The Admissibility of False Confession Expert Testimony

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Introduction

In 1995, Nassau County police proudly announced the arrest of Robert Moore for the murder of a Long Island taxicab driver. Moore had confessed to being with two acquaintances as they robbed and killed the cab driver and father of two children. Prosecutors talked of seeking the death penalty.

There was a problem with Robert Moore's confession, however. Not a word of it was true.

> Three weeks later, the prosecutors sheepishly revealed they had caught the real killers, who produced the murder weapon and said they had never heard of a Robert Moore . . . . Moore said he falsely confessed only because investigators grilled him for [twenty-two] hours, threatened him with the death penalty and even brought in a cousin to urge him to come clean. He had been tired, lonely, and scared. "I wanted to go home," he said.[1]

False confessions may seem to be a recent phenomenon in criminal law, but American history is replete with examples of false confessions. Many colonists falsely confessed to being witches in Salem, Massachusetts, in 1692. The trials resulted in at least nineteen executions before they stopped.[2] When the nineteen month-old baby of Charles Lindbergh was kidnapped and murdered in 1932, over 200 innocent people came forward to confess to the crime.[3] Even today, Mohammed Saddiq Odeh, a prime suspect in the bombings of the United States embassies in Kenya and Tanzania on 7 August 1998, claims Pakistani investigators used coercion to obtain a false confession from him about his involvement in the bombings.[4]

Despite the long history of false confessions in American jurisprudence, only in the last decade have persons with any degree of expertise in this area emerged. At the same time, the United States Supreme Court liberated local judges to admit whatever expert testimony the courts determined relevant and reliable using the guidelines contained in three landmark decisions: *Daubert v. Merrell Dow Pharmaceuticals, Inc*,[5] *General Electric Company v. Joiner*,[6] and *Kumho Tire Company v. Carmichael*.[7]

Confronted with a new type of expert testimony and a new standard to determine its admissibility, courts throughout the country have grappled with the complex question of whether expert testimony should be admitted on the subject of false confessions. The work of false confession theorists and the court opinions that admit or deny their testimony has created one of the hottest legal issues in years.[8] This article focuses on the psychology of false confessions, the experts behind the false confession theory, and the applicable law in this area. Further, this article argues that expert testimony on false confessions may be admissible in military courts-martial under highly limited circumstances.

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1. Jan Hoffman, *As Miranda Rights Erode, Police Get Confessions From Innocent People* (visited Jan. 20, 1999) <http://www.uiowa.edu/~030116/158/articles/hoffman2.htm>. *See* Jan Hoffman, *Court Says Its OK To Lie* (visited Jan. 20, 1999) <http://w1.480.telia.com/~u48003561/courtsayslie.htm>.

2. A total of 50 people actually confessed to being witches, but the tribunal executed only one of the confessed witches. The remainder of executions consisted of persons who were accused of being witches and either plead not guilty or refused to enter any plea at all. Nineteen died at the gallows and two perished in prison awaiting trial. One man, Giles Cory, died when he was "pressed" after refusing to enter a plea to the charge of practicing witchcraft. The colonial practice of "pressing" consisted of applying increasing weight to the body until the person being pressed relented. Cory died after two days of such torture. He never entered a plea. *See* Martha M. Young, Comment, *The Salem Witch Trials 300 Years Later: How Far Has The American Legal System Come? How Much Further Does It Need To Go?*, 64 TUL. L. REV. 235 (1989).

3. *See* Alan W. Scheflin, *Books Received*, 38 SANTA CLARA L. REV. 1293, 1296 (1998) (reviewing CRIMINAL DETECTION AND THE PSYCHOLOGY OF CRIME (David V. Carter & Lawrence J. Allison ed., 1997), and IAN BRYAN, INTERROGATION AND CONFESSION: IMAGES OF POLICE-SUSPECT DYNAMIC (1997)). *See also* DONALD S. CONNERY, GUILTY UNTIL PROVEN INNOCENT (1977)).

4. Michael Grunwald, *Bombing Suspect Alleges He Was Bullied Into Confession*, WASH. POST, Sept. 4, 1998, at A08.

5. 113 S. Ct. 2786 (1993).

6. 118 S. Ct. 512 (1997).

7. 119 S. Ct. 1167 (1999). These three cases outline the admissibility of expert testimony under the Federal Rules of Evidence (FRE).

8. The Court of Appeals for the Armed Forces recently decided a case concerning the admission of expert testimony in the area of false confessions in *United States v. Griffin*, 50 M.J. 278 (1999).

False Confession Theory

The seed of the false confession theory germinated first in Great Britain. There, Dr. Gisli H. Gudjonsson[9] compiled several studies of cases involving suggestibility and confessions. His book, *The Psychology of Interrogations, Confessions, and Testimony*,[10] ignited the false confession theory, which soon spread across the Atlantic to the United States. Gudjonsson assembled a small library of studies on police interrogation methods and anecdotal evidence of false confessions in real life. These studies illustrate a coherent theory to explain the counter-intuitive act of persons who falsely confess. He also endorsed a classification system for false confessions that was originally developed by American Professors Saul M. Kassin[11] and Lawrence S. Wrightsman[12] in 1985.[13]

While Gudjonssons's groundbreaking work explained the thought process of those who are undergoing interrogation by law enforcement officials, it had limited applicability in America. In Great Britain, criminal suspects cannot invoke a Fifth Amendment right to remain silent, the police do not read a suspect any rights under *Miranda v. Arizona*,[14] interrogators cannot resort to trick or deceit,[15] and the exclusionary rule is non-existent.

Thus, the tactics employed by American law enforcement officials during interrogation differ somewhat from those of their British counterparts, which were studied by Gudjonsson. American professors took the lead from Gudjonsson and have now assembled a significant body of anecdotal evidence and experimental data about false confessions and police interrogation tactics in the United States.[16]

Kassin conducted the only known laboratory experiment on false confessions in 1996.[17] He offered the following hypothesis: "The presentation of false evidence can lead individuals who are vulnerable (that is, in a heightened state of uncertainty) to confess to an act they did not commit," and whether it would cause those individuals to "internalize their confession and perhaps fabricate details consistent in memory consistent with that belief."[18]

The experiment consisted of seventy-five college students who were given a typing test on a computer. The subjects typed at two different speeds and were instructed not to touch the "ALT" key because it would crash the computer program and ruin the experiment. At approximately one minute into the typing test, the test team made the computer crash. The team then blamed the computer failure on the subject's pressing of the "ALT" key. Kassin's team then used several modern interrogation techniques on the subjects. Some were falsely told that the experimenter had seen them touch the "ALT" key. Other subjects were asked directly if they had hit the "ALT" key when the computer crashed. Eventually the subjects were asked to sign a statement acknowledging that they had touched the "ALT" key and caused the computer to crash. Amazingly, sixty-nine percent of the subjects signed the false confession, twenty-eight internalized[19] their guilt just by seeing the computer crash and being asked "what happened?" by the test team, and nine percent actually fabricated specific details to fit the allegation that they had touched the "ALT" key.[20]

While Kassin had proven his hypothesis, he recognized the inherit limitations of this experiment.[21] The subjects were not accused of an actual crime–merely negligence for a relatively trivial matter. Far higher stakes await a criminal suspect in a

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9. Dr. Gudjonsson hails from the Institute of Psychiatry in London. He is a published author in the fields of suggestibility and police interrogation in Great Britain. Gudjonsson also has testified in several criminal trials as an expert witness in the fields of police interrogation and false confessions. He is a forensic psychologist and a former police officer from Iceland.

10. GISLI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS, CONFESSIONS, AND TESTIMONY (1992).

11. Professor of Psychology, Williams College, Williamstown, Massachusetts.

12. Professor of Psychology, Kansas State University, Manhattan, Kansas.

13. SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, THE PSYCHOLOGY OF CONFESSION EVIDENCE AND TRIAL PROCEDURE 67-94 (1985).

14. 384 U.S. 436 (1966).

15. In Britain, Sections 76 and 78 of the Police and Criminal Evidence Act 1984, make the use of deliberate deception on the part of law enforcement personnel a reason to find a confession "unreliable" and thus not admissible in the British courts. No counterpart to this law exists in American jurisprudence.

16. *See* KASSIN & WRIGHTSMAN, *supra* note 13; Saul M. Kassin & Katherine L. Kiechel, *The Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 PSYCHOL. SCI. 125 (May 1996); Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. OF CRIM. L. AND CRIMINOLOGY 429 (1998) [hereinafter *The Consequences of False Confessions*]; Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DEN. U. L. REV. 979 (1997) [hereinafter *The Decision to Confess Falsely*]; Richard A. Ofshe & Richard A. Leo, *The Social Psychology of Police Interrogation: The Theory and Classification of False Confessions*, 16 STUD. IN L. POL. & SOC'Y 189 (1997) [hereinafter *The Social Psychology of Police Interrogation*].

17. Saul M. Kassin & Katherine L. Kiechel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, AM. PSYCHOL. 227 (Mar. 1996).

18. KASSIN & WRIGHTSMAN, *supra* note 13, at 126.

murder investigation. But Kassin also points out that the test subjects in his study possessed high intelligence[22] and were under very little pressure. Additionally, they were not subjected to a grueling, hours long, hostile interrogation by well trained investigators–factors that could also affect a suspect's likelihood to confess. As Kassin stated:

> An obvious and important empirical question remains concerning the external validity of the present results: To what extent do they generalize to the interrogation behavior of actual criminal suspects? . . . In this paradigm, there was only a minor consequence for liability. At this point, it is unclear whether people could similarly be induced to internalize false guilt for acts of omission (i.e. neglecting to do something they were told to do) or for acts that emanate from the conscious intent . . . . It is important, however, not to overstate this limitation. The fact that our procedure focused on an act of negligence and low consequence may well explain why the compliance rate was high.[23]

Kassin believes that additional research in this area is needed, especially if false confession testimony becomes admissible in court.[24] Unfortunately, he, and every other false confession theorist, may be prohibited from such experimental research due to the ethical constraints of the mental health profession.[25] Such an experiment entails knowingly extracting a false confession to a criminal act from one or more test subjects whom the test team *knew* to be innocent of any crime. The emotional and psychological damage inflicted on test subjects to falsely confess to a murder or rape they did not commit exceeds the tolerance of most people.[26] It might also subject the experimenters to legal liability for the tort of intentional infliction of emotional distress[27] or as a deprivation of civil rights.[28] Therefore, adopting Kassin's experiment to more closely approximate the conditions faced by the typical criminal suspect may not be possible.

With the gathering of empirical data severely limited by ethical and liability considerations, researchers must turn to anecdotal evidence to explain and to understand the issue of false confessions. In the article *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*,[29] Professors Richard A.

19. "Internalize" means to adopt privately a true belief one is guilty, despite having no personal knowledge whether they are indeed guilty. This typically occurs when people do not remember an incident and are confronted with evidence of their guilt, regardless of whether the evidence is feigned or real. In the Kassin study 28% of the subjects assumed they were guilty just because the computer crashed and the test evaluator asked "what happened?" These people sincerely believed they were guilty solely because of the evidence they were confronted with, not because they knew for a fact they had caused the computer to crash. The process of persons replacing gaps in their memory with imaginary experiences which they believe to be true is referred to as "confabulation." *See* GUDJONSSON, *supra* note 10.

20. Kassin & Kiechel, *supra* note 16, at 125-28.

21. *Id.* at 127.

22. *Id.* The SAT scores of the test subjects were 1300 or better.

23. *Id.*

24. Saul Kassin, *The Psychology of Confession Evidence*, AM. PSYCHOL. 221, 231 (Mar. 1997).

> The topic of confession evidence has been largely overlooked by the scientific community. As a result of this neglect, the current empirical foundation may be too meager to support recommendations for reform or qualify as a subject of "scientific knowledge" according to the criteria recently articulated by the U.S. Supreme Court (*Daubert v. Merrell Dow Pharmaceuticals Inc.* 1993). To provide better guidance in these regards, further research is sorely needed.

Id. Kassin left open, however, the possibility of admitting such evidence as "other specialized knowledge" under FRE 702.

25. Telephone Interview with Saul M. Kassin, Professor of Psychology, Williams College, Williamstown, Mass. (Nov. 24, 1998) [hereinafter Kassin Interview].

26. Professor Richard Ofshe claims, however, to have induced just such a confession. In the *Paul Ingraham* case, Ofshe (working as a consultant for the prosecution) first confirmed that at no time did Ingraham force his son and daughter to have sex. Suspecting Ingraham was delusional, Ofshe asked Ingraham whether he had indeed forced his son and daughter into having sex with each other and told Ingraham to think about it. Ofshe then permitted Ingraham to return to his cell. Ingraham later admitted to Ofshe that he had ordered his son and daughter to have sex. Ingraham even fabricated a detailed scenario to this effect and signed a confession to an incident which never occurred. Interview with Richard J. Ofshe, Professor of Sociology, University of California, Berkeley, at Fort Hood, Tex. (June 22, 1998). Paul Ingraham unsuccessfully appealed his guilty plea, conviction, and 20 year sentence. He remains in jail.

27. The elements of this tort include: (1) extreme and outrageous conduct on the part of the defendant; (2) the defendant's conduct was in an intentional or reckless manner; and (3) the defendant's acts caused severe emotional distress which resulted in bodily harm. RESTATEMENT (SECOND) OF TORTS §§ 46-47, 312, 313 (1965). "Liability has been found only where the conduct has been so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." St. Anthony's Medical Center v. H.S.H., 974 S.W.2d 606 (Mo. App. 1998). The Supreme Court of Alaska held that the "bodily harm" is not required to complete the tort of intentional or negligent infliction of emotional distress in *Chizmar v. Mackie*, 896 P.2d 196 (Alaska 1995), where a doctor incorrectly diagnosed a woman had contracted the AIDS virus.

28. *See* 42 U.S.C.A. §§ 1983, 1985 (West 1998).

Leo,[30] and Richard J. Ofshe[31] make a rare study of some sixty cases of alleged false confessions in the last quarter century. Of those, they categorize thirty-four as "proven" false confessions,[32] eighteen as "highly probable" false confessions,[33] and eight as "probable" false confessions.[34] The sixty cases break down as follows: five of the cases (eight percent) ended in arrest, twenty six of the cases (forty-three) ended with a dismissal of charges before trial, and the remaining twenty nine cases (forty-eight percent) ended in conviction.

They dissected each case to discover what creates false confessions and how false confessions differ from one another. Their primary method for determining guilt or innocence in these cases (not to mention the accuracy of the confessions) seems both unscientific and highly subjective. Leo and Ofshe typically read the defendant's post-admission narrative statement[35] and search for corroborating evidence in the case. The thirty-four proven cases also served as the foundation for their other article on false confessions, *The Decision to Confess Falsely: Rational Choice and Irrational Action.*[36]

Leo and Ofshe use a modified version of the classification system originally created by Kassin and Wrightsman. With this model they identify three different types of false confessions found in their sixty sample cases.[37] First is the "stress-compliant" false confession, which occurs when a suspect "makes his choice to escape an experience that for him has always been excessively stressful or one that has become intolerably punishing because it has gone beyond the bounds of a legally proper interrogation,"[38] (that is, actual use of physical force to obtain a suspect's confession). Second is the "coerced-compliant" confession where a suspect confesses "in response to classically coercive interrogative techniques such as threats of harm and/or promises of leniency."[39] Next is the "persuaded false confession,"[40] which occurs when a suspect has no memory of a crime, yet he readily admits that he committed the crime and adopts a sincere belief that he is guilty. This category of false confessions may be *coerced* or *non-coerced* depending on whether police interrogators used any actual or threatened harm toward the suspect or offered promises of leniency.

Each of these categories can be further broken down into sub-categories of compliant or persuaded false confessions. In "compliant" false confessions the suspect admits to incriminating facts that he knows are false. In "persuaded" false confessions the suspect admits to incriminating facts, not knowing whether they are true. In both cases, the suspect adopts the facts presented to him as the truth or believes himself to be guilty due to the persuasion of the interrogator or a lack of confidence in his own memory.[41] Gudjonsson refers to the latter as the character trait of "suggestibility."[42]

The studies of Gudjonsson, Kassin, Wrightsman, Leo, and Ofshe create an amalgam theory of false confessions. The theory embraces the existence of false confessions as a result of sophisticated psychological interrogation methods employed

29. *The Consequences of False Confessions, supra* note 16, at 429.

30. Assistant Professor of Criminology, Law and Society, University of California, Irvine.

31. Professor of Sociology, University of California, Berkeley.

32. *The Consequences of False Confessions, supra* note 16, at 435-438. Leo and Ofshe claim a "proven" false confession exists when an independent piece of evidence clearly exonerates the defendant (i.e., DNA test finds they are innocent, the murder victim is found alive, or the true perpetrator is caught and confesses).

33. Leo and Ofshe claim a "highly probable" false confession exists when no credible independent evidence supported the conclusion that the confession was true. "The evidence led to the conclusion that his innocence was established beyond a reasonable doubt." *Id.* at 437.

34. Leo and Ofshe claim a "probable" false confession exists where, although "the evidence of innocence was neither conclusive or overwhelming, there were strong reasons–based on independent evidence–to believe that the confession was false." *Id.*

35. A written statement made by the suspect after the initial interrogation has been completed and the suspect admits: "I did it." The purpose of the statement is to flesh out the details of the crime and memorialize the confession in writing. *See The Decision to Confess Falsely, supra* note 16, at 991-94 (referencing the use of the post-admission narrative statement). In *United States v. Hall*, 974 F. Supp. 1198 at 1204 (C.D. Ill. 1997), the court specifically found "Dr. Ofshe hypothesizes, and his peers appear to agree, that the major analytical method for determining the existence of a false confession is the post-admission narrative statement."

36. *The Decision to Confess Falsely, supra* note 16, at 979.

37. It is important to note that Leo and Ofshe studied only capital murder cases in their survey of 60 convictions by false confession. Other crimes such as rape, robbery, DUI, or even simple assault were not studied.

38. *Id*. at 997.

39. *Id*. at 998.

40. *Id*. at 999.

41. Kassin and Wrightsman, Gudjonsson, and Leo and Ofshe do not agree completely on the classification system. This article uses the classification system of Leo and Ofshe because it seemed more comprehensive and builds upon the work of Kassin and Wrightsman. They were the first to classify false confessions in 1985. *See The Social Psychology of Police Interrogation, supra* note 16, at 189.

by police. These methods produce confessions, both true and false.[43] Absent substantial corroborating evidence, the police cannot tell a true confession from a false confession.[44] Social scientists and psychologists skilled in police interrogations, however, can recognize certain factors that may cause a person to falsely confess, and, in limited cases, opine whether a confession is indeed false, or at least unreliable.[45]

The false confession theory is not without critics. Professor Paul Cassell[46] has repeatedly assailed the numbers used by Leo and Ofshe. He states that the "empirical lynchpin for their proposals is simply missing"[47] and derides the anecdotal evidence collected by Leo and Ofshe as having little information.[48] Cassell points out that Leo and Ofshe cannot presently quantify the number or the percent of false confessions.[49] A potentially fatal flaw for a theory that is based on science.

Cassell attacks the premise offered by Leo and Ofshe, that false confessions "occur regularly"[50] by simply looking at the numbers. By his estimate, some 386,000 police interrogations for murder occurred during the period of Leo and Ofshe's sixty false confessions.[51] Cassell calculates the odds of a false confession during a police interrogation in this country at between 1 in 2400 and 1 in 90,000.[52] Of course, Leo and Ofshe could not examine all 386,000 interrogations during this period. But the infinitesimal number of alleged false confessions during this period demonstrates Cassell's argument: Leo and Ofshe may have identified a potential problem with the way interrogations are conducted in this country, but it is premature to come to any conclusions about false confessions. Like Kassin, he believes this phenomenon needs further study.

Cassell also proposes an empirical study using a random sample of criminal cases to determine the frequency of false confessions in this country. He details a method for conducting such a study.[53] This study might uncover the frequency of false confessions and demonstrate whether it is an anomaly in criminal law enforcement or a pervasive problem for the courts in the criminal justice system that can be remedied.

Leo and Ofshe acknowledge the problems associated with such a small representative sample of only sixty cases and state:

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42. GUDJONSSON, *supra* note 10, 104-13. Gudjonsson also devised the "Gudjonsson Suggestibility Scales," which measure the degree of susceptibility of a person to suggestion. *Id.* at 131-36.

43. According to Kassin, these methods include deception, trickery, and psychologically coercive methods of interrogation. *See* Kassin, *supra* note 24, at 221. Ofshe and Leo give good examples of these methods. Their list includes: polygraph tests, false claims of strong evidence or eyewitness accounts, pseudo-scientific evidence (e.g., proton-neutron test), feigned co-conspirator statements, exaggerated scientific evidence (e.g., DNA testing), and actual or implied promises of threats or leniency. *See The Decision to Confess Falsely*, *supra* note 16, at 1008-88. Excellent examples of the "ploys" used in interrogation follow their definitions.

44. Saul M. Kassin & Christina T. Fong, "I'm Innocent!": Effects of Training on Judgements of Truth and Deception in the Interrogation Room (Oct. 1998) (unpublished manuscript, on file with the author).

45. Ofshe has testified in the past on the issue of whether a confession is false. An example of his opinion testimony can be found at the web site for the West Memphis 3. *Jessie Misskelley's Trial: Transcript of Dr. Richard Ofshe's Testimony* (visited Jan. 6, 1999) <http://www.wm3.org/html/confession_analysis.html>. Ofshe does not always offer such an opinion, however. *See* Susan Gembrowski, *Murder Confessions Coerced, Expert Testifies in Crowe Case*, SAN DIEGO TRIB.-UNION, Aug. 11, 1998, at B-3: 7-8. In one situation, Ofshe testified that a confession was coerced but declined to opine as to whether the confession was true or false. Kassin refuses to give an opinion concerning whether a confession is false. He does not believe he (or anyone else for that matter) is qualified to give such and opinion. Kassin Interview, *supra* note 25. This limitation on expert testimony is consistent with *United States v. Birdsall*, 47 M.J. 404, 410 (1998), where the court held the expert cannot act as a "human lie detector" and opine as to the credibility of a witness or their statements.

46. Professor of Law, University of Utah College of Law.

47. Paul Cassell, *Balanced Approaches to the False Confession Problem: A Brief Comment on Ofshe, Leo, and Alshuler*, 74 DEN. U. L. REV. 1123, 1125 (1997).

48. Paul Cassell, *Protecting the Innocent from False Confessions and Lost Confessions–And from Miranda*, 88 J. CRIM. L. AND CRIMINOLOGY 497, 505 (1998).

49. Cassell, *supra* note 47, at 1126. Cassell also points out that the "null hypothesis" might explain this. In other words, false confessions cannot be quantified because they occur so infrequently as to be insignificant.

50. *The Social Psychology of Police Interrogation*, *supra* note 16, at 191.

51. *See* Cassell, *supra* note 48, at 506. Cassell uses a conservative figure extrapolated from FBI and DOJ crime statistics for homicide and interrogation rates nationwide during the relevant time periods.

52. *Id.* at 502. Cassell also estimates that the total number of people actually being convicted by false confessions may number between 10 to 45 people annually in the United States. By comparison, only 50 people die from lightning strikes in any given year in the United States. *Id.* at 519-21.

53. *Id.* at 507-13. Cassell's detailed proposal includes complex sampling methodologies and statistical analysis which any social scientist would envy. He proposes using a random sample of recorded confessions (preferably videotaped) and then examining each of these cases individually. The sampling base would have to be incredibly large (at least 1,000 confessions or more), however, to capture at least one or more allegations of a false confession. Further the subjective determination of whether a "probable" false confession actually exists could wreak havoc with making objective analysis of the data. Cassell conducted a similar study in Salt Lake City in 1984 with Brent Hayman. They studied 173 cases at random and found no allegations of a false confession. *Id.* at 509. *See* Paul G. Cassell & Brent S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 U.C.L.A. L. REV. 839 (1996).

> The sixty cases discussed below do not constitute a statistically adequate sample of false confession cases. Rather they were selected because they share a single characteristic: an individual was arrested primarily because police obtained an inculpatory statement that later turned out to be a proven, or highly likely, false confession.[54]

Leo and Ofshe concede that they cannot determine the frequency of false confessions. They reiterate that their hypothesis cannot be tested by empirical means for three reasons: (1) a lack of police audio or video recordings of interrogations,[55] (2) a failure to keep law enforcement records concerning the frequency of interrogations in America, and (3) cases of false confessions do not enjoy wide attention in the media.[56] They also reject Cassell's assertion that quantification is necessary or even possible because of concerns of methodology in such a study.

> Cassell criticizes the false confession literature for failing to provide a ballpark estimate of the frequency of confessions, as if empirical researchers somehow bear this burden. However one might view the absence of any such estimates as resulting from most researchers' preference for an honest "I don't know" to the use of guesswork to arrive at specious estimates of real world facts. Until it becomes possible to draw a random sample of confession cases from a definable universe and accurately determine both the ground truth of the interrogation and the validity of the confession statement in each case, it will not be possible to arrive at a methodologically acceptable estimate of the annual frequency of wrongful convictions.[57]

Thus, the experts find themselves in an intellectual stalemate over whether further empirical research in the area of false confessions is even possible. Yet, Cassell's critique of the theories of Leo and Ofshe does not stop there.

Cassell attacked the sixty cases that Leo and Ofshe use in their study to map the false confession theory.[58] He examined the twenty-nine cases of alleged false confessions that resulted in conviction[59] and concluded that nine were indeed guilty,[60] and their confessions essentially true. Of the remaining twenty cases, Cassell asserts that an additional nine cases were undisputed false confessions,[61] which all parties agreed were false. Therefore, of the twenty disputed cases, Leo and Ofshe were wrong nine times by Cassell's accounting.[62] A fifty-five percent accuracy rate, or conversely, a forty-five percent rate of error. A coin toss would almost prove as accurate.

This presents two problems for the Leo and Ofshe theory. First, it underscores the high level of subjectivity present when analyzing allegations of false confessions. In each case, Cassell presumably looked at the same evidence as Leo and Ofshe. How then could three intelligent, well-educated, and legally savvy persons find such dissimilar results when confronted with the same evidence? Second, Cassell's finding also questions the foundation of Leo and Ofshe's theory itself. How much of the rational decision-making model for false confessions was based on these nine questionable cases? Should these cases remain part of the representative sample or be discarded? Does this potential problem extend to the thirty-one other cases Cassell did not examine? At the very least, the debate between Leo and Ofshe, and Cassell pinpoints the real problem of accurately identifying false confessions in an objective manner and poses some important questions for researchers in this area.

Armed with the facts they have, many of the false confession theorists have marched to the courtroom where many appear as consultants to the defense and even as expert witnesses.[63] Psychologists, social psychologists, psychiatrists, and other professionals are now using those theories to evaluate an accused's

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54. *The Consequences of False Confessions*, *supra* note 16, at 435-36.

55. Currently only two states require recording of police interrogations, Alaska and Minnesota. *See* Mallot v. State, 608 P.2d 737 (Alaska 1980); Stephan v. State, 711 P.2d 1156 (Alaska 1985); Scales v. Minnesota, 518 N.W.2d 587 (Minn. 1994). No federal or military courts have such requirements. Texas law requires the electronic recording of any confession as a prerequisite to admission at trial, but the interrogation preceding the confession itself does not have to be recorded. *See* TEX. CODE OF CRIM. PRO. § 38.22(3) (West 1998).

56. Richard A. Leo & Richard J. Ofshe, *Using the Innocent to Scapegoat Miranda: Another Reply to Paul Cassell*, 88 J. CRIM. L. AND CRIMINOLOGY 557, 560 (1998).

57. *Id*. at 561.

58. Paul G. Cassell, *The Guilty and The Innocent: An Examination of Alleged Cases of Wrongful Conviction from False Confession*, 22 HARV. J.L. & PUB. POL'Y 523 (1999).

59. Cassell did not examine the other 31 cases of alleged false confessions that ended in dismissal, arrest, or acquittal.

60. *Id.* at 523-26.

61. *Id.* at 587.

62. *Id.* at 587-89.

confession.[64] Is this just a novel theory based on "junk science,"[65] or is it reliable enough to be admissible in court through the use of expert testimony to guide a jury in weighing the confession of an accused?

The Subject of False Confessions: A Place for Experts?

Elliot Aronson[66] was probably the first expert to testify in this area. In the late 1980s, this professor of psychology from the University of California testified for the defense in the murder case of *People v. Bradley Nelson Page*.[67] His testimony supported the defendant's allegations of false confession and the coercive interrogation tactics used to interrogate the defendant.[68] For the first time in recorded American jurisprudence, a defense attorney offered, and a court admitted into evidence, the substantive testimony of an expert witness on the subject of false confessions. Aronson's testimony seems all the more dramatic when considering the difficult test of admissibility for scientific evidence at the time of trial and appeal.[69]

Since 1923, state and federal courts subscribed to the standard of expert testimony admissibility as outlined in *Frye v. United States*.[70] *Frye* excluded expert opinion testimony based on a scientific technique unless the relevant scientific community "generally accepted" the technique as being reliable.[71] Seventy years later, everything changed when the United States Supreme Court dispensed with the rigid *Frye* test and replaced it with a more flexible test espoused in the *Daubert*,[72] *Joiner*,[73] and *Kumho Tire Co*.[74] cases. Federal courts were no longer bound by the "general acceptance" test. In its place, the Supreme Court turned to the Federal Rules of Evidence (FRE).[75] State courts remained free to adopt either standard and some jurisdictions, such as New York,[76] still adhere to the *Frye* test.

For those jurisdictions using the FRE or an analog to those rules (as does the military), *Daubert* and *Kumho Tire Co.* dramatically changed the admissibility of expert testimony. Congress approved the FRE long after the *Frye* decision and incorporated in the FRE a specific provision addressing expert witnesses, FRE 702.[77] The text of FRE 702 makes no mention

63. Kassin and Ofshe have appeared as expert witnesses on this subject matter. The most notable case probably is *United States v. Hall*, 974 F. Supp. 1198 (C.D. Ill. 1997), where Dr. Ofshe testified as an expert witness in this area. Ofshe also testified at a court-martial at the 4th Infantry Division at Fort Hood, Texas.

64. The defense psychotherapist in *Beltran v. Florida*, 700 S.2d 132, 133-34 (Fla. Dist. Ct. App. 1997), unsuccessfully cited the Kassin experiment in an attempt to get admitted as an expert witness on false confessions.

65. Christopher Slobogin, *Psychiatric Evidence in Criminal Trials: To Junk or Not To Junk?*, 40 WM. & MARY L. REV. 1, 3 (1998).

66. Professor of Psychology, University of California at Santa Cruz.

67. 2 Cal. Rptr. 2d 898 (1991), *rehearing denied* 1992 Cal. App. LEXIS 76 (1992), and *review denied* 1992 Cal. LEXIS 1516 (1992).

68. *Id*. at 908-12.

69. Professor Aronson's expert testimony was admitted under *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). The court constrained his testimony, however, by not permitting him to testify as to the veracity of the defendant's confession. *Id.* at 911. The trial court judge also conducted a hearing out of the presence of the hearing of the jurors to determine what facets of Professor Aronson's testimony should be admitted. *Id.* at 909-11. Profesor Aronson did not have the benefit of the theories of Gudjonsson, Kassin, Wrightsman, Leo, or Ofshe. He cited a few experiments to the court for scientific validity, including the famous Milgram experiment, where test subjects delivered electric shocks to fictional test subjects at the urging of the test administrators. No studies cited by Arnonson bore directly on the issue of false confessions or even police interrogation.

70. 293 F. 1013 (D.C. Cir. 1923).

71. *Id.* at 1014.

72. Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786 (1993). This case involved the use of expert witnesses to prove or disprove that a drug called "Bendectin" manufactured by Merrell Dow caused birth defects in children when their mothers took the drug during pregnancy. Both the district court and the Court of Appeals incorrectly used the *Frye* test when weighing the admissibility of such testimony.

73. General Electric Co. v. Joiner, 118 S. Ct. 512 (1997). This case concerned whether PCBs could cause cancer in electricians exposed to the chemical. The trial court excluded the testimony of plaintiff's proffered expert because it found the studies of laboratory mice upon which his expertise was based was too attenuated to the predicament of human beings. The Supreme Court upheld the district court's findings, holding that the trial judge did not abuse his discretion in excluding the expert testimony.

74. Kumho Tire Co. v. Carmichael, 119 S. Ct. 1167 (1999). This case addressed whether a witness in tire manufacture and defects was qualified as an expert in "scientific" or "other specialized knowledge." The Supreme Court erased the distinction between the two and identified "reliability" as the trial court's mission in evaluating the testimony of proffered experts.

75. *Daubert*, 113 S. Ct. at 2793.

76. *See* People v. Green, 250 A.D.2d 143 (N.Y. App. Div. 1998). The court upheld the exclusion of false confession expert testimony under the *Frye* test, citing New York's refusal to follow *Daubert*.

of the term "general acceptance." The *Daubert* Court also found that the drafter's comments were devoid of any reference to the *Frye* case or the "general acceptance" standard.[78] The Court held:

> Given the Rules' permissive backdrop and their inclusion of a specific rule on expert testimony that does not mention "general acceptance," the assertion that the Rules somehow assimilated *Frye* is unconvincing. *Frye* made "general acceptance" the exclusive standard for admitting scientific expert testimony. That austere standard, absent from, and incompatible with, the Federal Rules of Evidence, should not be applied in federal trials.[79]

Trial court judges no longer needed to consider whether the scientific evidence had reached "general acceptance" in the scientific community. Instead the Court installed trial court judges as "gatekeepers," who must decide whether scientific evidence or testimony was both relevant and reliable.[80] Relevancy posed no problems. Judges typically rule whether evidence is relevant. Reliability was another matter. The *Daubert* Court carefully laid out a road map for reliability that trial court judges could use to evaluate the scientific validity of any proffered evidence based on a scientific method. The Court identified four factors to weigh when determining whether such evidence would be "reliable" to the trier of fact.[81]

The first factor is whether a theory or technique constitutes "scientific knowledge," which may be determined by whether it can be tested.[82] In other words, can the evidence be proven by empirical testing that ascertains the truth or falsity of the hypothesis being advanced?

Second, whether the pertinent theory or technique has been subjected to peer review or publication?[83] The *Daubert* Court clearly stated that publication "does not necessarily correlate to reliability" and that "publication (or lack thereof) in a peer reviewed journal thus will be a relevant, though not dispositive,[84] consideration in assessing the scientific validity"[85] of a particular theory or technique.

Third, what is the known or potential rate of error for a specific scientific technique? Fourth, the *Daubert* Court took a bow to the *Frye* test and stated, "general acceptance" can yet have a bearing on the inquiry"[86] in determining whether a theory or technique is indeed scientifically valid. Unless the trial court finds that the theory is scientifically valid, it has no evidentiary reliability or relevance and should not be admitted under FRE 702.

The Court also cautioned trial judges to consider the other Rules of Evidence in weighing the decision to admit or deny such evidence. The Court pointed out that vigorous cross examination, presentation of contrary evidence, and well-tailored instructions to the jury may attack the shaky but admissible evidence.[87]

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77. FED. R. EVID. 702 (governing testimony by expert witnesses). Rule 702 is identical to Military Rule of Evidence 702. It 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." *Id.*

78. *Daubert*, 113 S. Ct. at 2794.

79. *Id.*

80. *Id.* at 2795. Military courts had already been released from the *Frye* standard of "general acceptance" and told to follow MRE 702 as far back as 1987 in *United States v. Gipson*, 24 M.J. 246 (C.M.A. 1987), when the Court of Military Appeals ruled that MRE 702 superceded the *Frye* test.

81. *Daubert*, 113 S. Ct. at 2796.

82. *Id.*

83. *Id.* at 2797.

84. The Supreme Court identified this factor as not being dispositive, but did not identify which of the four factors were dispositive.

85. *Daubert*, 113 S. Ct. at 2797.

86. The Court cautioned that,

> The inquiry envisioned by Rule 702 is, we emphasize, a flexible one. Its overarching subject is the scientific validity–and thus the evidentiary relevance and reliability–of the principles that underlie a proposition. The focus of course must be solely on the principles and the methodology, not on the conclusions that they generate.

Id.

87. *Id*. at 2798.

Four years later in the case of *General Electric Co. v. Joiner*,[88] the Supreme Court reaffirmed its holding in *Daubert* and held that the decision of a trial court judge to admit or deny expert testimony under FRE 702 (or any other evidentiary ruling) would be reviewed only for an abuse of discretion.[89]

This year, in *Kumho Tire Co. v. Carmichael*,[90] the Supreme Court extended the potential use of some or all of the *Daubert* factors to evaluate the reliability of any expert witness testimony under FRE 702.[91] The Court declared that judges serve as "gatekeepers" for *all* expert testimony, not just scientific evidence.[92] This ended the distinction between "scientific" and "nonscientific" expert testimony under FRE 702.[93] The Court stated that trial judges "may" use the *Daubert* factors in arriving at a decision to find expert testimony reliable. The Court emphasized, however, that the *Daubert* factors were not a checklist or a test[94] and that the district court's approach to determining the reliability of a witness must be a "flexible"[95] one, dependent on the facts and circumstances of each particular case.[96] The Court remarked:

> The conclusion, in our view, is that we can neither rule out nor rule in, for all cases and for all time the applicability of the factors mentioned in *Daubert*, nor can we now do so for subsets of cases categorized by category of expert or by the kind of evidence. Too much depends on the particular circumstances of the particular case at issue.[97]

The *Daubert* factors are not an inclusive or exclusive list of factors to determine the reliability of every expert's testimony. They serve primarily as an illustration or guideline of the reliability inquiry each trial court judge must make.[98] Judges now must ascertain not only the reliability of a proffered piece of expert testimony, but the *means* to determine the reliability of that testimony.[99] That may entail using the *Daubert* factors, and sometimes it will preclude the use of some or all of them. The trial court's decision will be reviewed only for an abuse of discretion.[100] Regardless, the Court entreated the district courts to require expert witnesses to employ the "same intellectual rigor" used by experts in the relevant field.[101]

Through *Daubert*, *Joiner*, and *Kumho Tire Co.*, the Supreme Court clarified FRE 702 for federal courts and any state courts that followed FRE 702. Appellate courts would not dictate to the trial courts which expert testimony could or could not be admitted, or what constitutes an appropriate means to determine the reliability of an expert witness. Appellate courts could not overturn a trial judge's decision unless he abused his discretion in admitting or excluding such evidence. That same rule applies to military courts-martial, which follow FRE 702. Relevance and reliability became the sole benchmark of admissibility for expert testimony.

In the six years since Gudjonsson's theory of false confessions and the Supreme Court's decision in *Daubert*, many courts have evaluated the reliability of the theory underlying the expert testimony of psychologists, sociologists, and other trained professionals in the areas of false confessions.[102] These

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88. 118 S. Ct. 512 (1997).

89. *Id.* at 517, 519.

90. 119 S. Ct. 1167 (1999).

91. *Id.* at 1175.

92. *Id.* at 1174.

93. *Id.* at 1174-75.

94. *Id.* at 1171.

95. *Id.* at 1175.

96. *Id.*

97. *Id.* at 1175.

98. Indeed the Court stated the *Daubert* factors were "meant to be helpful, not definitive. Indeed, those factors do not all apply in every instance in which the reliability of scientific evidence is challenged." *Id.* at 1175.

99. *Id.* at 1176.

100. *Id.* at 1176-77.

101. *Id.* at 1176.

102. Two federal circuit courts have ruled on this matter, the 7th Circuit in *United States v. Hall*, 93 F.3d 1337 (7th Cir. 1996), and the 1st Circuit in *United States v. Shay*, 57 F.3d 126 (1st Cir. 1995). Only thirteen state courts have ruled on this matter. *See infra* notes 125-137 (providing a complete listing of how each state ruled).

cases often raised more questions than they answered. While the *Daubert* factors might work in evaluating "hard" science such as medicine, what about "soft" sciences like psychology and sociology where empirical data is scarce and anecdotal evidence is routinely used to predict the erratic nature of human behavior? Would *Daubert* be too harsh a standard if it were applicable to such studies? If so, what *Daubert* factors, if any, might be useful in evaluating this new form of expert testimony? Could courts use any other inquiry or factors to determine this new theory's reliability?

As in the Kassin Study, scientific principles of controlled experimentation and hypothesis testing are clearly at work in the false confession theory, but much of the theory is also based on anecdotal evidence. In many of those cases, the theorists themselves were personally involved and observed the false confession phenomenon at close range. Gudjonsson and Ofshe frequently testified or worked as experts for the defense, observing or conducting hundreds of police interrogations. From where should expertise spring–scientific study, personal observation, or both? The First and Seventh Circuits Courts of Appeals found that expertise is grounded in science and that the *Daubert* factors can measure the reliability of the false confession theory.[103]

The Seventh Circuit, in *United States v. Hall*,[104] overturned the district court's decision to exclude the testimony of Dr. Richard Ofshe as an expert in the area of false confessions. On a *de novo* review,[105] the Seventh Circuit found that the district court failed to apply the *Daubert* factors in evaluating the validity of Ofshe's theory and testimony. The court recognized that "[s]ocial science in general, and psychological evidence in particular, have posed both analytical and practical difficulties for courts attempting to apply [FRE] 702 and *Daubert.*"[106] But this did not excuse the district court's duty to treat it as any other form of *scientific*[107] expert testimony under FRE 702.[108] The Seventh Circuit remanded the case for an evidentiary hearing at the district court which later applied the *Daubert* factors in part, reversed itself, and admitted a large portion of Dr. Ofshe's testimony.[109] By subjecting Dr. Ofshe's expert testimony to the *Daubert* litmus test, the Seventh Circuit found it to be scientific in nature.

Years ahead of its time, the district court, on remand, used the "flexible" approach, later espoused by the Supreme Court in *Kumho Tire Co.*, to assess the reliability of Dr. Ofshe's theory. In a lengthy opinion, the court stated that the *Daubert* factors might apply to "non-Newtonian" science or other specialized knowledge, but to different degrees.[110] The court also found that the "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 [FRE] 702."[111] The court cited the work of Professor Edward J. Imwinkelried's epistemological[112] analysis of expert testimony[113] and used the *Daubert* factors as a guideline, not a litmus test, for admissibility. This flexible analysis was a precurser to the Supreme Court's later holding in *Kumho Tire Co.*[114]

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103. *Id.*

104. 93 F.3d 1337 (7th Cir. 1996), *on remand, motion denied in part*, 974 F. Supp. 1198 (C.D. Ill. 1997).

105. The Seventh Circuit followed a two-step analysis of the district court's action. First it determined whether the district court judge had used the correct legal standard in evaluating Dr. Ofshe's proffered theories and testimony. This was a review of the applicable law and, as such, was *de novo*. Then, if the Seventh Circuit found the district court applied the correct legal standard (*Daubert* and FRE 702), it would review the district court's decision to exclude Dr. Ofshe's testimony for an abuse of discretion. *Id.* at 1342. This would be consistent with *Joiner*, decided a year later by the Supreme Court. The district court in this case utterly failed to mention *Daubert* or to articulate its reasons for denying Dr. Ofshe's testimony within the *Daubert* framework. *Id.*

106. *Id.* at 1342.

107. Since the Supreme Court's decision in *Kumho Tire Co. v. Carmichael*, 119 S. Ct. 1167 (1999), the distinction between "scientific" and "nonscientific" expert testimony under FRE 702 has been largely eviscerated.

108. *Hall*, 93 F.3d at 1342-43.

109. United States v. Hall, 974 F. Supp. 1198, 1199-1206 (C.D. Ill. 1997).

110. *Id.* at 1202. The court did not refer to psychology and social psychology as a "soft" science, but it did refer to classical "Newtonian science" (i.e., physics, chemistry, etc.) as "hard" science, thus implying that the other sciences which cannot avail themselves of demonstrable, empirical proof were "soft." *Id.* at 1203.

111. *Id.* at 1205.

112. Epistemological: Of or relating to "the branch of philosophy that studies the nature of knowledge, its presuppositions and foundations, and its extent and validity." THE AMERICAN HERITAGE DICTIONARY 619 (3d ed. 1992).

113. *Hall*, 974 F. Supp. at 1202 (citing Imwinkelried, *The Next Step After Daubert: Developing A Similarly Epistemological Approach To Ensuring The Reliability of Nonscientific Expert Testimony*, 15 CARDOZO L. REV. 2271 (1994)). Professor Imwinkelried cites four potential standards for evaluating such testimony for reliability. They include: extending the *Daubert* standard to non-scientific expert testimony, using the old *Frye* test of "general acceptance," amending FRE 702 to define "reliability," and epistemological analysis. Of the former, Professor Imwinkelried calls for creating objective standards to measure the reliability of an expert's testimony. This is a tall order and one as diverse as the number of experts who might testify.

The district court then placed significant limitations on Dr. Ofshe's testimony.[115] It permitted him to testify "that false confessions do exist, that they are associated with the use of certain police interrogation techniques, and that certain of those techniques"[116] were used in the case of the defendant.

The court, however, prohibited Dr. Ofshe from testifying about whether the interrogation techniques caused the defendant to falsely confess, and prohibited him from testifying about the specifics of the defendant's statement to the police. The court left these matters to the jury.[117] In so doing, the court prevented Ofshe from addressing the credibility of the defendant's confession.

The court also predicated the admission of Ofshe's testimony on a defense admission of evidence of coercive police interrogation tactics and evidence from the accused that he believed his confession was coerced.[118] This foundation seems to be a prudent measure in any case where the accused raises an issue of false confession. Otherwise, the expert could testify about the hearsay statements that the accused made to him and get those statements before the jury without the accused being cross-examined by the prosecution or testifying under oath.

Other courts have wrestled with the issue of "soft" versus "hard" science under *Daubert*, particularly in the area of false confessions. In *United States v. Shay*,[119] the First Circuit Court of Appeals held the district court erred when it excluded the expert testimony of Dr. Robert Phillips, a psychiatrist. The defense proffered that Dr. Phillip's testimony would indicate that the defendant suffered from "pseudologia fantasica,"[120] which might explain his alleged false confession to another prisoner. The trial court reasoned that the jury could determine the credibility of the defendant's statements without the testimony of Dr. Phillips.[121]

The First Circuit did not address the *Daubert* reliability factors, but it determined that evidence concerning the credibility of the defendant's statements could not justify automatic exclusion of Dr. Phillips' testimony under FRE 702.[122] The court remanded the case to the district court for a full evidentiary hearing concerning the admissibility of Dr. Phillips' testimony. In so doing, the court implied that the use of the *Daubert* factors might be appropriate to evaluate the expert testimony.[123] Thus, the only two federal circuit courts to address the issue of false confession expert testimony have used the *Daubert* factors to assess the admissibility of such evidence, albeit in a relaxed fashion. No other federal circuit court has held differently.[124]

State courts have also addressed the admissibility of false confession expert testimony. Maine,[125] New Hampshire,[126] New York,[127] Florida,[128] Illinois,[129] Minnesota,[130] and Wyoming[131] have ruled that such testimony is inadmissible. Indiana,[132] Nebraska,[133] Ohio,[134] North Carolina,[135] Texas,[136] and Washington[137] have ruled that the testimony is admissible. The courts that have admitted this evidence have uniformly placed great limits on the scope of the expert's testimony. Few of these cases conducted a full analysis under *Daubert*, some still relied

114. 119 S. Ct. 1167 (1999).

115. United States v. Hall, 974 F. Supp. 1198, 1205 (C.D. Ill. 1997).

116. *Id.* at 1205.

117. *Id*.

118. *Id.* at 1206. This requirement from the court entices the accused to testify on the merits if he wishes to raise the issue of a false confession and get his expert to testify before the jury.

119. 57 F.3d 126 (1st Cir. 1995).

120. A mental condition (often characterized as an extreme form of pathological lying) in which one lies or exaggerates in order to achieve popularity or notoriety. It is often referred to as "Munchaussen's Disease" after Baron Von Munchaussen who wandered the countryside spinning tall tales. AMERICAN PSYCHIATRIC ASSOCIATION, THE DIAGNOSTIC AND STATISTICAL MANUAL FOR MENTAL DISORDERS 471-75 (4th ed. 1994) has classified this condition as a "factitious disorder."

121. *Shay*, 57 F.3d at 130.

122. *Id.* at 133.

123. *Id.* at 132-33.

124. *See* United States v. Raposos, 1998 U.S. Dist. LEXIS 19551 (S.D.N.Y. Dec. 14, 1998) (applying an extensive *Daubert* analysis and permitting an expert on false confessions (a clinical psychologist named Sanford Drob) to testify on everything, including the credibility of the confession).

125. State v. MacDonald, 718 A.2d 195, 197-198 (Me. 1998) (holding that a psychologists' expert testimony as to whether children of alcoholics suffer from a syndrome which may explain why they would falsely confess, the court weighed the *Daubert* factors and found such testimony unreliable).

126. State v. Monroe, 718 A.2d 878 (N.H. 1998) (upholding the trial court's decision to deny funds for an expert witness in the area of false confessions).

127. People v. Green, 250 A.D.2d 143 (N.Y. App. Div. 1998) (ruling that although expert testimony on false confession may be admissible under the *Daubert* factors, New York still follows the *Frye* test for "general acceptance," thus the expert testimony concerning false confessions must be excluded under that test).

on the *Frye* test, and many permitted or excluded the expert testimony upon a simple reading of FRE 702 or FRE 403,[138] without regard to the *Daubert* factors. Thus, state courts remain divided about what reliability test applies to false confession expert testimony and whether or not it is admissible. This exposes one consequence of the *Daubert-Kumho* analysis for the reliability of expert testimony. Different judges using a flexible reliability standard may come to different conclusions as to the admissibility of controversial expert testimony. Admissibility becomes highly judge-dependent as each court is left to its own discretion to ascertain reliability.

Military courts have treated psychological evidence in different ways. Eyewitness identification expert testimony has been subjected to tests under the *Daubert* standards for admissibility,[139] but military courts have admitted expert testimony on rape trauma syndrome simply upon a judge's finding that the testimony is "relevant" and reliable under MRE 702.[140] Expert testimony concerning child sexual abuse accommodation syndrome only needed to be "helpful" to be admitted under MRE 702 in one case.[141] A military court also admitted expert testimony on post-traumatic stress disorder caused by child abuse.[142]

Military appellate courts have addressed false confession expert testimony on at least two occasions. In *United States v. Koslosky*,[143] the Air Force Court of Criminal Appeals held that the military judge did not abuse his discretion in excluding expert testimony in the area of false confessions. Four years later, in *United States v. Griffin*,[144] the Court of Appeals for the Armed Forces also addressed the issue of false confession expert testimony.

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128. *See* Bullard v. State, 650 S.2d 631 (Flor. 1995) (upholding the trial court's denial of an expert in police interrogation and coercion to prove the defendant's testimony was coerced); Beltran v. State, 700 S.2d 132 (Flor. 1997) (holding the *Kassin* study was not enough to establish relevance of false confession expert testimony in a trial for sexual battery).

129. People v. Gilliam, 670 N.E.2d 606 (Ill. 1996) (upholding trial court's decision to grant prosecution's motion in limine preventing psychologist from testifying about the defendant's confession, the voluntariness of the confession, or the circumstances under which it was taken). This opinion can also be cited for the limited proposition that the court permitted the expert to testify to some degree.

130. Bixler v. State, 582 N.W.2d 252 (Minn. 1997) (holding the trial court judge did not abuse his discretion in excluding the expert testimony on false confessions).

131. *See* Madrid v. Wyoming, 910 P.2d 1340 (Wyo. 1996) (where the court declined to address the denial of an expert witness in false confessions); Kolb v. Wyoming, 930 P.2d 1238 (Wyo. 1996) (holding the trial court did not abuse its discretion in excluding false confession expert testimony).

132. Cassis v. State, 684 N.E.2d 233 (Ind. App. 1997) (admitting but limiting the testimony of Dr. Ofshe as an expert witness on police interrogation tactics). Interestingly the state did not object to Dr. Ofshe's expertise or methodology, merely to his opinion testimony concerning the confession. *Id.* The trial court sustained the objection, which was affirmed on appeal. *Id.*

133. State v. Buechler, 572 N.W.2d 65 (Neb. 1998) (holding the trial court committed prejudicial error when it excluded expert testimony on false confessions).

134. State v. Wells, (No. 93 CA 9) 1994 Ohio App. LEXIS 4122 (1994), *appeal not allowed by* 673 N.E. 2d 138 (Ohio 1996) (admitting the expert testimony on false confession, the expert was prohibited from commenting on the credibility of the accused or the reliability of the confession).

135. Baldwin v. State, 482 S.E.2d 1, 10-13 (N.C. Ct. App. 1997), *review granted*, 485 S.E.2d 299 (N.C. 1997), *review dismissed*, 492 S.E. 2d 354 (N.C. 1997) (holding the exclusion of a psychiatrist (Dr. Gary Hoover) who opined the defendant would have been susceptible to giving a false confession in response to the police interrogation tactics used against him, was error).

136. Lenormand v. State, (No. 09-97-150 CR) 1998 Tex. App. LEXIS 7612 (Dec. 9, 1998) (admitting expert testimony concerning the defendant's state of mind at the time of the interrogation and his susceptibility to coercion, but prohibiting any discussion of the defendant's guilt or veracity).

137. State v. Miller, (No. 15279-1-III) 1997 Wash. App. LEXIS 960 1997), *review denied by* 953 P.2d 95 (Wash. 1998) (remanding the case for a new trial with the finding that the excluded false confession expert testimony would have been "helpful" to the jury).

138. FED. R. EVID. 403 (excluding evidence when its prejudicial effect substantially outweighs its probative value); MIL. R. EVID. 403 (same).

139. *See* United States v. Brown, 45 M.J. 514, 517 (Army Ct. Crim. App. 1996), *affirmed by* United States v. Brown, 49 M.J. 448 (1998) *and* United States v. Garcia, 40 M.J. 533 (A.F. Ct. Crim. App. 1994).

140. United States v. Houser, 36 M.J. 392, 398-400 (C.M.A. 1993). This case was decided before the Supreme Court decided *Daubert*, but the "relevant and reliable" standard could have been lifted verbatim from *Daubert* even if all four of the factors were not accounted for to determine reliability.

141. United States v. Hansen, 36 M.J. 599, 604 (A.F. Ct. Crim. App. 1992).

142. United States v. Johnson, 35 M.J. 17 (C.M.A. 1992).

143. (No. ACM 30865) 1995 CCA LEXIS 254 (A.F. Ct. Crim. App. 1995).

144. 50 M.J. 278 (1999).

In *Griffin*, the military judge conducted a lengthy pre-trial hearing to determine the merits of expert testimony on false confessions.[145] The defense proffered Dr. Rex Frank as an expert witness on false confessions. Dr. Frank's background included a review of false confession research materials, a battery of psychological tests on the accused, and a six-hour interview with the accused.[146] Despite this background, the military judge found the evidence unreliable.

> I conclude that Dr. Frank knows a lot about the subject, but that this is not a proper subject matter for expert testimony in that this information will be more confusing to the members than helpful to them. The evidence he has does not have the necessary reliability to be of help to the trier of fact. Finally, under MRE 403, I conclude that any probative value of this evidence is substantially outweighed by the danger of confusion of the members and also by consideration of waste of time.[147]

Like many of their civilian counterparts, military courts may use the *Daubert* factors to determine whether expert testimony is reliable. Under *United States v. Houser*,[148] military judges must probe several fields, including: the qualifications of the expert witness, the subject matter of the expert testimony, the basis for the expert testimony, the legal relevancy of the expert testimony, the reliability of the scientific expert testimony, and the probative value of the expert testimony for the court.[149] The court articulated a standard of reliability parallel to the *Daubert* factors, stating that "when determining the reliability of scientific evidence, it is appropriate to determine whether the evidence embraces a new technique or theory and the potential rate of error, as well as the existence of any specialized literature and cases on the subject."[150]

The *Houser* court accounted for all but one of the *Daubert* factors–whether the method or theory has been or can be tested.[151] The *Houser* guidelines worked well before the *Daubert* factors and should perform well in light of the *Kumho Tire Co.* decision, especially since both *Houser* and *Kumho Tire Co.* analyze the reliability issue in the fact-specific context of a particular case.

In *United States v. Griffin*, the Court of Appeals for the Armed Forces used the *Houser* and *Daubert* factors to evaluate the military judge's decision to exclude Dr. Frank's expert testimony.[152] The court focused solely on the reliability of Dr. Frank's testimony in the context of the particular case. The court found that his testimony was unreliable because Dr. Frank could not reliably apply his studies of British prisoners to American military personnel.[153] Also, he could not opine whether the accused's confession was either coerced or false.[154] Even if Dr. Frank could give such an opinion, he would run afoul of the court's prohibition of "human lie detectors"[155] and such testimony would likewise be inadmissible.[156] Finally, the court found that the military judge properly exercised his "gatekeeping" responsibilities and did not abuse his discretion in excluding Dr. Frank's testimony.[157]

Does the court's holding in *Griffin* deter false confession expert testimony in military courts-martial? Perhaps, but the decision did not create a per se exclusion of such evidence, which was done with evidence of polygraph examinations in *United States v. Scheffer.*[158] The court did find that Dr. Frank's testimony might be relevant to the accused's mental state at the time he gave the confession,[159] particularly if the defense could

145. *Id.* at 281.

146. *Id.* at 281-282.

147. *Id.* at 283.

148. 36 M.J. 392 (C.M.A. 1993).

149. *Id.* at 398-400.

150. *Id.* at 399.

151. Daubert v. Merrell Dow Pharmaceuticals, 113 S. Ct. 2786, 2797 (1993).

152. United States v. Griffin, 50 M.J. 278, 283-84 (1999).

153. *Id.* at 285.

154. *Id.* at 284.

155. *See* United States v. Birdsall, 47 M.J. 404 (1998).

156. *Griffin*, 50 M.J. at 284.

157. *Id.* at 285.

158. 118 S. Ct. 1261 (1998).

draw a correlation between the accused's mental state and the possibility of giving a false or coerced confession.[160] The court still found, however, problems with the underlying studies and research into false confessions and determined they were too unreliable to constitute a basis for expert testimony.[161] A case with different facts might be a good candidate to test the admissibility of false confession expert testimony, especially where the accused's mental state is at issue.

The Reliability of the Psychology of False Confessions under *Daubert* and *Kumho*

The trend in many state courts and all federal appellate courts is to treat expert testimony concerning the psychology of false confessions as "scientific." This distinction may be irrelevant under the *Kumho Tire Co.* decision. Still, two questions remain. Is the psychology of false confessions reliable enough to support the admission of expert testimony on the subject? If so, should courts admit such evidence and with what restrictions? While a complete analysis is not possible without a real case, objectively applying the *Daubert* factors to false confession expert testimony can be done by looking at the available material. Although experts may debate whether all four *Daubert* factors apply to this field, an analysis can still be done.

The Publishing and Peer Review Factor

Daubert's requirement that a theory must be subjected to peer review and publishing seems well founded for the false confession proponents. Gudjonsson, Kassin, Wrightsman, Leo, and Ofshe have collectively penned almost a dozen works on the issue of false confessions.[162] While the field is not as well developed as other areas, such as rape trauma syndrome or eyewitness identification expert testimony,[163] the proponents have clearly placed the theory and methodology before their peers, as evidenced by the criticism of Professor Cassell. The science of false confessions appears to meet the publishing and peer review threshold.

Known or Potential Rate of Error

As the remarks of Professors Cassell, Leo, and Ofshe indicate, the "science" of false confessions has yet to produce a frequency or quantity of false confessions. Thus, experts cannot calculate a known or even a potential rate of error. While psychology and social psychology cannot predict human behavior to a mathematical certainty, it should be able to determine whether the data contains flaws or is so incomplete as to cast doubt on the reliability of the hypothesis being advanced by the false confession theory proponents.

The Kassin experiment could easily give an error rate, but the anecdotal and sometimes subjective evidence collected by the other researchers in this field does not avail itself to such analytical methods. Indeed, substantial questions have been raised about some of the sixty alleged "false confessions" in the studies of Leo and Ofshe. Cassell examined nine of the twenty-nine persons convicted with an alleged "false confession."[164] He claims that significant, if not substantial evidence, pointed to the guilt of those nine accused despite their allegations of a false confession.[165] The failure to give even a "ballpark figure" for a rate of error does not help this fledgling theory or its proponents prove the theory reliable under *Daubert*.

The Testing Factor

The lack of empirical data in the testing field presents another obstacle to assessing the reliability of the theory of false confessions. The Kassin experiment demonstrated that the false confession phenomenon existed, and could be replicated in a controlled environment. But Kassin's is the sole experiment in this field and even he questions whether the experiment

159. United States v. Griffin, 50 M.J. 278 (1999).

160. *Id.* at 22-23. Dr. Saul Kassin believes minority or mental disease/impairment may account for as much as 90% of all false confessions. Kassin Interview, *supra* note 25.

161. *Id.* at 22. It is unclear just what studies or research Dr. Frank based his opinions. Perhaps the court would have ruled differently if someone of Dr. Saul Kassin's or Dr. Richard Ofshe's experience had been the proffered expert. The reference to a study of British prisoners seems to imply Dr. Frank relied on the work of Dr. Gisli Gudjonsson.

162. *See* GUDJONSSON, *supra* note 10; *The Decision to Confess Falsely*, *supra* note 16, at 979; *The Consequences of False Confessions*, *supra* note 16, at 429; Kassin & Kiechel, *supra* note 16, at 125; KASSIN & WRIGHTSMAN, *supra* note 13; Kassin, *supra* note 24, at 221; Kassin & Kiechel, *supra* note 17, at 227; *The Social Psychology of Police Interrogation*, *supra* note 16, at 189; Richard A. Leo & Richard J. Ofshe, *Missing the Forest for the Trees: A Response to Paul Cassell's "Balanced Approach" to the False Confession Problem*, 74 DEN. U. L. REV. 1135 (1997); Leo & Ofshe, *supra* note 56, at 557.

163. Kassin Interview, *supra* note 25.

164. Cassell, *supra* note 58, at 523.

165. *Id.* at 524-26. Cassell does not focus on all 60 cased cited by Leo and Ofshe because only 29 resulted in wrongful convictions. The other 31 cases demonstrate the system works at ferreting out false confessions by dismissal or acquittal.

and the anecdotal evidence alone are enough to clear the *Daubert* threshold for reliability.[166]

Cassell, Leo, and Ofshe disagree about whether a random study of criminal cases could adequately study the false confession phenomenon. Any random study, imperfect though it may be, is better than no study at all. The lack of empirical research in this area leaves courts with little guidance. If false confessions do "occur regularly" as Leo and Ofshe propound, then even the most elementary random study, conducted properly, should reveal the nature and frequency of false confessions. "Another reason for ensuring that psychiatric testimony is subjected to adversarial testing is to prod the research community to perform better."[167] The lack of such testing handicaps the reliability of the false confession theory.

General Acceptance

Ironically, much of the theory of false confessions passes the "general acceptance" part of *Daubert* and possibly the *Frye* test too. No scholar on the subject debates whether false confessions exist. The classification systems of Kassin and Wrightsman, while modified by others, remains largely intact after thirteen years of scrutiny. By "reverse engineering" dozens of cases of alleged false confessions, theorists have a good idea about the cause of false confessions, but not the frequency.[168] Nevertheless, the frequency of false confessions remains a hot topic–and for good reason. It correlates to the fundamental issue of whether false confessions occur so regularly they can be readily identified and understood (even prevented) or whether they are a rare anomaly of the criminal justice system and human nature, incapable of being explained by experts. Furthermore, many of the tactics which the theorists claim create false confessions are largely successful at obtaining true confessions as well.

One cannot ignore the *Frye* test either. In California, the trial court admitted Professor Eliot Aronson's historic first-time testimony as an expert on the psychology of false confessions under the "general acceptance" constraints of the *Frye* test.[169] This occurred before the research of Gudjonsson, Kassin, Wrightsman, Leo, and Ofshe existed to demonstrate "general acceptance." New York never abandoned the *Frye* test.[170]

Other Tests for Reliability

The last question about the psychology of false confessions concerns how else a court can effectively probe the reliability of the expert's theory. No clear method exists yet. One commentator suggests that experts be required to use the "same intellectual rigor"[171] to establish the reliability of their non-scientific evidence as they would to prove their point to their peers.[172] Other possibilities include extending *Daubert* to the "soft" sciences of human behavior in a more relaxed manner, as the court did in *United States v. Hall*.[173] Although one must ask why the distinction is drawn between scientific and non-scientific evidence if they would be evaluated by the same standard under *Kumho Tire Co.*

A potential amendment to FRE 702 looms as a possibility,[174] but the proposed amendment would not define reliability or establish the factors, which would govern reliability. Another solution might be an "epistemological" view of determining how the expert knows what he knows and the reliability of his gathering of observations.[175] The Ninth Circuit Court of Appeals identified just such a standard, applicable to all experts, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[176]

None of these standards, however, has achieved preeminence. This flexibility may be warranted for the district courts

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166. Kassin, *supra* note 24, at 231.

> The topic of confession evidence has been largely overlooked by the scientific community. As a result of this neglect, the current empirical foundation may be too meager to support recommendations for reform or qualify as a subject of "scientific knowledge" according to the criteria recently articulated by the U.S. Supreme Court (*Daubert v. Merrell Dow Pharmaceuticals Inc.*). To provide better guidance in these regards, further research is sorely needed.

Id. Professor Kassin believes, however, that the "other specialized knowledge" threshold can be met by the experts in this field and he has been certified as an expert on the false confession phenomenon in various criminal trials using the "other specialized knowledge" moniker. Kassin Interview, *supra* note 25.

167. Slobogin, *supra* note 65, at 51-52.

168. Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.–C.L. L. REV. 105, 131 (1997).

169. People v. Page, 2 Cal. Rptr. 2d 898 (1991), *rehearing denied* 1992 Cal. App. LEXIS 76 (1992), *review denied*, 1992 Cal. LEXIS 1516 (1992).

170. People v. Green, 250 A.D.2d 143 (N.Y. App. Div. 1998) (ruling that although expert testimony on false confession may be admissible under the *Daubert* factors, New York still follows the *Frye* test for "general acceptance," thus the expert testimony concerning false confessions must be excluded under that test).

171. *See* Brown v. Lorillard Inc., 84 F.3d 230, 234 (7th Cir. 1996).

172. J. Brook Lathram, *The "Same Intellectual Rigor" Test Provides an Effective Method for Determining The Reliability of All Expert Testimony, Without Regard To Whether The Testimony Comprises "Scientific Knowledge" or "Technical or Other Specialized Knowledge,"* 28 U. MEM. L. REV. 1053, 1068-1070 (1998).

173. 974 F. Supp. 1198 (C.D. Ill. 1997).

and would maintain the *Daubert-Kumho* tradition of simply admitting all expert testimony that is relevant and reliable under FRE 702. Courts have long determined relevancy without much guidance or interference from the appellate courts. Determining the reliability of expert testimony should prove no more difficult. While this is an imperfect method, it would be unrealistic to assume the appellate courts can adequately address the reliability factors for every instance of expert testimony in the myriad of cases encountered nationwide. The categories are simply too broad and the number of cases too diverse. But the analysis does not stop there. Applying a balancing test under FRE 403[177] may find that the relevance of false confession expert testimony is substantially outweighed by danger of unfair prejudice, and hence excluded it, as the court did in *United States v. Griffin*.[178] In the end, the trial courts must decide for themselves what is relevant and reliable under FRE 702.

The Form of Expert Testimony

Some courts have admitted expert testimony on false confessions, but almost always with limitations. Even in the historic first testimony by Professor Aronson over a decade ago, the court prohibited him from commenting on the interrogation of the accused or opining about the reliability of the defendant's confession.[179] Dr. Ofshe faced even greater restrictions when he was finally allowed to testify in the *Hall* case. The judge prohibited him from discussing the post-admission narrative statement.[180] An Ohio appellate court upheld identical limitations placed on the expert witness in *State v. Wells*.[181] These courts address the concern that others have cited in excluding expert witness testimony on false confessions: that the expert would, in effect, become a "human lie detector." Civilian[182] and military[183] courts draw a clear line against such opinion testimony from experts.[184]

An expert witness who gives an opinion as to the veracity of another witness engages in speculation. Such testimony cannot be helpful to the factfinder and should be excluded. While the testimony of experts about the effect of police interrogation tactics and the psychology behind them may prove helpful to a jury, a blank opinion on the veracity of the accused does not. Likewise, anecdotal evidence of other instances of false confessions is not relevant and should be excluded. Finally, the use of the post-admission narrative statement by the expert in court is disturbing. Examining the post-admission narrative statement for veracity or corroboration is a function for the jury. This is not unusual. Indeed, military courts prohibit experts with polygraph machines from coming into the courtroom and usurping the panel's[185] role to weigh the evidence and testimony before it.[186]

Another problem is the split between state and federal courts on the admissibility of false confession expert testimony itself. For instance, a federal court located in New York with criminal

174. The proposed text of the amendment reads: "If scientific 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, provided that (1) the testimony is sufficiently based upon reliable 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. (Proposed amendment underlined) COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMNARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND EVIDENCE (August 1998) (on file with the Criminal Law Department, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia).

175. *See* Imwinkelried, *supra* note 113, at 2271.

176. 43 F.3d 1311, 1317 (9th Cir. 1995). This case is commonly referred to as "*Daubert II*."

177. FED. R. EVID. 403.

178. 50 M.J. 278, 283 (1999).

179. People v. Page, 2 Cal. Rptr. 898 (Cal. App. 1st Dist. 1991), *rehearing denied*, 1992 Cal. App. LEXIS 76 (Cal App. 1st Dist. 1992), *review denied*, 1992 Cal. LEXIS 1516 (Cal. 1992).

180. United States v. Hall, 974 F. Supp. 1198, 1205 (C. D. Ill. 1997).

181. (No. 93 CA) 1994 Ohio App. LEXIS 4122 1994), *appeal not allowed by* 673 N.E. 2d 138 (Ohio 1996).

182. *See* United v. Beasley, 72 F.3d 1518, 1528 (11th Cir. 1996).

183. *See* United States v. Birdsall, 47 M.J. 404, 406 (1998). *See also* United States v. Petersen, 24 M.J. 283, 284-285 (1985); United States v. Partyka, 30 M.J. 242, 247 (1990).

184. *See* United States v. Scheffer, 118 S. Ct. 1261, 1267 (1998) (upholding the exclusion of a polygraph expert under MRE 707, which expressly forbids such evidence in military courts-martial citing "the jury's role in credibility determinations").

185. Military courts-martial refer to the jury as a "panel."

186. Testimony concerning the taking of, refusal to take, or results of a polygraph test are inadmissible in military courts-martial pursuant to MRE 707. There is *no* federal counterpart to MRE 707.

jurisdiction over a defendant will probably permit the use of expert testimony to buttress a claim of false confession.[187] The same defendant would be unable to present such evidence in the New York state court.[188] This is one of the drawbacks of the *Daubert-Joiner-Kumbo Tire Co.* decisions.

While the *Frye* test may have been less permissive in admitting evidence, it at least had the benefit of being consistent by requiring "general acceptance" as a prerequisite to the admission of scientific evidence. Some jurisdictions continue to follow the *Frye* test and others may find one or all of the *Daubert* factors inapplicable. The days of consistency, however, are gone. The *Daubert* analysis has already led to a split of opinion on the admissibility of expert testimony in state courts. That trend will likely continue after the *Kumho Tire Co.* decision.

Conclusion

The unusual nature of the social sciences like psychology and social psychology may require a somewhat lower standard of scrutiny than the "hard" sciences like physics or chemistry, but *Daubert* remains a valid guideline for most scientific evidence, both hard and soft. For too long the behavioral sciences and the criminal justice system have neglected the phenomenon of false confessions. Professors Gudjonsson, Kassin, Wrightsman, Leo, and Ofshe, have opened a door on a new and little understood aspect of the interrogation process. This is not "voodoo science" but it is not yet ready for "prime time" either.

The false confession theory needs further study and refinement. Consequently, the admission of expert testimony based on this new theory is premature and therefore unreliable. Currently, the empirical base that supports the theory has too many unanswered questions, no known error rate, and just one laboratory experiment to back it up. This foundation cannot support reliable conclusions just yet. Cassell's proposal to conduct a random survey of confessions could help to alleviate this problem. Nevertheless, the proponents of the theory seem to spend more time defending themselves from Cassell's critiques than finding ways to conduct additional studies that are both empirically accurate and ethically acceptable.

Gudjonsson, Leo, and Ofshe present haunting tales that clearly establish the *existence* of false confessions. While every case of wrongful conviction from a false confession is a travesty of justice, these cases cannot be viewed in the abstract. Many of the tactics used by police that create false confessions typically result in true confessions as well. The search for corroborating evidence that fits with the post-admission narrative statement may be one "acid test" for the reliability of a confession, but it appears to be fact-finding, not scientific analysis. A lack of corroborating evidence may also be a sign of a weak case or a lack of evidence, but it does not necessarily mean the confession was false. To encourage further study in this area, courts should exercise their discretion as the "gatekeepers" of expert testimony and find the psychology of false confessions unreliable at this time.

Still, the admissibility of expert testimony based on the psychology of false confessions cannot be ruled out. Two federal appellate courts have found this testimony admissible and the state courts are split on the issue of the reliability of this theory. In light of the *Kumho Tire Co.* case, no trial court judge should fear the appellate courts on the reliability issue. Almost every trial judge who found this evidence reliable or unreliable has been upheld on appeal. Few have been found to abuse their discretion.[189] However, if courts-martial choose to admit such evidence, they should take measures to restrict the nature and scope of the expert's testimony, keeping in mind that the panel members, not the expert, determine the veracity of a confession once it is admitted.

The highest court in the armed forces recently decided the complex question of expert testimony on the issue of false confessions in the case of *United States v. Griffin.*[190] The Court of Appeals for the Armed Forces ruled the military judge did not abuse his discretion by excluding expert testimony on the psychology of false confessions.[191] This decision follows the reasoning of the Supreme Court's *Kumho Tire Co*. decision. However this does not mean trial courts should abandon their role as the "gatekeepers" of expert testimony in this area and blindly exclude or admit such evidence. To the contrary, the *Kumho Tire Co.* decision tasks the trial courts to be more vigilant about the evidence they admit. Military and civilian courts alike should weigh the reliability of the false confession theory for themselves and exercise their own discretion whether to admit such expert testimony irrespective of the decisions of other courts.

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187. *See* United States v. Raposos, (98 Cr 185 (DAB)) 1998 U.S. Dist. LEXIS 19551 (S.D.N.Y. 1998) (applying an extensive *Daubert* analysis and permitting an expert on false confessions a clinical psychologist named Sanford Drob, to testify on everything, including the credibility of the confession).

188. People v. Gilliam, 670 N.E. 2d 606 (Ill. 1996); People v. Green, 250 A.D.2d 143 (N.Y. App. Div. 1998) (ruling that although expert testimony on false confession may be admissible under the *Daubert* factors, New York still follows the *Frye* test for "general acceptance," thus the testimony under that test must be excluded).

189. The case of *United States v. Hall*, 93 F.3d 1337 (7th Cir. 1996), and other cases were overturned not because the judge declined to admit the expert testimony on false confessions, but because they did not conduct an evidentiary hearing or find the factors of reliability as required by FRE 702.

190. 50 M.J. 278 (1999).

191. *Id.* at 285.