychological interrogation methods routinely employed by police interrogators.[29] Fred E. Inbau and John E. Reid were among the earliest and most influential proponents of psychological police interrogation methods.[30] Inbau and Reid's colleagues at the Reid Institute[31] continue to teach these interrogation methods and provide updates to their influential manual *Criminal Interrogation and Confessions*.[32] Military law enforcement interrogators routinely employ the "pseudoscientific" psychological interrogation methods developed and promoted by Inbau and Reid.[33] As explained in detail in Section III, these psychological methods often begin with an interrogator's erroneous prejudgment of guilt and too often result in the production of misleading, inaccurate, and even false admissions and confessions that obscure the search for justice in the courtroom.[34] Section III concludes by explaining how a more rational military justice system would encourage the use of expert consultants and expert witnesses to educate military judges, lawyers, and panel members on the pseudoscience underlying psychological interrogation methods.

II. False Confession: A Counter-intuitive Yet Undeniable Phenomenon

> As psychological methods of interrogation have evolved over the years, they have become increasingly sophisticated, relying on more subtle forms of manipulation, deception, and coercion. As a result, it is no longer as apparent how or why police interrogation techniques might lead the innocent to confess falsely—particularly to crimes that carry the possibility of lengthy

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[29] *See* Ofshe & Leo, *supra* note 4, at 986.

[30] *See* John T. Philipsborn, *Interrogation Tactics in the Post-Dickerson Era*, 25 CHAMPION 18, 20 (2001); Charles D. Weisselberg, *Saving* Miranda, 84 CORNELL L. REV. 109, 154 (1998). Inbau and Reid first developed their psychological interrogation model in the 1940s. INBAU ET AL., *supra* note 2, at 122.

[31] John E. Reid & Assocs., Inc., http://www.reid.com (last visited Nov. 15, 2007).

[32] *See* INBAU ET AL., *supra* note 2.

[33] *Compare* U.S. DEP'T OF ARMY, FIELD MANUAL 3-19.13, LAW ENFORCEMENT INVESTIGATIONS ch. 4 (Jan. 2005) [hereinafter FM 3-19.13], *with* INBAU ET AL., *supra* note 2.

[34] *See* Ofshe & Leo, *supra* note 4, at 986; *see also* Saul M. Kassin et al., *Behavioral Confirmation in the Interrogation Room: On the Dangers of Presuming Guilt*, 27 L. & HUM. BEHAV. 187, 188 (2003), *available at* http://www.williams.edu/Psychology/Faculty/Kassin/research/confessions.htm ("[P]olice interrogations are persuasive, and at times too persuasive, in part because they are theory-driven social interactions founded upon a presumption of guilt.").

> prison sentences or execution. . . . Indeed, in the era of psychological interrogation, the phenomenon of false confession has become counter-intuitive.[35]

"Intuition" leads most people to believe that a suspect would not confess to a crime he did not commit unless subjected to physical torture.[36] Physical torture, however, is rare in the modern police interrogation room.[37] Police interrogators have replaced "the third degree"[38] with more "sophisticated" psychological interrogation methods.[39] Even after these police reforms, however, false confessions have not disappeared and in fact are still a "leading cause" of wrongful conviction.[40] Expert testimony is needed to bridge the gap between what uninformed "intuition" tells us about false confessions and the reality that psychological interrogation methods can and do cause people to confess falsely.[41]

A. Evidence of False Confessions in the Age of Psychological Interrogation

"Until recent years, false confessions . . . and, more generally, wrongful convictions were widely assumed by the legal profession and general public alike to be only regrettable anomalies in an otherwise well

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[35] Drizin & Leo, *supra* note 10, at 908–09.
[36] *See id.* at 907.
[37] *See id.* 907–08. In the first half of the twentieth century, increased scrutiny from the courts and the public compelled police departments to reform their interrogation methods. *Id.*
[38] *See id.* at 907 ("Through the nineteenth century and into the first one-third of the twentieth century, American police routinely relied on the infliction of bodily pain and psychological torment—the so-called "third degree"—to extract confessions from custodial suspects."); *see also* BLACK'S, *supra* note 5, at 1029 ("Term used to describe the process of securing a confession or information from a suspect or prisoner by prolonged questioning, the use of threats, or actual violence.").
[39] Drizin & Leo, *supra* note 10, at 906–09.
[40] *See id.*; *see also* INBAU ET AL., *supra* note 2, at 411–12; Saul M. Kassin et al., *"I'd Know a False Confession If I Saw One": A Comparative Study of College Students and Police Investigators*, 29 L. & HUM. BEHAV. 211 (Apr. 2005), *available at* http://www.williams.edu/Psychology/Faculty/ Kassin/research/confessions.htm.
[41] *See* McMurtrie, *supra* note 6, at 1273–74; *see also* Kassin & Gudjonsson, *supra* note 8, at 58–59 ("In this era of DNA exonerations . . . it is now clear that such [expert] testimony is amply supported not only by anecdotes and case studies of wrongful convictions, but also by a long history of basic psychology and an extensive forensic science literature . . . .").

functioning criminal justice system."[42] Recently, however, the false confession phenomenon has garnered much concern in the news media.[43] Undeniable evidence that wrongful convictions occur as a result of false confessions has emerged thanks to the work of such organizations as the *Innocence Project* at the Benjamin N. Cardozo School of Law at Yeshiva University.[44] Since 1992, the *Innocence Project* has exonerated 208 wrongfully convicted people after they had served many years in prison.[45] These wrongful convictions were exposed "[a]s a result of technological advances in forensic DNA typing . . . ."[46] False confessions were a significant contributing factor in more than twenty-five percent of those 208 wrongful convictions.[47] In other words, in more than twenty-five percent of those 208 wrongful convictions, suspects confessed to serious crimes we now know with scientific certainty they did not commit.[48]

In a significant number of cases, false confessions derail the search for justice.[49] In 2004, Professors Steven A. Drizin and Richard A. Leo compiled and analyzed wrongful conviction studies: "These studies report

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[42] Rob Warden, *The Role of False Confessions in Illinois Wrongful Murder Convictions Since 1970*, Center on Wrongful Convictions, Northwestern University School of Law, http://www.law.northwestern.edu/depts/clinic/wrongful/FalseConfessions2.htm (revised May 12, 2003).

[43] *See, e.g.*, Sharon Begley, *Interrogation Methods Can Elicit Confessions from Innocent People*, WALL ST. J., Apr. 15, 2005, at B1 ("I have written in the past about the lack of a rigorous scientific foundation for fingerprints, eyewitness testimony, standard lineups and other forensic techniques. Add to that list the assumption that only the guilty confess."); Editorial, *New Doubts About Confessions*, CHI. TRIB., Dec. 19, 2001, at N1 ("The mind is a malleable thing, open to suggestion, prone to fatigue. Strength of will and confidence in one's own sense of reality can twist and bend."); April Witt, *Police Tactics Taint Court Rulings, Victims' Lives*, WASH. POST, June 6, 2001, at A1 (explaining that false confessions do not get thrown out by judges because judges most often believe police descriptions of interrogations and disbelieve defendants' claims of coercion and innocence).

[44] *See* Innocence Project, Understand the Causes, False Confessions, http://www.innocenceproject.org/understand/False-Confessions.php (last visited Nov. 15, 2007).

[45] Innocence Project, http://www.innocenceproject.org/ (last visited Nov. 15, 2007).

[46] Kassin & Gudjonsson, *supra* note 8, at 34.

[47] Innocence Project, Understand the Causes, False Confessions, http://www.innocenceproject.org/understand/False-Confessions.php (last visited Nov. 15, 2007).

[48] *See id.*

[49] *See, e.g.*, A.B.A. CRIM. JUST. SEC. & N.Y. COUNTY LAW. ASS'N, REPORT ON THE ELECTRONIC RECORDING OF POLICE INTERROGATIONS 1 (2003), *available at* http://www.nycla.org/index.cfm?section=News_AND_Publications&page=Board_Reports_AND_Resolutions&pubyear=2003 ("False confessions by suspects appear to be among the major causes of wrongful convictions within the criminal justice system.").

that the number of false confessions range from 8–25% of the total of miscarriages of justice studied, thus establishing the problem of false confessions as a leading cause of the wrongful convictions of the innocent in America."[50] Drizin and Leo's conclusions are consistent with the conclusions of other experts.[51]

In 2005, in the most comprehensive single study of wrongful convictions thus far published, Professor Samuel R. Gross of the University of Michigan Law School led a group that examined 340 post-conviction exonerations from around the United States.[52] The Gross study included only those cases in which the criminal justice system took official action to declare a person innocent after they had been convicted.[53] In fifty-one, or fifteen percent, of these proven wrongful conviction cases, "the defendants confessed to crimes they had not

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[50] Drizin & Leo, *supra* note 10, at 905.

[51] *See, e.g.*, Michael J. Saks et al., *Symposium: Serenity Now Or Insanity Later?: The Impact of Post-Conviction DNA Testing on the Criminal Justice System: Panel Three: The Adversary System and DNA Evidence: Past, Present, and Future: Toward a Model Act for the Prevention and Remedy of Erroneous Convictions*, 35 NEW ENG. L. REV. 669, 671 (2001) (concluding that false confessions were a significant cause in nineteen percent (fifteen out of eighty-one) of wrongful convictions studied).

[52] Gross, *supra* note 10, at 523–25 (including 144 that were cleared by DNA evidence).

[53] *Id.* On average, the wrongly convicted in this study had spent more than ten years in prison before the system declared them innocent. *Id.* at 524. The exonerees fell into one of four categories:

> (1) In forty-two cases governors (or other appropriate executive officers) issued pardons based on evidence of the defendants' innocence. (2) In 263 cases criminal charges were dismissed by courts after new evidence of innocence emerged, such as DNA. (3) In thirty-one cases the defendants were acquitted at a retrial on the basis of evidence that they had no role in the crimes for which they were originally convicted. (4) In four cases, states posthumously acknowledged the innocence of defendants who had already died in prison . . . .

Id. (citation omitted). Professor Gross was very conservative in classifying a case as a wrongful conviction. *See id.* at 537–38. For example, in 1978 Curtis McGhee was convicted of murder in Iowa. *Id.* McGhee was convicted as a result of testimony from his alleged accomplice who had confessed to the crime. *Id.* In 2003, the Iowa Supreme Court reversed the conviction. *Id.* Rather than face additional jail time, McGhee entered a plea of "no contest" to a lesser charge and was immediately released from prison. *Id.* McGhee's alleged accomplice, who had recanted his confession, was later acquitted. *Id.* Because McGhee entered a "no contest" plea, he is not counted as exonerated in Professor Gross's study. *Id.* Any defendant who pled guilty in order to be released from prison, is not included in the study regardless of the evidence of the defendant's innocence. *Id.*

committed."[54] The skeptics can no longer deny that the false confession phenomenon is real and that it undermines the search for justice.[55]

B. The Tip of the Iceberg

The proven cases of wrongful conviction are "the mere tip of a much larger iceberg."[56] Thomas P. Sullivan, former U.S. Attorney, explains:

> There is every reason to act. Courts recently have determined that a great many innocent persons have been sentenced to death. But for every case resulting in a death sentence, there are far many more defendants sentenced to prison for life or a term of years. Accordingly, *we must face the likelihood that there are a vast number of persons now in our prisons who are innocent of the crimes for which they were convicted.* The protections against conviction of the innocent adopted for capital cases ought to be implemented as well in all felony cases throughout the country.[57]

The psychological interrogation methods that contribute to the wrongful conviction problem in capital cases are also used in non-capital cases.[58] It follows then that false confessions occur at similar rates in non-capital

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[54] Gross, *supra* note 10, at 544.

[55] *See, e.g.*, Innocence Project, Know the Cases, Search Profiles, http://www.innocence project.org/know/Search-Profiles.php# (last visited Nov. 15, 2007) (giving dozens of examples of how false confessions led to miscarriages of justice); *see also* Taslitz, *supra* note 7 ("[T]ens of thousands of innocent persons may be under the supervision of the criminal justice system at any given time. Correspondingly, similar numbers of the guilty may escape punishment, sometimes leading to explosive evidence of their continuing commission of serious offenses.") (citations omitted).

[56] *See* Kassin & Gudjonsson, *supra* note 8, at 34 (citing then unpublished manuscript which was later published at Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523 (2005)); *see also* Taslitz, *supra* note 7 ("[G]iven the enormous size of our criminal justice system, even a very small error rate means that tens of thousands of innocent persons may be under the supervision of the criminal justice system at any given time.").

[57] Sullivan, *supra* note 10, at 120 (emphasis added). Sullivan served as co-chairman of the Illinois *Governor's Commission on Capital Punishment. Id.*

[58] *See generally* INBAU ET AL., *supra* note 2, at 209–397 (advocating the use of the Reid Nine Steps of Interrogation for a variety of offenses); FM 3-19.13, *supra* note 33, at ch. 4 (describing the general applicability of interrogation techniques for solving all types of crime).

cases as in capital cases.[59] Furthermore, because military law enforcement uses the same pseudoscientific interrogation methods as their civilian counterparts,[60] the lessons learned from the proven false confession cases in civilian jurisdictions apply equally to the military justice system.[61]

1. Underreporting

Because of the time and resources required to win exoneration after wrongful conviction, the rate of wrongful conviction is significantly underreported.[62] The average time from wrongful conviction to exoneration is more than ten years.[63] Thus, many wrongly convicted people complete their sentences before they have an opportunity to win exoneration.[64] The effort to win exoneration is not worthwhile for individuals convicted of a less serious crime; more significantly, the resources required to win exoneration are not made available to those individuals.[65] Professor Gross explains:

> A falsely convicted defendant who has served his time for burglary and been released has little incentive to invest years of his life keeping the case alive in the hope of clearing his name—and if he wanted to, he'd probably have a hard time finding anybody to help. Our data reflect this: nobody, it seems, seriously pursues exonerations for defendants who are falsely convicted of shop lifting, misdemeanor assault, drug possession, or routine felonies—auto thefts or run-of-the-mill

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[59] *See* Taslitz, *supra* note 7 ("The mistakes made that have drawn the media's attention have mostly been in capital cases. But exploration of the causes of error in these cases has suggested that similar causes are at work in the far larger pool of more run-of-the-mill criminal cases.").

[60] *See, e.g.*, United States v. French, 38 M.J. 420, 434 (C.M.A. 1993) (Wiss, J., dissenting) (explaining that special agents' cutting off of denials is "a common interrogation ploy") (citation omitted); United States v. Schake, 30 M.J. 314, 317 (C.M.A. 1990) ("Behavioral Analysis Interviews of appellant conducted by the military criminal investigators . . . [were] clearly a form of police interrogation.") (citations omitted).

[61] *See* Sullivan, *supra* note 10, at 120.

[62] *See* Gross, *supra* note 10, at 535–36.

[63] *See id.*

[64] *See id*; Taslitz, *supra* note 7.

[65] *See* Gross, *supra* note 10, at 535–36.

> burglaries—and sentenced to probation, a $2000 fine, or even six months in the county jail or eighteen months in state prison.[66]

Ninety-six percent of the 340 proven cases of wrongful conviction in Professor Gross's study involved defendants accused of murder, rape and sexual assault.[67] Because those who are wrongly convicted of lesser offenses are largely ignored, a large number of wrongful convictions and a concomitant number of false confessions go unreported.[68]

2. Collateral Effects of Psychological Interrogation Methods

"False confessions have more impact on false convictions than their numbers suggest, since quite often they implicate other innocent people in addition to the confessor."[69] For example, manipulative psychological interrogation methods are often used against suspects who later testify falsely against other defendants.[70] One study of the DNA exoneration cases revealed that seventeen percent of wrongful convictions resulted from false witness testimony.[71] The military justice system is not immune from the problem of manipulated witness testimony.[72] "All trial lawyers are aware of pliable witnesses, those whose testimony can be shaped by persuasive interviewers, and those whose tentative versions of events can evolve and be made more certain by repetition and suggestion."[73]

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[66] *Id.* (citations omitted).
[67] *Id.* at 528–29.
[68] *See id.* at 537–38; Taslitz, *supra* note 7.
[69] Gross, *supra* note 10, at 545.
[70] *See, e.g.*, Innocence Project, Know the Cases, Search Profiles, http://www.innocence project.org/Content/79.php (last visited Nov. 15, 2007). The case of Richard Danziger illustrates this point. Danziger was convicted after his roommate, Christopher Ochoa, falsely confessed to raping and murdering a waitress in 1988. *Id.* In his false confession, Ochoa implicated Danziger in the rape. *Id.* As part of a plea bargain, Ochoa agreed to testify against Danziger. Both Ochoa and Danziger were later exonerated by DNA evidence and released from jail in 2002. *Id.*
[71] Saks et al., *supra* note 51, at 671.
[72] *See, e.g.*, United States v. Arnold, 61 M.J. 254, 257 (2005). In the Arnold case, the trial counsel coached a coaccused witness for his trial testimony by having the witness review Arnold's statement to police. *Id.* Police manuals recognize this type of witness "contamination" as a threat to the integrity of the judicial process. *See* FM 3-19.13, *supra* note 33, at 4-2.
[73] Sullivan, *supra* note 10, at 108 (suggesting that "[i]nterviews of significant witnesses whose testimony may be challenged should be recorded electronically . . . in its initial, untutored form.").

Psychological "suggestion" and manipulation of witnesses are obstacles to the truth finding function of the judicial process.[74]

As explained later in Section III, one psychological method police interrogators use in order to overcome a suspect's reluctance to confess is to minimize the suspect's criminal culpability and to shift blame to an accomplice.[75] For example, a military interrogator may suggest to a suspect that the suspect was merely following orders when he committed an offense and that his superiors bear the blame for the offense at issue.[76] In October 2005, for example, the Army charged Second Lieutenant Erick J. Anderson with two specifications of unpremeditated murder.[77] The Army alleged that Second Lieutenant Anderson had "authoriz[ed] the murders of two unarmed Iraqis" in Baghdad in 2004.[78] The prosecution's key witnesses were the Soldiers who had actually done the shootings.[79] However, those witnesses proved to be unreliable.[80] During the pretrial hearing,[81] one witness "stated under oath that his previous sworn statement [to the Army's Criminal Investigation Division] was a lie."[82] The witness explained that he lied because "he felt pressured by the CID to implicate Lt. Anderson or he would lose his plea bargain . . . ."[83] The CID interrogator had obviously suggested to this witness that he would get a plea bargain by implicating Lieutenant Anderson.[84] This is just one example of how law enforcement employs psychological interrogation methods against witnesses as well as the suspect who is eventually prosecuted.[85]

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[74] *See id.*; *see also* GOVERNOR'S COMMISSION, *supra* note 7, at 40, 109, 124 (noting the dangers posed by false informant and false accomplice testimony and recommending expert assistance to educate police, judges, and attorneys on those dangers).
[75] *See* discussion *infra* Section III.D and accompanying notes.
[76] *See id.*; Gina Cavallaro, *All Charges Dropped*, ARMY TIMES, Dec. 19, 2005, at 10.
[77] Cavallaro, *supra* note 76, at 10.
[78] *Id.*
[79] *Id.*
[80] *See id.*
[81] UCMJ art. 32 (2005) ("No charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made.").
[82] Cavallaro, *supra* note 76, at 10 (quoting the Investigating Officer's Report).
[83] *Id.* (quoting the Investigating Officer's Report). In his recommendation to dismiss the charges, the Investigating Officer also found that the "[t]he CID ha[d] developed a scenario that does not fit the facts . . . ." *Id.*
[84] *See id.*
[85] *See, e.g.*, Innocence Project, Know the Cases, Search Profiles, Contributing Cause, False Confessions, http://www.innocenceproject.org/know/Search-Profiles.php (last visited Nov. 15, 2007).

C. The Illinois Commission: An Important Role for Experts

In 2000, the State of Illinois created the *Governor's Commission on Capital Punishment* in order to study the problem of wrongful murder convictions in that state.[86] The commission members came from varied backgrounds and included a former federal judge, a former U.S. Senator, a former U.S. Attorney, and several prosecutors and public defenders.[87] The commission made a total of eighty-five recommendations, several of which wrestled with the problem of false confessions.[88] Thomas P. Sullivan, former U.S. Attorney and co-chairman of the commission, noted that "[i]n several of the capital cases that led to [the appointment of the commission] . . . police testified to confessions or admissions by defendants who were later exonerated."[89]

The *Governor's Commission* recommended videotaping certain custodial interrogations as a means to combat the false confession problem.[90] The commission explained that "videotaping the entire interrogation process" has several benefits including protecting against "questionable confessions."[91] Quoting Professor Welsh S. White, the commission noted the need for "courts to make more informed judgments about whether interrogation practices were likely to lead to untrustworthy confessions."[92] According to Professor White, the courts also need to use expert testimony in order to determine whether particular interrogation methods are "likely to lead to a false confession."[93]

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[86] *See* Sullivan, *supra* note 10, at 107.
[87] *See* GOVERNOR'S COMMISSION, *supra* note 7, at v–vi.
[88] *See id.* Recommendation Three, for example, advocates "[a]uthorizing public defenders to appear in response to a request from a defendant for a lawyer during questioning . . . [in order to] reduce the prospect of false confessions . . . ." *Id.* at 24.
[89] Sullivan, *supra* note 10, at 108.
[90] GOVERNOR'S COMMISSION, *supra* note 7, at 24.
[91] *Id.* at 25.
[92] *Id.* (quoting Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 153–54 (1997)).
[93] *See* White, *supra* note 92, at 154–55 (1997). Professor White explains:

> Videotaping interrogations will also enable courts, possibly with the aid of expert testimony, to make more informed judgments as to whether interrogation methods used in a particular case are likely to lead to false confessions. Even if the police employ only permissible interrogation tactics, the combination of these tactics or their effect on a particular suspect could lead to false confessions in some cases. . . . Indeed, in several of the cases now viewed as involving

Most significantly, the *Governor's Commission* unanimously recommended that, "[i]n capital cases, courts should closely scrutinize any tactic that misleads the suspect as to the strength of the evidence against him/her, or the likelihood of his/her guilt, in order to determine whether this tactic would be likely to induce an involuntary or untrustworthy confession."[94] At the same time the commission recognized the need for courts to more carefully scrutinize interrogation tactics, the commission also recognized that most judges, lawyers, and police officers are not adequately educated on how interrogation tactics can cause false confessions.[95] The commission emphasized an important role for experts in educating judges, lawyers, and police officers on "interrogation methods . . . . [and][t]he risks of false confessions."[96]

D. *Miranda*: No Safeguard Against False Confessions

False confessions are not a new phenomenon.[97] For centuries, there has been a part of the law that has distrusted confessions.[98] Over time the law has attempted to prevent coerced and unreliable confessions by adopting certain safeguards.[99] The *Miranda* warnings are the best known

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> false confession, tapes of all or part of the interrogations have played a significant part in convincing observers that the confessions were false.

Id.

[94] GOVERNOR'S COMMISSION, *supra* note 7, at 123 (footnote omitted).

[95] *See id.* at 40, 96, 111.

[96] *See id.* ("All judges . . . should receive periodic training . . . and experts on these subjects [should] be retained to conduct training . . . on these topics: . . . interrogation methods . . . [and][t]he risks of false confessions.").

[97] *See* Agar, *supra* note 26, at 26.

[98] *See, e.g.*, Major Russell L. Miller, *Wrestling with MRE 304(g): The Struggle to Apply the Corroboration Rule*, 178 MIL. L. REV. 1 (2003) (tracing the development of the corroboration rule since seventeenth century England).

[99] *See, e.g.*, MCM, *supra* note 5, MIL. R. EVID. 304(g) ("An admission or confession of the accused may be considered as evidence against the accused on the question of guilt or innocence only if independent evidence . . . has been introduced that corroborates the essential facts admitted to justify sufficiently an inference of their truth."). However, only a "very slight" quantum of evidence is required to corroborate an admission or confession. *See* United States v. Arnold, 61 M.J. 254, 257 (2005). The military corroboration rule is similar to its civilian counterparts. *Id.*

example of such safeguards.[100] Even after *Miranda* and other safeguards, however, false confessions continue to occur at unacceptable rates.[101]

Research has demonstrated that the *Miranda* warnings are not effective at protecting the innocent against police coercion.[102] Given the psychologically manipulative nature of modern interrogation tactics, waiving *Miranda* rights is generally not a good idea for an innocent person.[103] However, innocent suspects are more likely to waive their *Miranda* rights than guilty suspects.[104] One study reported: "[The] truly innocent [are] significantly more likely to sign a waiver than those who [are] guilty."[105] In fact, most people "[n]aively believ[e] in the power of their innocence to set them free . . . [even] where the risk of interrogation [is] apparent."[106] Rather than protect the innocent, the *Miranda* warnings protect the guilty and single out the innocent for psychological interrogation.[107]

Professors Kassin and Norwick identified two possible explanations for the relatively high *Miranda* waiver rate among innocent suspects in comparison to guilty suspects:

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[100] *See* Miranda v. Arizona, 384 U.S. 436 (1966); *see also* United States v. Leiker, 37 M.J. 418, 420 (C.M.A. 1993) ("The Miranda rules were issued to counter-balance the psychological ploys used by police officials to obtain confessions.").

[101] *See* Taslitz, *supra* note 7.

> Nor do the Fifth and Fourteenth Amendment Due Process Clauses, prohibiting admission at trial of "involuntary" confessions obtained by the police, currently offer much protection. Those clauses, as recently understood by most courts, set a low standard of voluntariness turning on a case-by-case weighing of a wide range of circumstances concerning what tactics the police use and how able the individual suspect was to resist those tactics. Moreover, a finding of valid waiver of *Miranda* rights generally automatically renders the confession voluntary in the eyes of most judges.

Id. (citations omitted).

[102] *See id.* ("These false confessions take place despite the giving of *Miranda* warnings . . . ."); Saul M. Kassin & Rebecca J. Norwick, *Why People Waive Their* Miranda *Rights: The Power of Innocence*, 28 L. & HUM. BEHAV. 211, 211–12 (2004).

[103] *See* Kassin & Norwick, *supra* note 102, at 212.

[104] *See id. at* 211–12; *see also* Taslitz, *supra* note 7 (These false confessions take place despite the giving of *Miranda* warnings and despite the modern decline of extreme tactics like those of the "third degree.").

[105] *See* Kassin & Norwick, *supra* note 102, at 211.

[106] *Id.*

[107] *See* Taslitz, *supra* note 7; Kassin & Norwick, *supra* note 102, at 211–12.

> One possible reason for the high waiver rate [among innocent suspects] is that police employ techniques designed to obtain waivers just as they do confessions. . . . [P]olice investigators often overcome the warning and waiver requirement by strategically establishing rapport with the suspect, offering sympathy and an ally, and minimizing the process as a mere formality, thus increasing perceived benefits relative to costs. . . . A second possibility is suggested by individual differences among actual suspects. . . . [P]eople who have no prior felony record are far more likely to waive their rights than are those with criminal justice "experience."[108]

The relatively high rate of *Miranda* waiver among the innocent magnifies the problem of investigator bias discussed in Section III.C, below.[109]

E. Lingering Skepticism in the Military Justice System

"'[O]bdurate' lawyers and judges . . . [with] preconceptions about the social sciences" and about the import of the false confession phenomenon slow the pace of reform and obstruct the search for justice.[110] In the past, prosecutors and judges have resisted efforts to use new DNA technology to exonerate the wrongly convicted.[111] The wrongly convicted were forced to engage in costly and time consuming litigation in order to gain access to the evidence that would eventually set them free.[112] Reluctance to believe that psychological interrogation methods pose a problem for the administration of justice is understandable given that only in the last few years has the magnitude of

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[108] Kassin & Norwick, *supra* note 102, at 212 (citations omitted).
[109] *See infra* Section III.C.
[110] *See* McMurtrie, *supra* note 6, at 1274.
[111] *See* Innocence Project, Fix the System, Priority Issues, http://www.innocenceproject.org/fix/DNA-Testing-Access.php (last visited Nov. 15, 2007); *see also* Hilary S. Ritter, *It's the Prosecution's Story, But They're Not Sticking to It: Applying Harmless Error and Judicial Estoppel to Exculpatory Post-Conviction DNA Testing Cases*, 74 FORDHAM L. REV. 825, 827 (2005).
[112] *See* Innocence Project, Fix the System, Priority Issues, http://www.innocenceproject.org/fix/DNA-Testing-Access.php (last visited Nov. 15, 2007); *see also* Ritter, *supra* note 111, at 827.

the false confession problem become apparent.[113] However, justice demands that prosecutors and judges educate themselves on the growing body of evidence suggesting that psychological interrogation methods produce misleading and false confessions at unacceptable rates.[114]

1. The Skeptics Have Been Proven Wrong

In the past, some skeptics have argued that false confession theory lacks an "empirical lynchpin."[115] The skeptics, however, provided little if any critical analysis of police interrogation methods.[116] Instead, the skeptics concentrated on the difficulty associated with reproducing the criminal interrogation in an experimental setting and the difficulty of producing precise measurements of the false confession problem.[117] Such skeptics concluded that the "psychology of false confessions" was unreliable, but that further study of the problem was warranted.[118] However, as explained in Sections II.A and II.B, evidence of the false confession problem continues to mount and this evidence represents just the "tip of the iceberg" in terms of numbers of false confessions.[119] The growing number of proven false confessions is clear evidence of the

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[113] Warden, *supra* note 42.
[114] *See* McMurtrie, *supra* note 6, at 1274.
[115] *See, e.g.*, Agar, *supra* note 26, at 30 (quoting Paul G. Cassell, *Balanced Approaches to the False Confession Problem: A Brief Comment on Ofshe, Leo, and Alshuler*, 74 DENV. U. L. REV. 1123, 1125 (1997)). This article points out that the skeptics have failed to acknowledge the significance of the false confession problem. The false confession skeptics have it backwards: they should be skeptical of the validity of the evidence produced by pseudoscientific interrogation methods, not the attempt to analyze and explain those methods. *See* McMurtrie, *supra* note 6, at 1274.
[116] *See id.*
[117] *See id.*; Paul G. Cassell, *The Guilty and the "Innocent": An Examination of Alleged Cases of Wrongful Conviction from False Confessions*, 22 HARV. J.L. & PUB. POL'Y 523 (1999) (criticizing Leo and Ofshe's reliance on the news media for accounts of false confessions and concluding that false confessions do not occur at significant rates). These skeptics, however, wrote before the more recent proven false confessions were discovered. *See, e.g.*, Innocence Project, http://www.innocenceproject.org/ (last visited Nov. 15, 2007). The study led by Professor Gross, for example, included only those cases in which the criminal justice system took official action to declare a person innocent after they had been convicted. *See supra* notes 58–61 and accompanying text. Neither the *Innocence Project* nor Professor Gross's study relied upon media accounts to declare a person innocent. *Id.*
[118] *See, e.g.*, Agar, *supra* note 26, at 42 ("The false confession theory needs further study and refinement.").
[119] *See* Gross, *supra* note 10, at 523.

reality that psychological police interrogation methods produce unreliable results at unacceptable rates.[120]

In recent years, even the proponents of psychological interrogation methods have been compelled to acknowledge that false confessions are real.[121] The most recent edition of *Criminal Interrogation and Confessions* acknowledges that "[t]here is no question that interrogations have resulted in false confessions from innocent suspects."[122] The proponents of psychological interrogation, however, minimize or even deny the significance of the problem.[123] For example, Army Field Manual (FM) 3-19.13, *Law Enforcement Investigations*, states: "Although false confessions are rare, there have been several instances where people who confessed to a crime and were subsequently convicted were later proven to be innocent through forensic evidence."[124] Published in January 2005, FM 3-19.13 grudgingly admits that "several people . . . were later proven to be innocent through forensic evidence . . . ." This statement ignores several key points: (1) well over half of the exonerations studied thus far have been as a result of non-forensic evidence,[125] (2) between eight percent and twenty-five percent of wrongful convictions involve false confessions,[126] (3) because of the time and resources required to win exoneration after wrongful conviction, the rate of wrongful conviction is significantly underreported,[127] and (4) the problem of false confessions by accomplices contributes to underreporting of the false confession problem.[128] Field Manual 3-19.13's obvious understatement of the false confession problem reveals the unbending skepticism among law enforcement as to the significance of the false confession problem.[129]

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[120] *See* Loftus, *supra* note 28, at i–ii.
[121] *See* INBAU ET AL., *supra* note 2, at 411–12; FM 3-19.13, *supra* note 33, at 4-31 to -32.
[122] INBAU ET AL., *supra* note 2, at 411.
[123] *See id.* at 411–12; FM 3-19.13, *supra* note 33, at 4-31 to 4-32.
[124] FM 3-19.13, *supra* note 33, at 4-31.
[125] Gross, *supra* note 10, at 523–25.
[126] Drizin & Leo, *supra* note 10, at 905.
[127] *See* Gross, *supra* note 10, at 535–36.
[128] *See id.* at 537–38.
[129] *See* McMurtrie, *supra* note 6, at 1274.

2. False Confession Theory Is Reliable

The courts should acknowledge recently completed research and analysis by social scientists and find that false confession theory is reliable. In *United States v. Griffin*, the military judge excluded expert testimony because he found that the testimony would confuse the members and that it lacked "the necessary reliability to be of help to the trier of fact."[130] The CAAF held that the trial court did not abuse its discretion in excluding false confession evidence and emphasized that the false confession testimony proffered in that case lacked the reliability required by *United States v. Houser*[131] and *Daubert v. Merrell Dow Pharmaceuticals, Inc*.[132] When *Griffin* was decided, the courts had neither the full benefit of the lessons learned from the DNA exoneration

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[130] United States v. Griffin, 50 M.J. 278, 283 (1999).

[131] *See id.* at 284–85. In *Griffin*, the court applied the six factors first announced in *United States v. Houser*, 36 M.J. 392, 397 (C.M.A. 1993). The proponent of expert testimony must establish:

> (1) "the qualifications 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) probative value outweighing the other considerations outlined in Mil. R. Evid. 403.

Griffin, 50 M.J. at 283.

[132] Daubert v. Merrell Dow Pharms. Inc., 509 U.S. 579 (1993). The *Griffin* court explained that "[t]he Supreme Court focused on the issues of reliability . . . and relevance . . . holding that Fed. R. Evid. 702 assigns to the trial judge the duty to act as a gatekeeper, i.e., 'the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand.'" *Griffin*, 50 M.J. at 283–84 (citations omitted). The *Daubert* factors are:

> (1) Whether the theory or technique "can be (and has been) tested"; (2) Whether "the theory or technique has been subjected to peer review and publication"; (3) The "known or potential" error rate; (4) The "existence and maintenance of standards controlling the technique's operation"; (5) The degree of acceptance within the "relevant scientific community'; and (6) Whether the "probative value" of the evidence "is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."

Griffin, 50 M.J. at 284 (citations omitted); *see also* United States v. Billings, 61 M.J. 163, 166 (2005) (explaining that even though *Houser* predates *Daubert* and Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999), the court continues to use the *Houser* factors to analyze the admissibility of expert testimony).

cases nor the results of the more recent studies discussed earlier in this article.[133]

Griffin is not an outright ban on "psychological testimony regarding false confessions."[134] However, false confession skeptics use *Griffin* to attack the general reliability of social science research into psychological interrogation methods and false confessions.[135] In *Griffin*, the defense proffered expert testimony from a psychologist, Dr. Frank, who would have testified that Griffin's confession was "consistent with a coerced compliant type of confession."[136] In upholding the trial court's denial of expert testimony, the CAAF emphasized Dr. Frank's statement that "he had reservations about the normative standards base on which he based his conclusions."[137] Dr. Frank testified that there was a problem with the study upon which he based his conclusions because that study "did not differentiate between the issue of coercion and the issue of torture in the police interviews that resulted in a confession."[138] Dr. Frank also explained that research into false confessions was "'relatively new,' dating back to the 1980s."[139] Since the *Griffin* decision in 1999, however, much additional research and analysis has been completed.[140]

The cumulative weight of research in this area has caused some experts to reevaluate their previous skepticism. In the late 1990s, proponents of false confession theory such as Professor Kassin "believe[d] that additional research in this area is needed, especially if false confession testimony becomes admissible in court."[141] Since 1999, additional research has been conducted and experts such as Professor Kassin have changed their view of the problem. In 2004, Professor Kassin explained:

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[133] *See supra* Sections II.A through II.C and accompanying notes.
[134] Major Joshua E. Kastenberg, *A Three-Dimensional Model for the Use of Expert Psychiatric and Psychological Evidence in False Confession Defenses Before the Trier of Fact*, 26 SEATTLE U. L. REV. 783, 829–30 (2003).
[135] *See id.* (suggesting that courts should allow "psychiatric-based" false confession evidence but should use the *Griffin* "framework" to exclude "psychology-based" false confession evidence).
[136] *Griffin*, 50 M.J. at 282.
[137] *See id.* at 285.
[138] *Id.* at 281.
[139] *Id.*
[140] *See, e.g.*, *supra* Sections II.A through II.C and accompanying notes.
[141] *See* Agar, *supra* note 26, at 28.

> In this new era of DNA exonerations . . . it is now clear that such [expert] testimony is amply supported not only by anecdotes and case studies of wrongful convictions, but also by a long history of basic psychology and an extensive forensic science literature, as summarized not only in this monograph but also in several recently published books . . . .[142]

Professor Kassin's earlier skepticism as to the reliability of psychology-based false confession evidence has been replaced by a clear conviction that expert testimony in this area is reliable.[143]

Most significantly, the recent false confession studies have made significant strides since the late 1990s in achieving objective standards. Skeptics criticized a 1998 study by Professors Leo and Ofshe as "unscientific and highly subjective."[144] In the 1998 study, Leo and Ofshe relied upon the highly subjective method of reading post-admission narrative statements and then searching for corroborating evidence in the case to determine whether the confession was true or false.[145] Today, on the other hand, thanks to the growing number of DNA exoneration cases as well as more conservative research methods, objective studies of false confessions have been completed.[146] As explained in Section II.A, for example, the Gross study included only those cases in which the criminal justice system took official action to declare a person innocent after they had been convicted.[147]

In the past, false confession skeptics have successfully argued that false confession theory lacked an "empirical lynchpin."[148] Today, on the other hand, the DNA exoneration cases and the recent false confession studies have given false confession theory the level of reliability required

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[142] Kassin & Gudjonsson, *supra* note 8, at 59. The books to which Kassin and Gudjonsson refer are G.D. LASSITER, INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT (2004); GISLI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS: A HANDBOOK (2003); and A. MEMON ET AL., PSYCHOLOGY AND LAW: TRUTHFULNESS, ACCURACY AND CREDIBILITY (2003). *Id.* For an exhaustive list of resources see *id.* at 61–67.

[143] *See id.* at 58–59.

[144] *See* Agar, *supra* note 26, at 29.

[145] *Id.*

[146] *See supra* Section II.A and accompanying notes.

[147] *See supra* note 53 and accompanying text.

[148] *See* Agar, *supra* note 26, at 30; *see also supra* Section II.E.1 and accompanying notes.

by MRE 702.[149] The courts must now recognize this progress, acknowledge the reality of the false confession problem, and allow expert assistance and expert testimony in this area.

3. An Obdurate Military Justice System

An uninformed skepticism underlies the majority opinion in *United States v. Bresnahan*.[150] In *Bresnahan*, the CAAF majority accepted the military judge's "circuitous" rationale for denying assistance.[151] The military judge reasoned that, "defense counsel is searching for evidence that would assist her defense of the accused, but with little evidence to indicate such evidence exists."[152] By accepting this "circuitous" reasoning, the CAAF "sets the bar unreasonably high."[153] Rather than engage in a well informed analysis of the psychological interrogation methods used against the accused, the military judge and the CAAF took an intellectual shortcut to the preordained conclusion that expert assistance was not necessary.[154] By creating this unreasonable standard, the court reveals its inflexible skepticism concerning the validity of the social sciences that describe psychological interrogation methods.[155] Ironically, the expert assistance that the court denied to the defense is the same expert assistance that could have educated the court and helped the court craft a more reasoned analysis of the interrogation methods used against the accused.[156]

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[149] *See* MCM, *supra* note 5, MIL. R. EVID. 702; *see also supra* Section II.A through II.C and accompanying notes.
[150] *See* McMurtrie, *supra* note 6, at 1274.
[151] United States v. Bresnahan, 62 M.J. 137, 147 (2005) (Erdmann, J., and Effron, J., dissenting).
[152] *Id.* at 142 (majority opinion).
[153] *Id.* at 147 (Erdmann, J., and Effron, J., dissenting).
[154] *See id.* at 148 ("If Bresnahan were able to develop evidence that his confession was false prior to receiving expert assistance, then he would not need the assistance at all. Requiring 'evidence that such evidence exists' as the military judge did here is circuitous reasoning.").
[155] *See id.* at 148–49; *see also* McMurtrie, *supra* note 6, at 1271 ("The legal profession's reluctance to acknowledge the findings of social scientists, while accepting other 'sciences' on little other than blind faith has contributed to the phenomena of erroneous convictions.").
[156] *See* McMurtrie, *supra* note 6, at 1271, 1273–74; Kassin & Gudjonsson, *supra* note 10, at 58–59.

The CAAF should adopt a standard similar to the "colorable showing" test suggested by the *Bresnahan* dissent.[157] "Although Bresnahan's confession was voluntary and therefore admissible at trial, the defense counsel made a colorable showing that there was a reasonable possibility she could raise doubt in the members' minds as to the reliability of that confession."[158] As the *Bresnahan* dissent points out, the defense counsel did in fact identify "several factors" indicating that Bresnahan's interrogator employed psychological interrogation methods in order to obtain his confession.[159] The court should have granted the request for expert assistance after the defense showed that the interrogator used psychological interrogation methods against the accused.[160]

An accused's "own confession is probably the most probative and damaging evidence that can be admitted against him."[161] Military law enforcement greatly emphasizes getting a suspect to provide incriminating evidence even though this evidence is often unreliable.[162] For the court to admit doubt about a fundamental part of the military justice system would require an enlightened view of the psychological interrogation methods that regularly bring powerful, but often inaccurate, evidence into the courtroom.[163] The CAAF's refusal to craft a reasonable standard for demonstrating the necessity for expert assistance in this area demonstrates the court's continuing lack of comprehension as to the nature of the pseudoscientific psychological interrogation methods used

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[157] *See Bresnahan*, 62 M.J. at 148 (Erdmann, J., and Effron, J., dissenting).
[158] *Id.*
[159] *See id. at* 148–49.

> [Defense Counsel] identified for the military judge several factors based on her own research that might suggest that Bresnahan gave a false confession including: (a) the sophistication of the interrogators; (b) the fact that Bresnahan was not able to speak to doctors about the condition of his son; and (c) the fact that the interrogator told Bresnahan that he needed to tell her what he did to his son so that the doctors could save his son's life.

Id.
[160] *See id.*
[161] United States v. Datz, 61 M.J. 37, 44 (2005) (citing Arizona v. Fulminante, 499 U.S. 279, 296 (1991) (quoting Bruton v. United States, 391 U.S. 123, 139–40(1968)).
[162] *See* FM 3-19.13, *supra* note 33, at 4-2 ("Although testimonial evidence can be the most beneficial evidence in many investigations, it is also the least reliable form of evidence.").
[163] *See* McMurtrie, *supra* note 6, at 1271–74.

by military law enforcement.[164] Those psychological interrogation methods are the subject of Section III.

III. Psychological Interrogation: Pseudoscience in the Interrogation Room

This section examines the psychological interrogation process that begins with an interrogator's prejudgment of guilt and all too often ends with a false confession.[165] As explained in Section II, the false confession phenomenon is a significant problem in the criminal justice system.[166] Judges, lawyers, and panel members are not well educated on the "pseudoscience" behind psychological interrogation methods and how these methods can cause a person to confess falsely.[167] This section of the article is intended to highlight the pseudoscience behind these psychological interrogation methods and thereby overcome uninformed preconceptions concerning the necessity for expert assistance in this area.[168] Once the pseudoscientific nature of these psychological interrogation methods is exposed, the necessity for expert assistance becomes clear.[169]

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[164] *See id.*

[165] *See generally* Kassin & Gudjonsson, *supra* note 8 (scrutinizing the interrogation process from the pre-interrogation interview through *Miranda* warnings, interrogation tactics, and finally to why people confess both truthfully and falsely); Ofshe & Leo, *supra* note 4, at 986–1001 (providing detailed description of how police elicit true and false confessions). The Supreme Court has described the use of psychological interrogation methods as being used to "unbend th[e] reluctance" of criminal suspects to confess. *See* Columbe v. Connecticut, 367 U.S. 568, 571–73 (1961). The *Miranda* Court quoted Inbau and Reid to describe the manipulative use of psychological interrogation methods by police: "To obtain a confession, the interrogator must 'patiently maneuver himself or his quarry into a position from which the desired objective may be attained.'" Miranda v. Arizona, 384 U.S. 436, 455 (1966) (quoting INBAU & REID, LIE DETECTION AND CRIMINAL INTERROGATION 185 (3d ed. 1953)).

[166] *See, e.g.*, Taslitz, *supra* note 7.

[167] *See* McMurtrie, *supra* note 6, at 1273–74; GOVERNOR'S COMMISSION, *supra* note 8, at 8, 96, 111.

[168] *See* McMurtrie, *supra* note 6, at 1273–74.

[169] *See id.*; *see also* MCM, *supra* note 5, MIL. R. EVID. 102 ("These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.").

The analysis in this section relies heavily upon the influential manual *Criminal Interrogation and Confessions*, first written by Fred E. Inbau and John E. Reid.[170] Both the Supreme Court[171] and the military appellate courts[172] have repeatedly cited versions of this manual. Most significantly, military law enforcement has adopted the psychological interrogation methods outlined in *Criminal Interrogation and Confessions*.[173] Inbau and Reid's colleagues at the *Reid Institute* continue to offer numerous courses on their psychological interrogation methods.[174] Inbau and Reid's impressive influence over police interrogation methods continues today.[175] A better understanding of this influential interrogation model can assist judges, lawyers, and panel members to overcome their preconceptions concerning false confessions, police interrogation methods, and the necessity for expert assistance in this area.[176]

A. The Suspect Interview: Prejudging Guilt

In the context of a law enforcement investigation, the terms "interview" and "interrogate"[177] have very specific and very distinct

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[170] Weisselberg, *supra* note 30, at 154 ("[Inbau and Reid] . . . developed the most influential model and . . . published the leading interrogation manual for law enforcement officers."); *see also* Philipsborn, *supra* note 30, at 20.

[171] Missouri v. Seibert, 542 U.S. 600, 611 (2004); Stansbury v. California, 511 U.S. 318, 324(1994); United States v. Davis, 512 U.S. 452, 470 (1994); Moran v. Burbine, 475 U.S. 412, 459 (1986); Oregon v. Elstad, 470 U.S. 298, 328–29 (1985); James v. Arizona, 469 U.S. 990, 996 (1984); Rhode Island v. Innis, 446 U.S. 291, 306 and 317 (1980); Miranda v. Arizona, 384 U.S. 436, 449–55 (1966).

[172] *See* United States v. French, 38 M.J. 420, 434 (C.M.A. 1993); United States v. Leiker, 37 M.J. 418, 420 (C.M.A. 1993); United States v. Schake, 30 M.J. 314, 317–19 (C.M.A. 1990); United States v. Gibson, 14 C.M.R. 164, 174 (C.M.A. 1954); United States v. Josey, 14 C.M.R. 185, 193 (C.M.A. 1954); United States v. Whitehead, 26 M.J. 613, 618–19 (A.C.M.R. 1988); United States v. Helton, 10 M.J. 820, 823 (A.F.C.M.R. 1979); United States v. Reynolds, 36 C.M.R. 913, 917 (A.F.B.R. 1966).

[173] *Compare* FM 3-19.13, *supra* note 33, at ch. 4, *with* INBAU ET AL., *supra* note 2 (describing the same interrogation methods).

[174] *See* John E. Reid & Assocs., Inc., Training Programs, http://www.reid.com/training_programs/r_training.htm (last visited Nov 15, 2007). The author attended The Reid Technique of Interviewing and Interrogation Course, 10–13 May 2005, in Phoenix, Arizona.

[175] Philipsborn, *supra* note 30, at 20.

[176] *See* McMurtrie, *supra* note 6, at 1273–74.

[177] Note also that "interrogate" has a distinct yet related meaning in the context of *United States v. Miranda*. The Supreme Court explained that "the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its

meanings.[178] A suspect interview normally precedes the interrogation.[179] During the suspect interview, the investigator asks open ended questions and takes notes while the suspect does much or most of the talking.[180] An interview is non-accusatory.[181] Most importantly, the investigator uses the suspect interview to evaluate the suspect's veracity.[182]

Once the investigator determines that the suspect's denials of wrongdoing are untruthful, then the investigator transitions from the interview to the accusatory interrogation.[183] "The investigator must be reasonably certain of the suspect's guilt before initiating an interrogation."[184] The purpose of an interrogation is to "elicit an admission against interest."[185] An interrogation is confrontational and accusatory.[186]

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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 . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." Rhode Island v. Innis, 446 U.S. 291, 300–01 (1980); *see also* United States v. Young, 49 M.J. 265, 267 (1998).

[178] *See* INBAU ET AL., *supra* note 2, at 5–10.

> The first thing that must be addressed in determining whether to interview or interrogate a suspect is to recognize the difference between an interview and an interrogation. An interview is generally unstructured and takes place in a variety of locations, such as a residence, workplace, or police station. It is conducted in a dialogue format where investigators are seeking answers to typically open-ended questions, and the guilt or innocence of the person being interviewed is generally unknown. An interrogation is planned and structured. It is generally conducted in a controlled environment free from interruption or distraction and is monologue-based.

FM 3-19.13, *supra* note 33, at 4-7.

[179] INBAU ET AL., *supra* note 2, at 9–10.

[180] *See id.* at 5–7; FM 3-19.13, *supra* note 33, at 4-7.

[181] INBAU ET AL., *supra* note 2, at 6.

[182] *Id.* at 5–7.

[183] Christian A. Meissner & Saul M. Kassin, *"He's guilty!": Investigator Bias in Judgments of Truth or Deception*, 26 LAW & HUM. BEHAV. 469, 477 (2002), *available at* http://www.williams.edu/Psychology/Faculty/Kassin/ research/confessions.htm.

[184] FM 3-19.13, *supra* note 33, at 4-7.

[185] Frank Horvath, Brian Jayne, & Joseph Buckley, *Differentiation of Truthful and Deceptive Criminal Suspects in Behavior Analysis Interviews*, 39 FORENSIC J. SCI. 793, 794 (May 1994), *available at* http://www.reid.com/reid_institute/Library/index.html (access restricted to Reid Institute Members).

[186] FM 3-19.13, *supra* note 33, at 4-7 to 4-8.

> An interrogation is confrontational in nature, which means the suspect will be directly confronted with his involvement in the offense . . . . An interrogation is not an open two-way communication. If the suspect is allowed to interrupt and provide false denials, he will be entrenched into his lie, making it progressively more difficult to obtain the truth during the interrogation.[187]

An interrogation is a monologue in which the investigator does almost all of the talking and dominates the suspect through the use of interrogation tactics.[188]

B. The Behavior Analysis Interview: Targeting the Innocent

"An interrogation is conducted only when the investigator is reasonably certain of the suspect's guilt."[189] In many cases, however, investigators initiate an interrogation with little or no actual evidence of guilt.[190] Instead, investigators make initial judgments about a suspect's guilt or innocence based upon the suspect's behavioral responses during the behavior analysis interview (BAI).[191] During the BAI, the investigator applies his understanding of behavior symptom analysis (BSA).[192] "Through observation of the suspect's verbal and nonverbal responses [during the interview], the investigator can assess if any indications of deception are present, which may cause the investigator to transition to an interrogational setting."[193]

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[187] *Id.*

[188] *See* INBAU ET AL., *supra* note 2, at 8; *see also infra* Sections III.D and III.E and accompanying text for examples of interrogation tactics.

[189] INBAU ET AL., *supra* note 2, at 8.

[190] *See* Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 275 (1996) (reporting that in thirty-three percent of 182 observed cases, pre-interrogation evidence was weak, meaning highly unlikely to lead to charging).

[191] *See* INBAU ET AL., *supra* note 2, at 190 ("In the majority of interviews . . . the investigator will generally be able to classify the overall responses . . . as either fitting the description of an innocent or guilty suspect."); s*ee also* FM 3-19.13, *supra* note 33, at 4-7.

[192] *See infra* Section III.B.1 for a definition of BSA; *see generally* INBAU ET AL., *supra* note 2, at 121–91 (describing the development and use of behavior symptom analysis).

[193] *See* FM 3-19.13, *supra* note 33, at 4-7.

The police routinely initiate an interrogation even when there is little or even no evidence of guilt against a suspect.[194] Brian C. Jayne and Joseph P. Buckley, coauthors of the third and fourth editions of *Criminal Interrogations and Confessions*, explained the critical importance of securing a confession in the absence of evidence:

> Unfortunately, most investigations do not come gift wrapped in . . . a neat package. All too often a confession is needed to develop the evidence necessary for a conviction and frequently, absent a confession, there is little admissible evidence to support the suspect's guilt. Through factual analysis and a Behavior Analysis Interview the investigator may have little doubt regarding a suspect's involvement. But when it comes to producing evidence admissible in court, the confession oftentimes makes or breaks a case.[195]

The BSA is often the investigator's only tool for determining whether or not to transition from interview to interrogation.[196] Once the investigator believes a suspect is guilty based upon the investigator's application of BSA during the interview, then the investigator makes the critically important transition from interview to accusatory interrogation.[197]

The less evidence an investigator has against a suspect, the more likely he is to employ psychological interrogation tactics in order to get a confession.[198] Rather than acknowledge a lack of evidence prior to interrogation, Jayne and Buckley recommend that investigators "portray increased confidence in the suspect's guilt" and confront the suspect with the existence of fictitious evidence during the interrogation.[199] One study revealed that detectives are prone to use more interrogation tactics during an interrogation when the pre-interrogation evidence is weak or moderate.[200] Thus, investigators routinely rely upon BSA to make two critical judgments: (1) whether or not to transition from interview to

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[194] *See* BRIAN C. JAYNE & JOSEPH P. BUCKLEY, THE INVESTIGATOR ANTHOLOGY 224 (1999).
[195] *Id.*
[196] *See id.*
[197] *See* Meissner & Kassin, *supra* note 183, at 477.
[198] *See* Ofshe & Leo, *supra* note 4, at 986–87.
[199] *See* JAYNE & BUCKLEY, *supra* note 194, at 227–30.
[200] *See* Leo, *supra* note 190, at 298.

interrogation, and then (2) whether or not to increase the amount of psychological pressure and manipulation applied against the suspect.[201]

During the interrogation, if the investigator determines that a suspect's continued denials are deceptive, then the investigator increases the amount of psychological pressure applied against the suspect.[202] This process, of course, goes astray when the interrogator mistakenly interprets the suspect's truthful denials as deceptive denials.[203] In that case, as the suspect offers additional truthful denials, the interrogator ratchets up the psychological pressure through the use of interrogation tactics.[204] In that case, the interrogator targets an innocent person with more and more manipulative and deceptive psychological interrogation tactics.[205]

1. Behavior Symptom Analysis Defined

Jayne and Buckley describe BSA as "the systematic observation of a suspect's behavioral responses during a structured interview."[206] The investigator observes the suspect's behavior in three distinct areas: verbal, paralinguistic, and nonverbal.[207] "Verbal" refers to the suspect's "word choice and arrangement of words" in response to preplanned questions; "paralinguistic" refers to the "characteristics of speech falling outside the spoken word" such as rate, tone, length, and continuity of speech during the interview; and "nonverbal" behavior includes "posture, arm and leg movements, eye contact, and facial expressions."[208] Field Manual 3-19.13 divides the behavioral responses into "verbal" and "nonverbal" and includes the "paralinguistic" behaviors as a subset of the verbal behaviors.[209] During an interview, the investigator observes the suspect's behavior in each area and makes inferences about the suspect's truthfulness.[210] For example, according to Inbau:

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[201] *See id.*; Meissner & Kassin, *supra* note 183, at 477.
[202] *See* Meissner & Kassin, *supra* note 183, at 477; Leo, *supra* note 190, at 298.
[203] *See* Ofshe & Leo, *supra* note 4, at 986–87.
[204] *See id.*
[205] *See id.*; *see also* JAYNE & BUCKLEY, *supra* note 194, at 227–30 (recommending that investigators "portray increased confidence in the suspect's guilt" and confront the suspect with the existence of fictitious evidence during the interrogation).
[206] JAYNE & BUCKLEY, *supra* note 194, at 67.
[207] INBAU ET AL., *supra* note 2, at 125.
[208] *Id.* at 125; JAYNE & BUCKLEY, *supra* note 194, at 67.
[209] *See* FM 3-19.13, *supra* note 33, at 4-18 to 4-20.
[210] INBAU ET AL., *supra* note 2, at 125–26.

> Deceptive suspects generally do not look directly at the investigator; they look down at the floor, over to the side, or up at the ceiling, as if to beseech some divine guidance when answering questions. They feel less anxiety if their eyes are focused somewhere other than on the investigator; it is easier to lie while looking at the ceiling or floor.[211]

According to the BSA theory, truthful subjects are sincere, helpful, concerned, and cooperative; deceptive subjects are insincere, unhelpful, unconcerned, and uncooperative.[212] The manuals provide numerous other examples of allegedly deceptive and truthful behaviors.[213] No single behavior alone indicates deception.[214] According to the manuals, the BSA should be "accomplished by evaluating clusters of behavior."[215]

2. Behavior Symptom Analysis: Pseudoscientific Guesswork

According to John E. Reid & Associates, Inc., "research studies demonstrated that interviewers specifically trained and experienced in BSA can correctly identify the truthfulness of a person 85% of the time."[216] Jayne and Buckley state emphatically that BSA is supported by research as well as "the common sense belief that the behavior of a subject during structured questioning can often reveal whether or not the subject is telling the truth or withholding information."[217] Some studies support the notion that investigators trained in the principles of BSA are able to detect truth or deception above "chance levels."[218] On the other hand, several studies challenge the notion that investigators trained in BSA can reliably detect deception above chance levels.[219] The results of

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[211] *Id.* at 151.
[212] *Id.* at 128–30.
[213] *See id.* at 121–153; JAYNE & BUCKLEY, *supra* note 194, at 224, 227–30 (1999).
[214] FM 3-19.13, *supra* note 33, at 4-19.
[215] *Id.*
[216] John E. Reid & Assocs., Inc., http://www.reid.com/services/r_behavior.html (last visited Nov. 15, 2007); *see also* INBAU ET AL., *supra* note 2, at 123 (reporting eighty-six percent accuracy in evaluating truthful suspects and eighty-three percent accuracy in evaluating deceptive suspects).
[217] JAYNE & BUCKLEY, *supra* note 194, at 66.
[218] *See generally* Horvath et al., *supra* note 185.
[219] *See generally* Saul M. Kassin & Christina T. Fong, *"I'm Innocent!": Effects of Training on Judgements of Truth and Deception in the Interrogation Room*, 23 L. & HUM.

one study were "unambiguous" in finding that the techniques taught by John E. Reid & Associates, Inc., did not increase a person's ability to detect deception.[220]

Interestingly, the CAAF recently expressed doubt about an interrogator's ability to accurately interpret body language.[221] In a unanimous opinion, the CAAF overturned a conviction which had been based on an alleged adoptive admission by the accused.[222] The court explained its rationale for distrusting the interrogator's interpretation of the accused's body language:

> [T]hat admission rested upon a law enforcement officer's interpretation of body language. Without some additional written, verbal, or video confirmation, this amounted to a confession by gesture of a critical element of the offense—and the only contested element of the offense. *Gestures and reactions vary from person to person under the pressure of interrogation.* As a result, the military judge's decision to admit evidence of Appellant's head nodding without adequate foundation was prejudicial error.[223]

This statement, of course, contradicts the key assumption behind BSA: that an interrogator can accurately judge truth or deception based upon "gestures and reactions."[224]

"[If] gestures and reactions vary from person to person under the pressure of interrogation," then those gestures and reactions cannot be consistently categorized as either truthful or deceptive and thus cannot be accurately observed and interpreted from one suspect to the next.[225] For example, FM 3-19.13 asserts: "An innocent person will generally sit upright, appearing more relaxed and casual. In most cases, he will go so

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BEHAV. 499 (1999), *available at* http://www.williams.edu/Psychology/Faculty/Kassin/research/confessions.htm; Kassin et al., *supra* note 40, at 188–89.

[220] *See* Kassin & Fong, *supra* note 219, at 512. *But see* INBAU ET AL., *supra* note 2, at 124–25 (blaming the negative results of some studies on the difficulties associated with recreating realistic interview and interrogation conditions in a controlled setting).

[221] *See* United States v. Datz, 61 M.J. 37, 44 (2005).

[222] *Id.*

[223] *Id.* (emphasis added).

[224] *See id.*; John E. Reid & Assocs., Inc., http://www.reid.com/services/r_behavior.html (last visited Nov. 15, 2007).

[225] *See Datz*, 61 M.J. at 44.

far as to lean toward the interviewer inviting the questions and demonstrating an eagerness to resolve the issue . . . ."[226] However, if these particular "gestures and reactions vary from person to person under the pressure of interrogation," then they cannot be accurate indicators of truth or deception at all.[227] Military law enforcement, however, categorizes the "sit upright . . . [and] lean toward the interviewer" gesture and reaction as an example of truthful behavior.[228]

The CAAF appears to agree with the leading false confession experts that BSA is at best "pseudoscientific guesswork."[229] Therefore, the only explanation for the *Bresnahan* majority opinion is that the court lacks an understanding as to the chain of events that starts with BSA and ends with a false confession.[230] That chain of events is further described below.

C. Behavior Symptom Analysis and Investigator Bias

1. "Prejudgments of Guilt Confidently Made But Frequently In Error" [231]

Some studies indicate that instead of bolstering an investigator's effectiveness, reliance upon BSA may in fact hinder the search for truth because it contributes to investigator bias.[232] One study found that those who received training in BSA were actually *less* accurate in judging truth or deception.[233] Accuracy aside, however, those who received training in BSA were "more self-confident and more articulate about the reasons for their often erroneous judgments."[234] Those who received training were more articulate in explaining their judgments of truth or deception, but they were not actually more accurate in judging truth or deception.[235] A

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[226] FM 3-19.13, *supra* note 33, at 4-20.
[227] *See Datz*, 61 M.J. at 44.
[228] *See* FM 3-19.13, *supra* note 33, at 4-20.
[229] *See* Ofshe & Leo, *supra* note 4, at 986.
[230] *See* Ofshe & Leo, *supra* note 4, at 986–1001 (providing detailed description of how police elicit true and false confessions); *see generally* Kassin & Gudjonsson, *supra* note 8 (scrutinizing the interrogation process from the pre-interrogation interview through *Miranda* warnings, interrogation tactics, and why people confess).
[231] Kassin et al., *supra* note 34, at 189.
[232] *See id.* at 187.
[233] *See* Kassin & Fong, *supra* note 219, at 512.
[234] *Id.*
[235] *Id.*

second study concluded that "even experienced detectives—many of whom were specially trained in interviewing and interrogation—also did not exceed chance level performance."[236] That second study, led by Professor Saul M. Kassin, described the phenomenon of investigator bias:

> Compared to others, [experienced detectives] also exhibited a deception response bias, leading them to commit an abundance of false positive errors. Thus the pivotal decision to interrogate a suspect may well be based on prejudgments of guilt confidently made but frequently in error . . . . [R]esearch suggests that once people form a belief, they tend unwittingly to seek, interpret, and create information in ways that verify that belief.[237]

Police interrogators are often very confident but very wrong in their detection of deception; therefore, investigator bias is the first crucial step in the chain of events leading to a false confession.[238]

Because BSA is at best "pseudoscientific guesswork," the police often choose to employ very persuasive interrogation tactics "against the wrong target"—an innocent person.[239] This problem is compounded by the previously mentioned tendency among investigators to use more interrogation tactics when the pre-interrogation evidence is weak or moderate.[240] As mentioned in Section II.D, this problem is compounded even further by the relatively higher rate of *Miranda* waiver by innocent suspects than by guilty suspects.[241] Thus, in certain cases, investigators choose to interrogate an innocent person and then compound the mistake by piling on the number and type of interrogation tactics as the suspect continues to deny guilt.[242]

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[236] Kassin et al., *supra* note 34, at 189.
[237] *Id.*
[238] *See id.* at 188–89.
[239] Ofshe & Leo, *supra* note 4, at 986.
[240] *See* Leo, *supra* note 190, at 298.
[241] *See* Kassin & Norwick, *supra* note 102, at 211.
[242] *See* Leo, *supra* note 190, at 298.

An interrogator who is overconfident in his judgment of guilt will "tend unwittingly to seek, interpret, and create information in ways that verify that belief."[243] Thus the next step in the chain of events leading to a false confession is the investigator's contamination of the suspect's statement.[244] Professor Kassin explains:

> In most documented false confessions . . . the statements ultimately presented in court are highly scripted by investigators' theory of the case; they are rehearsed and repeated over hours of interrogation; and they often contain vivid details about the crime, the scene, and the victim that became known to suspects through secondhand sources.[245]

As explained in Section III.D, the interrogator convinces the suspect to include the secondhand information in the "confession" through the use of powerful psychological tactics.[246]

2. Stepping Down the Accusation: Every Suspect Is Guilty of Something

The interrogation technique known as "stepping down the accusation" illustrates the overconfidence advocated in *Criminal Interrogation and Confessions*.[247] "The successful interrogator must possess a great deal of inner confidence in his ability to detect truth or deception, elicit confessions from the guilty, and stand behind decisions of truthfulness."[248] An interrogator should never acknowledge that BSA led him to erroneously conclude that a person is guilty when in fact that person is innocent.[249]

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[243] Kassin et al., *supra* note 34, at 189.
[244] *See id.*; *see also* FM 3-19.13, *supra* note 33, at 4-2 ("[S]everal studies have proven that erroneous information inserted into a scenario is frequently incorporated in future witness accounts by the individuals who were provided such information.").
[245] Kassin et al., *supra* note 34, at 224.
[246] *See* Kassin et al., *supra* note 34, at 188–89.
[247] INBAU ET AL., *supra* note 2, at 320–21 (explaining how to handle "[d]enials coming from a probably innocent suspect").
[248] *See id.* at 78 (quoting Kassin & Gudjonsson, *supra* note 8, at 41).
[249] *See* INBAU ET AL., *supra* note 2, at 320–21.

According to this approach to interrogation, every suspect is guilty of something.[250] John E. Reid and Associates teaches that "[w]hen the investigator senses that the suspect may be innocent, he should begin to diminish the tone and nature of the accusatory statements."[251] However, "no statement should be made immediately that [the suspect] is clear of any subsequent investigation."[252] The interrogator should not apologize for subjecting an innocent person to the stress of the interrogation room but instead should blame the suspect for misleading the interrogator in some way.[253] In the rare case when the interrogator begins to doubt his initial judgment of guilt, the interrogator is taught to probe for "indications of something the suspect may have done of a less relevant nature that evoked the suspicion about his commission of the principal act."[254] As the logic goes, the suspect must be guilty of something because the BAI results indicated that the suspect was attempting to deceive the investigator.[255]

"[T]he decision by police to interrogate suspects on the basis of their observable interview behavior is a decision that is fraught with error, bias, and overconfidence."[256] Their overconfident refusal to acknowledge errors leads police interrogators to employ powerful psychological interrogation tactics against innocent people.[257] The employment of those psychological tactics is the final step in the chain of events that ends in false confession. Section III.D briefly describes those interrogation tactics.

D. Psychological Interrogation: Isolation, Confrontation, Deception, Despair

"Modern Psychological interrogation is a gradual yet cumulative process; each technique builds on the next as the investigator seeks to emphasize the overriding strength of the State's case and the futility of

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[250] *See id.*
[251] *Id.* at 320.
[252] *Id.* at 321.
[253] *See id.* at 320–21.
[254] *Id.* at 321.
[255] *See id.* at 321 ("[T]he investigator should soften the accusation to the point of indicating that the suspect may not have actually committed the act but was only involved in it in some way, perhaps merely has some knowledge about it, or else harbors a suspicion as to the perpetrator.").
[256] Kassin & Gudjonsson, *supra* note 8, at 39.
[257] *See* Ofshe & Leo, *supra* note 4, at 986.

the suspect's denials."[258] The interrogator begins by isolating the suspect in a "small, barely furnished, soundproof room housed within the police station."[259] The interrogation room is intended to "remove the suspect from familiar surroundings and isolate him or her, denying access to known people and settings, in order to increase the suspect's anxiety and incentive to extricate himself or herself from the situation."[260] Once the suspect is isolated, the confrontational interrogation may begin.[261]

As explained earlier, interrogation is a confrontational monologue, not a conversation between the suspect and investigator.[262] A successful interrogation requires planning and preparation.[263] A skilled interrogator communicates to the suspect that the interrogator knows key details about the suspect's life, career, and family—this technique "is extremely beneficial in increasing anxiety at key points of the interrogation

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[258] Drizin & Leo, *supra* note 10, at 916.

> The most effective technique used to persuade a suspect that his situation is hopeless is to confront him with seemingly incontrovertible evidence of his guilt, whether or not any actually exists. . . . Over and over again, the investigator conveys the message that the suspect has no meaningful choice but to admit to some version of the crime because continued resistance—in light of the extensive and irrefutable evidence against him—is simply futile. These techniques are thus designed to persuade the suspect to perceive his situation, and thus his options, much differently than when he first entered the interrogation room.

Id. at 913–14 (2004) (citation omitted).

[259] Kassin & Gudjonsson, *supra* note 8, at 42; *see also* INBAU ET AL., *supra* note 2, at 51 ("The principal psychological factor contributing to a successful interview or interrogation is privacy . . . ."); FM 3-19.13, *supra* note 33, at 4-8 to 4-9 ("An interrogation needs to be strictly planned and controlled. An interrogation should rarely, if ever, be conducted in a suspect-supportive environment. The location selected for an interrogation should be supportive to the interrogator and provide absolute privacy.").

[260] Kassin & Gudjonsson, *supra* note 8, at 42; *see also* FM 3-19.13, *supra* note 33, at 4-25 ("[T]here should be a two-way mirror installed in the interview room that allows other investigative personnel to observe the interrogation . . . . This allows the observers to point out issues that create anxiety in the suspect . . . .).

[261] *See* Taslitz, *supra* note 7 ("[I]nterrogations often take place with suspects isolated from both lawyers and intimates. There is good reason to believe that significant numbers of ordinary people under such circumstances 'can be led to agree that they have engaged in misconduct, even serious misconduct, when they are entirely innocent.'" (citation omitted)).

[262] *See supra* Section III.A.

[263] *See* FM 3-19.13, *supra* note 33, at 4-23.

process."[264] Outside the interrogation room, the interrogator develops "themes,"[265] "ploys,"[266]and "alternative questions"[267] for use against the suspect during the interrogation. *Criminal Interrogation and Confessions* describes the use of these techniques as the "Reid Nine Steps of Interrogation."[268] The interrogation process described in FM 3-19.13 is consistent with the "Reid Nine Steps."[269]

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[264] *Id.* 4-24.

[265] *See* INBAU ET AL., *supra* note 2, at 232 ("Immediately after the direct, positive confrontation . . . the investigator should begin the development of a 'theme.' This involves presenting a 'moral excuse' for the suspect's commission of the offense or minimizing the moral implications of the conduct."); *see also* FM 3-19.13, *supra* note 33, at 4-27 to 4-28.

> A theme may be designed to pry at those things most important to the suspect, which is why it is vital during the rapport-building [interview] stage for investigators to seek out the things that will help a suspect better recognize the situation for what it is . . . . For instance, if a suspect has a strong relationship with his mother, investigators may want to have him reflect on how his mother would feel about the situation. This could also be effective when used with how he handles himself subsequent to the incident.

FM 3-19.13, *supra* note 33, at 4-27 to 4-28.

[266] *See* INBAU ET AL., *supra* note 2, at 427–28 ("[T]rickery and deceit represent a continuum of false representations ranging from demeanor and attitude to outright lies concerning the existence of evidence."); FM 3-19.13, *supra* note 33, at 4-16 ("The use of trickery, deceit, ploys, and lying is legally permissible during the course of an interrogation . . . .").

[267] *See* FM 3-19.13, *supra* note 33, at 4-30 to 4-31 ("The alternative question is designed to help the suspect feel that the investigator understands and does not judge him. . . ."); INBAU ET AL., *supra* note 2, at 353 ("The alternative question . . . presents the suspect a choice between two explanations . . . . [T]he suspect may be asked, 'Did you blow that money on booze, drugs, and women . . . or did you need it to help out your family?'").

[268] INBAU ET AL., *supra* note 2, at 209–397. The Nine Steps are:

> Step 1 – Direct, Positive Confrontation
> Step 2 – Theme Development
> Step 3 – Handling Denials
> Step 4 – Overcoming Objections
> Step 5 – Procurement and Retention of a Suspect's Attention
> Step 6 – Handling the Suspect's Passive Mood
> Step 7 – Presenting an Alternative Question
> Step 8 – Having the Suspect Orally Relate Various Details of the Offense
> Step 9 – Converting an Oral Confession into a Written Confession

Id. at vi.

[269] *Compare id. with* FM 3-19.13, *supra* note 33, at ch. 4.

Professors Ofshe and Leo have described the psychological interrogation process in broad terms as "a two-step process of social influence."[270] "In the first step, the interrogator accuses the suspect of committing the crime and lying about it, cuts off the suspect's denials, attacks his or her alibi (occasionally attacking the suspect's memory), and often cites real or fabricated evidence to buttress these claims."[271] During this first step, the interrogator uses "themes,"[272] "ploys,"[273]and "alternative questions."[274] "This step is designed to plunge the suspect into a state of hopelessness and despair and to instill the belief that continued denial is not a means of escape."[275]

Once the suspect achieves this hopeless and desperate state, the interrogator enters the second step in which he "suggests inducements that motivate the suspect by altering his or her perceptions of self-interest."[276] Kassin and Gudjonsson explain:

> The inducements that are used can be arrayed along a spectrum: At the low end are moral or religious inducements suggesting that confession will make the suspect feel better; in the midrange are vague assurances that the suspect's case will be processed more favorably if he or she confesses; at the high end are inducements that more expressly promise or imply leniency in exchange for confession or threaten or imply severe treatment if the suspect refuses to confess.[277]

Of course, explicit promises of leniency and explicit threats of severe treatment are generally illegal and if exposed may lead to suppression of a suspect's statement.[278] Interrogators are taught techniques to avoid such problems.[279]

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[270] Kassin & Gudjonsson, *supra* note 8, at 33; *see also* Ofshe & Leo, *supra* note 4, at 989–90 (elaborating in much greater detail).
[271] Kassin & Gudjonsson, *supra* note 8, at 46.
[272] *See* INBAU ET AL., *supra* note 2, at 232.
[273] *See id.* at 427–28.
[274] *See* FM 3-19.13, *supra* note 33, at 4-30 to 4-31.
[275] Kassin & Gudjonsson, *supra* note 8, at 46.
[276] *Id.* (citation omitted).
[277] *Id.*
[278] *See* INBAU ET AL., *supra* note 2, at 420.
[279] *See id.* at 419–24 ("Communicating these incentives in a legal manner is an important consideration of confession admissibility."); FM 3-19.13, *supra* note 33, at 4-31, 4-47

Deception is fundamental to the psychological interrogation model.[280] The interrogator must deceive the suspect into believing that confession is in the suspect's best interest.[281] This becomes problematic when an interrogator's use of the BSA principles leads to an erroneous determination of a suspect's guilt.[282] If an innocent person, disoriented and confused by the interrogation experience, is temporarily deceived into thinking that "self-interest" dictates agreeing to the interrogator's demand to admit to a crime, a false confession may result.[283] This type of false confession is known as a "coerced compliant confession."[284] An

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(instructing interrogators to include rapport-based questions, such as, "How were you treated by CID and/or MPI today?" in the body of the suspect's written statements).

[280] *See* INBAU ET AL., *supra* note 2, at 427 ("Many of the interrogation techniques presented in this text involve duplicity and pretense.").

[281] *See id.*

> The purpose for interrogation is to persuade a suspect *whom the investigator believes* to be lying about involvement in a crime to tell the truth. The only way this can be accomplished is by allowing the suspect to believe that he will benefit in some way by telling the truth. Ordinary people do not act against self-interest without at least a temporary perception of positive gain in doing so.

Id. at 419 (emphasis added).

[282] *See* Kassin & Gudjonsson, *supra* note 8, at 39 ("[T]he decision by police to interrogate suspects on the basis of their observable interview behavior is a decision that is fraught with error, bias, and overconfidence."); Ofshe & Leo, *supra* note 4, at 986–87 ("If an interrogation is poorly founded—based on guesses, hunches, or pseudoscientific behavioral cues . . . . [the interrogator] may . . . use a very aggressive or a hostile questioning style that emphasizes the power and authority of his role, and eventually . . . use coercive tactics.").

[283] *See* INBAU ET AL., *supra* note 2, at 412–16.

[284] *See id.*

> [A] coerced compliant confession occurs when the suspect claims that he confessed to achieve an instrumental gain. Such gains include being allowed to go home, bringing a lengthy interrogation to an end, or avoiding physical injury. In a review of 350 trials occurring during the twentieth century involving persons believed to have been innocent, 49 of those cases (14 percent) involved a possible false confession. Of those 49 confessions, the coerced compliant was the most prevalent category (45 percent).

Id. at 412–13 (citations omitted).

innocent suspect may also come to doubt his own memory of events and agree to a "coerced internalized confession."[285]

E. Pragmatic Implication: Reading Between the Lines

An interrogator need not make explicit promises or threats in order to communicate an intended message to a suspect.[286] As explained above, "[c]ourts will generally frown upon confessions wherein the investigator directly" promises leniency or threatens harsh treatment.[287] On the other hand, implying consequences or rewards is legally permissible.[288]

"'Pragmatic Implication' refers to the sending and processing of implicit meanings in communication, as occurs when an individual 'reads between lines.'"[289] When an interrogator exaggerates or lies about "the strength of the evidence and the magnitude of the charges [he] communicates by pragmatic implication" to the suspect that the suspect will receive "a relatively severe sentence" unless the suspect cooperates and provides a confession.[290] On the other hand, an interrogator may "lull the suspect into a false sense of security by mitigating the crime, making excuses for the suspect, or blaming the victim . . . imply[ing] a relatively light sentence for the suspect who does confess."[291] Professor Kassin describes these techniques of pragmatic implication as "maximization" and "minimization"—maximizing the consequences for refusing to confess or, alternatively, minimizing the consequences for confessing.[292]

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[285] *See id.* ("Coerced internalized confessions . . . occur when the investigator successfully convinces an innocent suspect that he is guilty of a crime he does not remember committing." *Id.* at 414.).

[286] *See* Saul M. Kassin & Karlyn McNall, *Police Interrogations and Confessions: Communicating Promises and Threats by Pragmatic Implication*, 15 L. & HUM. BEHAV. 233, 241–42 (1991).

[287] *See* INBAU ET AL., *supra* note 2, at 420.

[288] *See id.* at 419–22.

[289] Drizin & Leo, *supra* note 10, at 915 n.138 (2004) (citations omitted).

[290] Kassin & McNall, *supra* note 286, at 247.

[291] *Id.*

[292] *See id.*

> [T]wo types of approaches recommended by Inbau et al. can be distinguished. One is what we call *maximization*, a "hard-sell" technique in which the interrogator tries to scare and intimidate the suspect into confessing by making false claims about evidence (e.g., staging an eyewitness identification or a fraudulent lie-detector test) and exaggerating the seriousness of the offense and the magnitude of

F. Precautions Against False Confession

The interrogation manuals state emphatically that if applied correctly, the psychological interrogation methods they advocate will not cause an innocent suspect to confess falsely.[293] Even if this assertion were true, many police investigators are not as skilled as they should be at employing precautions against false confession.[294] Expert assistance is necessary to dissect the interrogation methods applied to a particular suspect and to determine whether or not those methods were applied in accordance with the guidelines in the manuals.[295] If those methods were not applied in accordance with the guidelines in the manuals, then expert testimony is necessary to educate the military judge and panel members as to the errors committed by the interrogator.[296]

Both FM 3-19.13 and *Criminal Interrogations and Confessions* describe precautions to be taken during an interrogation.[297] Threatening a suspect with the death penalty or the loss of her children are obvious examples of coercive, not to mention illegal, interrogation methods that should be avoided.[298] A young suspect with low intelligence is the most obviously vulnerable person that might render an untrustworthy

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> the charges. . . . The second approach is what we call minimization, a "soft-sell technique in which the police interrogator tries to lull the suspect into a false sense of security by offering sympathy, tolerance, face-saving excuses, and even moral justification, by blaming a victim or accomplice, by citing extenuating circumstances, or by playing down the seriousness of the charges."

Id.

[293] *See* INBAU ET AL., *supra* note 2, at 421. Inbau emphatically rejects the notion that suspects will form beliefs based upon "pragmatic implication." *See id.* at 420–21. For example, Inbau flatly rejects the idea that pragmatic implication would cause an innocent suspect to believe "that the consequences of their crime are not that severe . . . ." Inbau asks: "Would an innocent suspect be likely to form these beliefs and decide to confess because of them?" *Id.* at 421. Inbau answers his own question in the negative: "To this the answer is clearly 'No!'" *See id.*

[294] *See* GOVERNOR'S COMMISSION, *supra* note 7, at 40 (recommending additional training for police interrogators on the causes of false confessions).

[295] *See* McMurtrie, *supra* note 6, at 1274.

[296] *See id.*

[297] *See* FM 3-19.13, *supra* note 33, at 4-31 to 4-32 ("Because juries tend to place a great deal of weight in confessions when deliberating a case, it is paramount that investigators and interrogators implement safeguards to prevent false confessions.").

[298] *See id.* at 4-31.

confession or admission.[299] Actions by the interrogator can also contaminate a suspect's statement.[300] Inbau and Reid advise interrogators to exercise caution when dealing with "intent issues."[301] Interrogators should, "[f]ocus the interview on behaviors rather than intentions."[302] If these and other guidelines are not followed, a false confession may result.[303]

G. The Gap Between Legally Voluntary and Factually Reliable

A confession can be legally voluntary, but psychologically involuntary. Inbau and Reid explain:

> [N]o confession following interrogation is completely voluntary in the psychological sense of the word. . . . At what point an investigator's words, demeanor or actions are so intense or powerful as to overcome the suspect's will cannot be universally defined. Each suspect must be considered individually, and consideration must be given with respect to such factors as his previous experience with police, his intelligence, mental stability, and age.[304]

Expert assistance is necessary to examine and explain the complex psychological interplay of "an investigator's words, demeanor or actions" with a particular suspect's characteristics.[305]

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[299] *See id.* The manual, however, provides no guidance on how an investigator is to determine the intelligence quotient, language aptitude, or test scores of an eighteen year old private, for example. *See id.*

[300] *See id.* at 4-32 (advising against showing a suspect crime scene photos or taking a suspect to the crime scene before getting a confession).

[301] *See* INBAU ET AL., *supra* note 2, at 46–48 ("Because of the nature of intent issues, the investigator must take special care with respect to corroborating a confession.").

[302] *See id.* at 47 ("Physical actions or statements either occurred, or they did not. However, intentions can be subject to perceptual distortions, similar to beliefs or opinions."). A similar problem not explicitly identified in the manuals may occur when an interrogator asks a rape suspect if an intoxicated rape victim was able to consent. If the issue at trial is the alleged victim's level of intoxication, then the suspect's admission that the victim was "probably not" able to consent may not be meaningful unless corroborated by the suspect's description of the victim's physical movements, etc. *See id.*

[303] *See id.* at 46–48.

[304] *See id.* at 417.

[305] *See id.* Inbau et al. lend support to the notion that an interrogation is much too complex to examine in the abstract: "for psychological and legal reasons, a confession

Inbau and Reid are careful to instruct interrogators on the legal limits of their interrogation tactics. They explain how to go up to the legal line without crossing it: "[E]ven though overbearing a suspect's free will could, in a broad sense, incorporate cognitive elements, the legal essence of coercion involves real or threatened physical activities."[306] These "physical activities" include real or threatened physical harm, increased prison time, or promises of leniency.[307] While explicit threats or promises are not legally permissible, implying such consequences or benefits is legally permissible: "It should be emphasized that merely discussing real consequences during an interrogation does not constitute [legal] coercion. It is only when the investigator uses real consequences as leverage to induce a confession through the use of threats or promises that coercion may by claimed."[308] Interrogators are thus taught to obtain legally voluntary and thus admissible statements, but this does not necessarily mean that those statements are "trustworthy."[309]

The *Bresnahan* dissent recognized the gap between legally voluntary and factually reliable.[310] Judge Erdmann explained, "[a]lthough Bresnahan's confession was voluntary and therefore admissible at trial, the defense counsel made a colorable showing that there was a reasonable possibility she could raise doubt in the members' minds as to the reliability of that confession."[311] Denied expert assistance, the accused was denied the opportunity to mount a defense against the intuitive notion held by the panel members that a person would not confess to a crime he did not commit.[312] By denying Bresnahan expert assistance, the court denied him a fair opportunity to defend himself.[313]

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should not be separated from the interrogation that produced it." *See id.* at 412. On the other hand, Inbau et al. would place the ultimate "responsibility of determining whether a confession is true or false . . . upon the investigator who obtained it." *Id.* at 411. If all investigators were truly objective, this suggestion might be worthwhile. However, the reliability of confessions and admissions is an issue for judges or juries to decide. *See* MCM, *supra* note 5, MIL. R. EVID. 304.

[306] *See* INBAU ET AL., *supra* note 2, at 417–18.

[307] *See id.*

[308] *See id.* at 418.

[309] *See id.* at 424.

[310] *See* United States v. Bresnahan, 62 M.J. 137, 148 (2005) (Erdmann, J., and Effron, J., dissenting).

[311] *Id.*

[312] *See* McMurtrie, *supra* note 6, at 1274.

[313] *See Bresnahan*, 62 M.J. at 148 (Erdmann, J., and Effron, J., dissenting).

Confession in the interrogation room does not always equal factual guilt in the courtroom.[314]

H. A More Rational Military Justice System

1. Deception In the Interrogation Room, Distraction in the Courtroom

> [I]nterrogations . . . frequently require the use of psychological tactics and techniques that could well be classified as "unethical," if evaluated in terms of ordinary, everyday social behavior.[315]

Deceptive tactics in the interrogation room distract from the search for truth in the courtroom. This is especially true in the military courtroom because military officers and noncommissioned officers place greater emphasis on ethical values such as respect, honor, and integrity.[316] Deceptive tactics do not go over well with military panels.[317] An accused has the right to expose the unethical methods used by

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[314] *See id.*

> Confessions, even those that have been found to be voluntary, are not conclusive of guilt. . . . Stripped of the power to describe to the jury the circumstances that prompted his confession, the defendant is effectively disabled from answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt?

Id. (quoting Crane v. Kentucky, 476 U.S. 683, 689 (1986)).

[315] INBAU ET AL., *supra* note 2, at xi–xii.

[316] *See e.g.*, U.S. DEP'T OF ARMY, FIELD MANUAL 1, THE ARMY 1-15 to 1-16 (June 2005).

> The Army is a values-based organization. It upholds principles that are grounded in the Constitution and inspire guiding values and standards for its members. These principles are best expressed by the Army Values . . . .
> . . . .
> RESPECT – Treat people as they should be treated . . . HONOR – Live up to all the Army Values . . . INTEGRITY – Do what's right – legally and morally . . . .

Id.

[317] *See* FM 3-19.13, *supra* note 33, at 4-16.

interrogators even if those methods are legally permissible.[318] Even if unethical conduct by police interrogators does not "sway" the military judge, the panel members "may be more concerned."[319]

In recent years, police training manuals have reluctantly acknowledged that unethical interrogation methods have become a distraction in the courtroom:

> Although lying rarely results in a confession being thrown out, it is frequently a factor used in a deliberation for panel members and judges who are not certain they can completely trust the officer who they know to be a convincing liar . . . . Defense attorneys have become very adept at bringing out lies told during interrogations in courtroom settings and at turning these lies into credibility issues for the panel.[320]

The use of unethical methods in the interrogation room distracts from the search for truth in the courtroom by moving the focus away from the merits of the psychological interrogation model and toward the integrity of the interrogator.[321]

2. A More Rational Approach: Educate the Factfinder

Military courts should encourage the use of experts to frame the arguments of counsel and assist panel members in overcoming their preconceptions concerning interrogation methods and false

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[318] *See* United States v. Leiker, 37 M.J. 418, 420 (C.M.A. 1993) ("An accused has the right to present evidence at trial about what interrogation techniques were used in order to prove that he was questioned as a suspect rather than as a witness or to establish involuntariness of a statement." (citing Crane v. Kentucky, 476 U.S. 683)).

[319] *See* Steven A. Drizin, *Defending a False or Coerced Confession Case in the Post-DNA Age: What Do You Need to Know to Represent Your Clients Effectively?*, 12 WISCONSIN DEFENDER 4 (2004) (describing how defense counsel are able to develop evidence for use in attacking their clients' confessions); *see also* GISLI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS: A HANDBOOK 37 (2003) ("Although such measures are commonly allowed in American courts, they raise serious questions about the ethical nature of this form of interrogation. Public awareness of this kind of police behaviour must inevitably undermine the public's respect for the professionalism of police officers.").

[320] FM 3-19.13, *supra* note 33, at 4-16.

[321] *See id.*

confessions.[322] *United States v. Houser* provides a model for using social psychology to educate panel members in order to overcome "widely held misconceptions."[323] At trial, the defense brought to the members' attention the rape victim's failure to resist, failure to report immediately, her lack of anxiousness, and her inconsistent acts and statements.[324] The prosecution responded by offering the testimony of a counseling psychologist, Dr. Remer, to explain the counter-intuitive behaviors displayed by someone suffering from rape trauma syndrome.[325] The Court of Military Appeals[326] concluded that the military judge did not abuse his discretion in admitting Dr. Remer's testimony.[327]

The *Houser* court explained that MRE 702[328] is a very liberal standard.[329] The court explained:

> The test is not whether the jury could reach some conclusion in the absence of the expert evidence, but whether the jury is qualified without such testimony "to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject. . . ."[330]

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[322] *See* United States v. Houser, 36 M.J. 392, 400 (C.M.A. 1993); *see also* McMurtrie, *supra* note 6, at 1273–74 ("[T]he research of social scientists in these areas contains findings that are counter-intuitive and therefore expert testimony can assist the trier of fact.").
[323] *See Houser*, 36 M.J. at 398.
[324] *Id.*
[325] *Id.* at 393, 398–99.
[326] Predecessor to the Court of Appeals for the Armed Forces.
[327] *Houser*, 36 M.J. at 400.
[328] Military Rule of Evidence 702 provides:

> 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.

MCM, *supra* note 5, MIL. R. EVID. 702.
[329] *Houser*, 36 M.J. at 398.
[330] *Id.* (citations omitted).

The court held that rape trauma syndrome was proper subject matter for expert testimony, even though rape trauma syndrome was not recognized in Diagnostic and Statistical Manual III.[331] Dr. Remer testified that rape trauma syndrome was developed by interviewing victims each with varying responses along a "continuum."[332] In other words, rape trauma syndrome is based upon the same "observational, as opposed to experimental, techniques" as false confession theory.[333]

The *Houser* court emphasized that Dr. Remer "was very careful not to confuse or mislead the court members."[334] The court explained:

> Dr. Remer made it clear that her testimony was to give a framework within which to consider the arguments made by the defense in the context of what happens in some rape cases, but she would not usurp the role of the factfinder. . . . Furthermore, Dr. Remer did not violate our prohibition against expert witnesses' testifying about the credibility of the victim.[335]

Military judges could readily apply the same stringent controls to expert testimony on the psychological interrogation tactics employed in a particular case.[336] Military judges could also easily prohibit experts from "testifying about the credibility" of the accused's confession.[337]

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[331] *See id.* at 396–98; *see also* AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3d ed. 1980).
[332] *See id.* at 395–96.
[333] United States v. Hall, 974 F. Supp. 1198, 1205 (C.D. Ill. 1997).

> [T]he science of social psychology, and specifically the field involving the use of coercion in interrogations, is sufficiently developed in its methods to constitute a reliable body of specialized knowledge under Rule 702. While Dr. Ofshe and his peers utilize observational, as opposed to experimental, techniques, this is wholly acceptable in the established field of social psychology.

Id.
[334] *Houser*, 36 M.J. at 400.
[335] *Id.*
[336] *See, e.g.*, *Hall*, 974 F. Supp. at 1205.

> The Court cautions Defendant, however, that it will hold Dr. Ofshe to his word that he will only testify to the correlation between false confessions and the various factors espoused by him. Thus, he can testify that false confessions do exist, that they are associated with the use of certain police interrogation techniques, and that certain of

The CAAF should encourage rational discourse concerning the merits of psychological interrogation by acknowledging the general reliability of false confession theory and the probative value of expert testimony describing psychological interrogation methods.[338] As the *Houser* court explained in reference to rape trauma syndrome evidence, "[s]uch testimony assists jurors in disabusing themselves of widely held misconceptions."[339] The current focus in the courtroom on the integrity of police interrogators and the investigative process detracts from rational decision making.[340] The military justice system would be better served by a more sophisticated analysis of psychological interrogation methods both before and during trial.[341] Defense counsel, of course, must do their part to identify the psychological interrogation methods that police use against their clients and then educate military judges on the link between those methods and the research suggesting that those interrogation methods produce misleading and false confessions.[342] Military courts should then encourage a more rational analysis of those psychological interrogation methods by granting defense motions for employment of expert witnesses able to frame the issues for the factfinder.[343]

IV. Conclusion

Military justice practitioners must strive to fill the "gap in our knowledge as to what in fact goes on in the interrogation room."[344]

> those techniques were used in Hall's interrogation in this case. Dr. Ofshe *cannot* explicitly testify about matters of causation, specifically, whether the interrogation methods used in this case caused Hall to falsely confess. . . . Dr. Ofshe will simply provide the framework which the jury can use to arrive at its own conclusions.

Id.

[337] *See id.*

[338] *See* McMurtrie, *supra* note 6, at 1271–74; United States v. Hall, 974 F. Supp. 1198, 1205 (C.D. Ill. 1997).

[339] *See Houser*, 36 M.J. at 398.

[340] *See* FM 3-19.13, *supra* note 33, at 4-16.

[341] *See* GOVERNOR'S COMMISSION, *supra* note 7, at 40, 109, 124 (recommending expert assistance to educate police, judges, and attorneys on interrogation methods).

[342] *See* Drizin, *supra* note 319, at 22–24 (listing helpful hints for defending confession cases).

[343] *See* MCM, *supra* note 5, R.C.M. 703(d); *Hall*, 974 F. Supp. at 1205; *Houser*, 36 M.J. at 400.

[344] *See* Miranda v. Arizona, 384 U.S. 436, 448 (1966).

Military law enforcement places great emphasis on collecting confession evidence as a means of solving cases even though this evidence is often unreliable.[345] Most judges and lawyers are uninformed as to the extent of the false confession problem and the psychological interrogation methods at the root of that problem.[346] Justice demands that key players within the military justice system overcome their predisposition against the need for experts to analyze and expose the pseudoscience behind psychological interrogation methods and the consequences of those methods.[347]

The time for uninformed skepticism is over. The false confession problem is real. Because of the work of organizations such as the *Innocence Project*, we now know that false confessions are a leading cause of wrongful conviction and that many innocent people have falsely confessed.[348] We also know that there are many more wrongly convicted people who are never exonerated and a concomitant number of false confessions.[349] A well-reasoned dialogue concerning the merits of psychological interrogation methods is a prerequisite to both reforming interrogation methods and to achieving justice. If during trial, military justice practitioners expose the pseudoscience behind psychological interrogation methods, eventually law enforcement will react by adopting reasonable reforms for the interrogation room.[350] Military law

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[345] *See* FM 3-19.13, *supra* note 33, at 4-2 ("Although testimonial evidence can be the most beneficial evidence in many investigations, it is also the least reliable form of evidence.").

[346] *See* McMurtrie, *supra* note 6, at 1273-74; *see also* Governor's Commission, *supra* note 7, at 40, 96, 111.

[347] *See id.*

[348] *See supra* Sections II.A–B and accompanying notes.

[349] *See* Sullivan, *supra* note 10, at 120 ("[W]e must face the likelihood that there are a vast number of persons now in our prisons who are innocent of the crimes for which they were convicted.").

[350] *See* FM 3-19.13, *supra* note 33, at 4-16 (advising interrogators against lying to suspects about the existence of fictitious evidence in large part because of the negative emphasis defense attorneys and panel members have placed on such blatantly deceptive tactics during trial.); *see, e.g.*, GOVERNOR'S COMMISSION, *supra* note 7, at 24 (advocating that law enforcement videotape interrogations as one means of combating the false confession problem.). Field Manual 3-19.13 recommends against telling suspects that evidence exists when in fact it does not. *See* FM 3-19.13, *supra* note 33, at 4-16. Instead of outright lying about the existence of evidence, FM 3-19.13 recommends confronting the suspect with "potential evidence." *See id.* This recommendation does not remove deceit from the interrogation room. *See supra* Section III.D and accompanying notes. Deception is fundamental during every stage of psychological interrogation including rapport building, theme development, and using alternative questions. *See id.* Skilled defense attorneys are able to emphasize the inherent deception in psychological

enforcement and the military justice system will benefit from the added scrutiny.

The military justice system needs a more rational means of examining the interrogation process. Counsel must have access to experts who can provide a well-reasoned analysis of the interrogation methods used against a particular accused. Without both expert assistance and expert testimony, the courtroom analysis will continue to focus on the integrity of police interrogators and the investigative process. We can do better. The military courts should encourage rational analysis of the interrogation process both before and during trial; our panel members are capable of deciding whether or not the problems associated with psychological interrogation methods apply to a particular case.[351]

The CAAF's refusal in *United States v. Bresnahan* to craft a rational standard for demonstrating the necessity of expert assistance in this area reveals a fundamental lack of comprehension as to the nature of the pseudoscientific psychological interrogation methods used by military law enforcement.[352] The reality of the false confession phenomenon calls for a more enlightened view of the psychological interrogation methods that too often bring unreliable evidence into the courtroom. The court should adopt a standard similar to the "colorable showing" test suggested by the *Bresnahan* dissent: once the defense has made a "colorable showing" that police interrogators used psychological interrogation methods against an accused, the court should acknowledge the necessity for expert assistance and direct the Government to appoint the expert.[353] By adopting this standard, the CAAF would make tremendous progress toward eliminating pseudoscience from the interrogation room—the same pseudoscience that obscures justice in the courtroom.

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interrogation, even if interrogators abandon one or more blatantly deceptive tactics. *See id.*

[351] *See* UCMJ art. 25(d)(2) (2005) ("When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament.").

[352] *See* McMurtrie, *supra* note 6, at 1271–74.

[353] *See supra* notes 24–25 and accompanying text.