NOTES

LESSONS FROM *STATE V. LAWSON*: THE RELIABILITY FRAMEWORK APPLIED TO CONFESSIONS AND ADMISSIONS

by
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The Oregon Supreme Court's ruling in State v. Lawson *changed the way courts approach eyewitness identification evidence in criminal trials. Under* Lawson*'s framework, Oregon courts assess the reliability of eyewitness identifications under the Oregon Evidence Code and can provide remedies tailored to that concern. Additionally, the Oregon Supreme Court took judicial notice of an extensive body of research in the field and provided a non-exclusive list of considerations based on that research. In doing so, the Court has transcended the Constitutional doctrines that do not adequately address the proven unreliability of eyewitness identifications.*

Like eyewitness identifications, false confessions have contributed to an alarming number of wrongful convictions, and the constitutional doctrines for suppressing the evidence offer inadequate protections. This is because, again, the risk of unreliability, standing alone, is not enough to suppress the evidence. However, the known risks of police interrogation practices suggest that courts should take the same evidentiary precautions when presented with confession evidence as they now apply to identifications. This Note explores the value of this approach and proposes the factors a court could consider in undertaking an evidentiary review of confession evidence.

[*] J.D. Candidate, 2014, Lewis & Clark Law School. I would like to thank Professor Aliza Kaplan for advising me on my work and for encouraging and supporting me in exploring wrongful convictions and social justice lawyering. I would also like to thank Metropolitan Public Defender, Oregon Justice Resource Center, and Attorneys Alex Bassos, Dean Smith, Robert Campbell, Torreya Hamilton, Tom Needham, and Tony Thedford for teaching me what it means to be an advocate, by their guidance and example. Finally, I would like to thank my family, just because.

INTRODUCTION

> *It was a tragedy for everybody . . . . We're innocent, but they didn't want to listen. But they're going to listen now. I truly believe that. I think they will.*[1]
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> – Terrill Swift, exonerated January 17, 2012[2]

In January 1990, 23-year-old Taunja Bennett's body was found beaten, raped, and strangled in the Columbia Gorge, outside of Portland, Oregon.[3] Laverne Pavlinac was a 57-year-old grandmother in an abusive

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[1] Erica Goode, *When DNA Evidence Suggests 'Innocent,' Some Prosecutors Cling to 'Maybe'*, N.Y. TIMES, Nov. 16, 2011, at A19 (quoting Terrill Swift).

[2] *Know the Cases: Terrill Swift*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Terrill_Swift.php. Terrill Swift was sentenced to 30 years in prison of which he served 12 years after falsely confessing to the brutal rape and murder of Nina Glover in 1994. *Id.* When DNA emerged matching another man who had been convicted of a similar crime a few years earlier, the Cook County State's Attorney, Anita Alvarez, opposed vacating the convictions of Terrill and three codefendants. Goode, *supra* note 1.

[3] Michael S. Perry, *Laverne Pavlinac*, NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/pages/casedetail.aspx?caseid=3526.

relationship.[4] When she heard about the murder of Taunja Bennett, she saw a way out: Ms. Pavlinac reported her boyfriend, John Sosnovske, to the police as the killer.[5] Initially, she made anonymous tips about Sosnovske, but when she did not receive the response she was hoping for, she eventually told them that she was also involved.[6] Ms. Pavlinac told the police that she and Sosnovske met Taunja Bennett at a bar and that Sosnovske had forced her to help rape Bennett and to dispose of her body. When the police interviewed John Sosnovske, he denied Ms. Pavlinac's claims. The police also searched Pavlinac and Sosnovske's home but did not find incriminating evidence. Ms. Pavlinac then went even further—she planted evidence in the trunk of her car to match items the police were seeking. Although the officers recognized the evidence as planted, they took Ms. Pavlinac to the Columbia River Gorge to see if she could identify where Ms. Bennett's body was found. There, Ms. Pavlinac identified where the body was found, but she could not identify where Ms. Bennett's personal items had been located. Prosecutors arrested and charged both Ms. Pavlinac and Mr. Sosnovske.[7] Although Ms. Pavlinac recanted and asserted her innocence at trial, she was convicted of felony murder by a jury in Multnomah County Circuit Court.[8] Fearing that he would receive the death penalty, Mr. Sosnovske pleaded no contest to murder and kidnapping in March of 1991 in exchange for a sentence of life in prison.[9]

Years later, in 1995, serial killer Keith Jesperson (known as the "Happy Face Killer") confessed to killing Ms. Bennett and corroborated police information that Ms. Pavlinac never knew: the location of Taunja Bennett's purse and identification card.[10] In November 1995, Keith Jesperson pleaded no contest to the murder.[11] Even after Jesperson, an admitted serial killer, pleaded guilty to the murder, a Marion County Circuit Judge took over two months to release Laverne Pavlinac and John Sosnovske from custody.[12] However, even in releasing her on the basis of her innocence, the judge refused to vacate Pavlinac's conviction and

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[4] *Id.*; *see also* MICHELLE DRESBOLD & JAMES KWALWASSER, SEX, LIES, AND HANDWRITING: A TOP EXPERT REVEALS THE SECRETS HIDDEN IN YOUR HANDWRITING 84 (2006) ("Laverne Pavlinac, a 57-year-old grandmother in Portland, Oregon, picked up the phone and called the police. 'I know who raped and killed Taunja Bennett,' she said.").

[5] Perry, *supra* note 3.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*; Daniel Engber, *Why Make a False Confession?*, SLATE (Aug. 17, 2006), http://www.slate.com/articles/news_and_politics/explainer/2006/08/why_make_a_false_confession.html.

[11] Perry, *supra* note 3.

[12] *Evidence Clears Two. The Law Doesn't.*, N.Y. TIMES, Nov. 26, 1995, at 28; Perry, *supra* note 3.

chastised her for abusing the judicial system.[13] Although Laverne Pavlinac and John Sosnovske's cases demonstrate a bizarre set of circumstances,[14] they also reveal a broader issue: false confessions, once made, create unreliable and devastating evidence against a defendant.[15]

There are three constitutional doctrines that govern admissibility of confession evidence: the Fourteenth Amendment due process voluntariness standard, the Sixth Amendment right to counsel, and the Fifth Amendment *Miranda* doctrine.[16] These doctrines have developed over time to reflect the shifting values between the highly probative value of confessions, the search for truth in criminal cases, and the rights of the accused.[17] However, none of these doctrines present a satisfying answer to the question: what happens when a person confesses for the "wrong" reason?[18] That is, what happens when a person confesses, not because that person is guilty, but because of mental illness, personal motivations, or psychological coercion? What happens when a person's confession is so unreliable that it may lead to a wrongful conviction?

These risks are not hypothetical. Rather, social psychologists, attorneys, law students, and activists have documented hundreds of police-induced false confessions over the past 20 years.[19] In nearly a quarter of exonerations studied by the National Registry of Exonerations, the defendant either falsely confessed or was wrongfully accused by a codefendant who falsely confessed.[20] In homicide prosecutions, this number jumps to 39%.[21] Each of these cases "advertises the existence of many other false confessions that will never be discovered or come to the attention of re-

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[13] Perry, *supra* note 3. Mr. Sosnovske's conviction was set aside for violations of his civil rights. *Id.*

[14] *See infra* Part I.B (describing the various types of false confessions).

[15] *See infra* Part II.

[16] RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 272 (2008).

[17] *Id.* at 272–83.

[18] *See, e.g.*, *id.* at 36–37 (arguing that constitutional protections are "largely irrelevant" because police frequently skip through the warnings, most confessions are not considered constitutionally "involuntary," defense attorneys do not frequently bring suppression motions, and when they do, they "usually lose"); TOM WELLS & RICHARD A. LEO, THE WRONG GUYS: MURDER, FALSE CONFESSIONS, AND THE NORFOLK FOUR 47 (2008) (describing suppression motions as "rarely granted").

[19] LEO, *supra* note 16, at 244; *see also False Confessions*, INNOCENCE PROJECT, http://www.innocenceproject.org/understand/False-Confessions.php.

[20] SAMUEL R. GROSS & MICHAEL SHAFFER, NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN THE UNITED STATES, 1989–2012, at 41 (2012), *available at* http://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf. Eighty-six percent of false confessions made by codefendants occurring in exoneration cases occurred in homicide exonerations, and 63% occurred in cases where the defendants themselves did not make a confession. *Id.* at 59.

[21] *Id.* This is because of the "high stakes" of murder and rape prosecutions, which create higher risks of wrongful convictions based on all of the leading categories of risk factors (confessions, eyewitness misidentifications, perjury, and false accusations). *Id.* at 55.

searchers or policy makers."[22] Sadly, these risks are not surprising. Police interrogation is a "strategic, multistage, goal-directed, stress-driven exercise in persuasion and deception, one designed to produce a very specific set of psychological effects."[23] By using the techniques of psychological interrogation, police interrogators are able to perform a "genius or mind trick" that "makes the irrational (admitting to a crime that will likely lead to punishment) appear rational."[24] Once a false confession is made, the risk of a wrongful conviction grows exponentially—police are likely to curtail further investigation that could lead to the true perpetrator; prosecutors look at the evidence as strong evidence of guilt in charging decisions; defense attorneys may concentrate their efforts away from trial and toward plea negotiations; jurors give confessions determinative weight; and appellate courts rely heavily on confessions in harmless error analyses.[25] In short, a false confession "can easily become [a] self-fulfilling prophec[y]."[26]

Confessions made under psychologically coercive circumstances are still largely deemed "voluntary" and usually comply with *Miranda*'s requirements.[27] Despite its faults, confession evidence is the gold standard for obtaining a conviction—"False confessions are . . . the most incriminating and persuasive *false* evidence of guilt that the state can bring against an *innocent* defendant."[28] This is because "[m]ost people don't believe they would ever admit committing a crime of which they were innocent, and many are skeptical that anybody else would."[29] Furthermore, even prosecutors and judges may "believe that confessions are virtually always true," leading them to "demand irrefutable evidence of innocence to agree to an exoneration of a defendant who has confessed."[30] Thus, by

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[22] LEO, *supra* note 16, at 245.

[23] *Id.* at 119; *see also* FRED E. INBAU ET AL., ESSENTIALS OF THE REID TECHNIQUE: CRIMINAL INTERROGATION & CONFESSIONS 119–26 (2005) (laying out the specific multi-step process); C. H. VAN METER, PRINCIPLES OF POLICE INTERROGATION 36 (1973) (describing how to convince a suspected criminal that confessing is in his best interest using interrogation "dos" and "don'ts").

[24] LEO, *supra* note 16, at 164 (internal quotation marks omitted) (quoting Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 919 (2004)).

[25] JAMES R. ACKER & ALLISON D. REDLICH, WRONGFUL CONVICTION: LAW, SCIENCE, AND POLICY 142 (2011); *see also* GROSS & SHAFFER, *supra* note 20, at 63 ("From the look of things, an innocent defendant who confesses to a robbery-murder will have a hard time even getting a hearing on the basis of recantations by eyewitnesses or the discovery of suppressed evidence of perjury by an informant or alibi evidence or other new evidence of innocence that might have [led] to exoneration if he hadn't confessed.").

[26] ACKER & REDLICH, *supra* note 25, at 142.

[27] *See* LEO, *supra* note 16, at 174.

[28] *Id.* at 248.

[29] GROSS & SHAFFER, *supra* note 20, at 57.

[30] *Id.* at 62. Gross and Shaffer describe the example of Juan Rivera who was tried and convicted three times for the 1996 rape-murder of an 11-year-old girl based on a false confession. Even where DNA tests eliminated Mr. Rivera as the source of semen

constitutionally deeming confessions made under these conditions "voluntary" and therefore admissible, the law endorses a broad category of confessions that present a high risk of wrongful convictions.

Similar risks plague another substantial cause of wrongful convictions: eyewitness identifications, particularly those influenced by suggestive police procedures. In documented wrongful convictions, researchers have found this evidence played a part in 75% of exonerations secured by DNA testing.[31] In sexual assault cases, eyewitness identifications played a role in 80% of wrongful convictions.[32] As the Oregon Supreme Court noted in *State v. Lawson*, because jurors tend to over-rely on this form of evidence, "eyewitness identifications subjected to suggestive police procedures are particularly susceptible to concerns of unfair prejudice."[33] With the Oregon Supreme Court's November 2012 *Lawson* opinion, Oregon became the second state in the country[34] to seriously address the reliability of eyewitness identifications, outside of the more lenient due process standard, by adopting a new analysis under the Oregon Evidence Code (OEC).[35]

Under the *Lawson* test, when a defendant moves to exclude an eyewitness identification, the state bears the initial burden of proving that the identification is reliable.[36] The state must do so by establishing the facts necessary for admissibility under the evidence code—including: (1) that the eyewitness has personal knowledge of the matters to which he or she will testify under OEC 602; and (2) that under OEC 701, the identifi-

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recovered from the victim's vagina, Lake County, Illinois State's Attorney Michael Waller "insisted on taking Rivera to trial a third time on the theory that the 11-year-old victim was sexually active" in order to overcome the DNA evidence. *Id.* "In 2011, the Illinois Appellate Court reversed [Rivera's] conviction because it was 'unjustified and cannot stand.'" *Id.*

[31] *Eyewitness Misidentification*, INNOCENCE PROJECT, http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php ("Eyewitness misidentification is the single greatest cause of wrongful convictions nationwide, playing a role in nearly 75% of convictions overturned through DNA testing. While eyewitness testimony can be persuasive evidence before a judge or jury, 30 years of strong social science research has proven that eyewitness identification is often unreliable.").

[32] David Protess, *Did Oklahoma Wrongfully Convict a Chicago Hoops Standout?*, HUFFINGTON POST (Aug. 22, 2012), http://www.huffingtonpost.com/david-protess/darrell-williams-case_b_1818054.html. David Protess describes the racial breakdown of the cases as "eye-popping": two-thirds of sexual assault exonerees were black, and white victims inaccurately testified in 72% of the cases. *Id.*

[33] State v. Lawson, 291 P.3d 673, 695 (Or. 2012).

[34] The other state is New Jersey, which adopted a similar approach in *State v. Henderson*, 27 A.3d 872 (N.J. 2011).

[35] *Lawson*, 291 P.3d at 690. The prior standard was governed by *State v. Classen*, 590 P.2d 1198, 1203 (Or. 1979), which provided a two-step process that emphasized unfair procedures over reliability. First, a court considers whether the identification procedure is unnecessarily suggestive; second, if the procedure *was* unnecessarily suggestive, a court will look at several factors to determine if the identification testimony is nevertheless reliable under the totality of the circumstances. *Id.* at 1203–04.

[36] *Lawson*, 291 P.3d at 692.

cation was rationally based on the witness's first-hand impressions and will be helpful to the jury.[37] If the state meets its burden, the defense may still exclude the evidence by showing that the probative value of the identification is substantially outweighed by the risk of unfair prejudice under OEC 403.[38] *Lawson*'s Rule 403 analysis explicitly provides that in cases of suggestive police procedures, courts, as "evidentiary gatekeeper[s]," have a "heightened role" because, "'traditional' methods of testing reliability—like cross-examination—can be ineffective at discrediting unreliable or inaccurate eyewitness identification evidence."[39] Thus, *Lawson* further encourages the trial courts to consider Rule 403's "intermediate remedies," which include excluding particularly prejudicial forms of testimony such as self-appraisal by eyewitnesses and likely allows for a special jury instruction as well.[40]

Lawson's return to the rules of evidence in eyewitness identifications also presents a promising framework in which to view confession evidence. While *Lawson*'s holding is directed toward eyewitness testimony specifically, the policy and legal arguments persuasive to the Oregon Supreme Court carry the same weight with respect to confessions. While the United States Supreme Court has made clear that the Constitution is not concerned with the "reliability" of either types of evidence,[41] the Oregon Supreme Court seems willing to consider the policy implications of this choice and to use the rules of evidence as an additional tool. For example, the Court in *Lawson* specifically referenced the high rate of wrongful convictions as a result of eyewitness misidentification and expanding scientific research as the basis for revising the Oregon standard.[42] The Court's stated goal was to "attempt to strike a proper balance between the utility of [eyewitness identification] evidence in convicting the guilty and its proclivity, on occasion, to inculpate the innocent."[43]

The similarities between confessions and eyewitness identifications—the ease with which each may be manipulated by police procedures, the ineffectiveness of due process protections, the evidence's persuasive force to juries, and the strong correlation to wrongful convictions—all suggest

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[37] *Id.* at 697.

[38] *Id.*

[39] *Id.* at 695.

[40] *Id.*

[41] *See, e.g.*, Perry v. New Hampshire, 132 S. Ct. 716, 730 (2012) (holding that the Fourteenth Amendment Due Process Clause did not require initial evaluation of reliability of eyewitness identification that was not procured under unnecessarily suggestive circumstances arranged by law enforcement); Colorado v. Connelly, 479 U.S. 157, 167 (1986) (citing FED. R. EVID. 601) (providing that a statement in the suspect's condition "might be proved to be quite unreliable, but this is a matter to be governed by the evidentiary laws of the forum and not by the Due Process Clause of the Fourteenth Amendment") (citation omitted); *see also* LEO, *supra* note 16, at 274–91 (discussing the limitations of constitutional approaches respecting reliability).

[42] *Lawson*, 291 P.3d at 690.

[43] *Id.*

that Oregon's new method should apply with equal force to confessions. While this approach is not likely to change the outcome in *every* close case, a reliability test will rightly help to place the balance of the criminal adjudication system between utility and risk. Also, the reliability approach provides the additional advantages of (1) grounding the issue in state law, (2) focusing attention on the most harmful results of psychological interrogation, (3) (ultimately) benefiting all players in the system, and (4) encouraging police departments to record both interrogations and confessions.[44]

My analysis requires context of interrogation practices and the development of confession evidence in Oregon law and under the Constitution. It also requires background on *State v. Lawson*. Thus, Part I provides background on contemporary interrogation practices. Part II provides background on the constitutional and statutory treatment of statements by defendants in criminal cases. Part III discusses the *Lawson* decision, its basis in the Oregon Evidence Code, and the social psychology and policy concerns the holding reflects. Lastly, Part IV applies the reasoning in *Lawson* to the issue of confessions by defendants and analyzes how this additional tool may be employed in cases in which constitutional and statutory protections are insufficient.

I. Interrogations and Confessions

It is beyond dispute that many people falsely confess to committing crimes that were committed by someone else or that were never committed at all.[45] Although the exact frequency of false confessions is not known, researchers have revealed hundreds of police-induced false confessions in the context of wrongful convictions.[46] Based on these studies, experts in the field have concluded that "false confessions may be the

[44] For a discussion on the practical benefits of the Rule 403-based approach see, e.g., Leo, *supra* note 16, at 283–91; Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 Wis. L. Rev. 479. *But see* Eugene R. Milhizer, *Confessions After* Connelly*: An Evidentiary Solution for Excluding Unreliable Confessions*, 81 Temp. L. Rev. 1, 34–37 (2008) (proposing a new evidentiary rule rather than relying on FRE 403).

[45] *See* Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. Crim. L. & Criminology 429, 432–33 & n.10 (1998); Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 Denv. U. L. Rev. 979, 983 (1997).

[46] Leo, *supra* note 16, at 244 (compiling studies amounting to 250 documented false confessions); *see also* Brandon L. Garrett, Convicting the Innocent: Where Criminal Prosecutions Go Wrong 5–9 (2011) (reporting that 16% of the 250 DNA exonerees in his study confessed to crimes they did not commit, and that all but two of the exonerees reportedly confessed to details about the crime that only the killer or rapist could have known); *False Confessions*, *supra* note 19 (stating that 25% of DNA exonerations involved an incriminating assertion).

single leading cause of wrongful convictions in homicide cases."[47] Furthermore, because of the prevalence of coercive interrogation practices and the difficulty of documenting false confessions and suppressing or excluding confessions, "the documented cases of interrogation-induced false confessions are therefore likely to represent only the tip of a much larger problem."[48]

A. Psychologically Coercive Interrogation Methods

Unreliable confessions are created in large part by psychologically coercive interrogation[49] tactics. Modern police interrogation is a "strategic, multistage, goal-directed, stress-driven exercise in persuasion and deception, one designed to produce a very specific set of psychological effects."[50] By using the techniques of psychological interrogation, police interrogators are able to perform a "mind trick" that "makes the irrational (admitting to a crime that will likely lead to punishment) appear rational."[51] In setting out these techniques, I rely principally on the interrogation manuals produced by Inbau, Reid, and Buckley, which have been published in various forms since 1962.[52] I rely on these particular techniques because they are the most authoritative and widely used by police agencies[53] and because they have been most frequently discussed by social psychology literature[54] and court decisions.[55]

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[47] LEO, *supra* note 16, at 245.

[48] *Id.* at 247.

[49] Police and detectives frequently refer to this process as an "interview," particularly when testifying in court. INBAU ET AL., *supra* note 23, at 3. The current "Reid Technique" manual in fact describes "interviewing" and "interrogating" as two separate processes. The first "interview" process refers to a "free-flowing, nonaccusatory meeting or discussion used to gather information" in which "[t]he investigator should remain neutral and objective." *Id.* at 3–4. The latter "interrogation" process refers to "an accusatorial interaction with a suspect, conducted in a controlled environment, designed to persuade the suspect to tell the truth." *Id.* at 3. For ease of reference, I will generally refer to the process as a whole as an "interrogation" except where the distinction is helpful.

[50] LEO, *supra* note 16, at 119; *see also* INBAU ET AL., *supra* note 23, at 119–26; VAN METER, *supra* note 23, at 36–38, 46–48 (describing how to convince a suspected criminal that confessing is in his best interest using interrogation "dos" and "don'ts").

[51] LEO, *supra* note 16, at 164 (internal quotation marks omitted) (quoting Drizin & Leo, *supra* note 24, at 919).

[52] *See* GISLI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS, CONFESSIONS AND TESTIMONY 31 (Graham Davies ed., Wiley Series in Psychology of Crime, Policing and Law 1992). *See generally* FRED E. INBAU & JOHN E. REID, CRIMINAL INTERROGATION AND CONFESSIONS (1st ed. 1962); FRED E. INBAU & JOHN E. REID, CRIMINAL INTERROGATION AND CONFESSIONS (2d ed. 1967) [hereinafter INBAU & REID (2d ed. 1967)]; INBAU ET AL., *supra* note 23; JOHN E. REID & FRED E. INBAU, TRUTH AND DECEPTION: THE POLYGRAPH ("LIE-DETECTOR") TECHNIQUE (2d ed. 1977); FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS (4th ed. 2001).

[53] *See, e.g.*, GUDJONSSON, *supra* note 52, at 31.

[54] *See, e.g.*, *id.*; LEO, *supra* note 16, at 107–08 (describing the importance of training manuals on police practices and the preeminence of the Reid technique specifically).

Frequently, police interrogators conduct an initial "interview" before interrogation.[56] Interrogation manuals suggest that the interview will assist law enforcement in "identifying whether [a] suspect is, in fact, likely to be guilty."[57] However, police officers' ability to accurately make this determination is questionable due to "interrogation bias," which leads to selective perception on the part of the police. Once they have arrested a suspect, "police officers [may be] particularly vigilant and receptive to information that is consistent with their prior assumptions and beliefs, whilst ignoring, minimizing or distorting information that contradicts their assumptions."[58] More realistically, then, the interview process is not designed to weed out the innocent but to loosen suspects up for interrogation. Officers build a particular rapport with the suspect, maximize the opportunity for a free flow of information,[59] and use tropes to minimize the suspect's fears of the consequences of speaking to the police.[60]

During the "interview" stage, or shortly thereafter, the officers also determine how to construct the environment of the questioning.[61] These physical features associated with interrogation "have major effects on the way suspects react to police interrogation."[62] Although the context and conditions of interrogation can vary, certain techniques are quite common.[63] The most common environmental conditions are: isolation; eliminating "distracting" objects or pictures from the room; close quarters between the suspect and interrogator; and some form of monitoring, such as a one-way mirror or camera so that other officers can observe the interview for "signs of vulnerabilities" of which the interrogating officers can take advantage.[64] The environment may also include additional physical and psychological stressors for suspects, including "[s]ocial isolation, sensory deprivation, fatigue, hunger, . . . lack of sleep, physical and emotional pain and threats," all of which commonly result in "impaired judgment, mental confusion and disorientation, and increased suggestibility."[65]

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[55] *See, e.g.*, Missouri v. Seibert 542 U.S. 600, 611 n.2 (2004); Oregon v. Elstad, 470 U.S. 298, 328 (1985) (Brennan, J., dissenting); Miranda v. Arizona, 384 U.S. 436, 449 n.10 (1966).

[56] INBAU ET AL., *supra* note 23, at 6–7.

[57] *Id.* at 6; *see also* GUDJONSSON, *supra* note 52, at 23.

[58] GUDJONSSON, *supra* note 52, at 14.

[59] *Id.* at 23; INBAU ET AL., *supra* note 23, at 25–34.

[60] GUDJONSSON, *supra* note 52, at 16–18, 22; INBAU ET AL., *supra* note 23, at 6–7, 27 (providing that "[c]learly, during an interview or especially an interrogation, it is psychologically improper to mention any consequences or possible negative effects that a suspect may experience if he decides to tell the truth").

[61] GUDJONSSON, *supra* note 52, at 30.

[62] *Id.*

[63] *Id.*

[64] *Id.*; *see also* INBAU ET AL., *supra* note 23, at 27–34.

[65] GUDJONSSON, *supra* note 52, at 31.

Of course, in the United States, police are required to issue *Miranda* warnings prior to any in-custody interview or interrogation. Where the interrogator does not properly warn suspects or fails to secure a "knowing and intelligent" waiver, the statements should be suppressed at trial.[66] In theory, such a waiver would present a serious obstacle to the police. However, as researchers have found, "the *Miranda* ritual makes almost no practical difference in . . . police interrogation."[67] Police have developed a variety of strategies to either circumvent or violate *Miranda* simply by adapting to it and incorporating it into their strategy. Such tactics include reframing the interview as "noncustodial," quickly breezing through the rights to secure an "implicit" waiver,[68] downplaying the significance of the warnings, and persuading the suspect that waiving her rights is actually in her best interest—her opportunity to tell "her side of the story."[69]

After securing a *Miranda* waiver, the Reid technique suggests a nine-stage process for effective interrogation.[70] These steps are as follows:

> Step 1: The investigator directly and positively confronts the suspect.
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> Step 2: The investigator introduces an interrogation theme.
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> Step 3: The investigator handles the initial denials of guilt.
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> Step 4: The investigator overcomes the suspect's objections.
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> Step 5: The investigator gets and retains the suspect's attention and clearly displays sincerity in what he says.
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> Step 6: The investigator recognizes the suspect's passive mood.
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> Step 7: The investigator uses an alternative question—a suggestion of a choice to be made by the suspect concerning some aspect of the crime.
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> Step 8: The investigator has the suspect orally relate the various details of the offense that will serve ultimately to establish legal guilt.
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> Step 9: The verbal confession is converted into a written or recorded statement.[71]

The purpose and theory of the nine-step process is to "increase [the suspect's] anxiety while decreasing the perceived consequences of confessing."[72]

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[66] Miranda v. Arizona, 384 U.S. 436, 444–45 (1966).

[67] LEO, *supra* note 16, at 124.

[68] In *North Carolina v. Butler*, 441 U.S. 369, 374–76 (1979), the Supreme Court held that a waiver does not require that the police *ask* the suspect whether he would like to waive his rights or *ask* whether he actually understands the warnings. Instead, it is sufficient if the suspect understands the warnings and continues to speak to the police.

[69] LEO, *supra* note 16, at 124–30.

[70] INBAU ET AL., *supra* note 23, at 121.

[71] *Id.* at 125.

[72] LEO, *supra* note 16, at 115.

In executing these steps, police interrogators are trained to use "negative incentives" in order to "break down [a suspect's] resistance, reverse his denials; lower his self-confidence; and induce feelings of resignation, distress, despair, fear, and powerlessness."[73] These "negative incentives" include evidence ploys (presenting real or fake evidence that persuades the suspect that his version of events is impossible or a lie),[74] as well as "alternat[ing] displays of sympathy with displays of hostility" in order to reinforce with "friendliness" when a suspect says the "right" answer and negative displays when the suspect does not.[75]

For example, in Michael Crowe's case, officers told the then-14-year-old Michael Crowe that he killed his 12-year-old sister.[76] The detectives submitted Michael to a Computer Voice Stress Analyzer exam, a test known to produce unreliable and inadmissible results.[77] They then falsely told Michael that he had failed the test, "conclusively" establishing his guilt.[78] The detectives told him, "the evidence can't be argued with. So what happened is not an issue any longer."[79] False evidence ploys, like this one, are used to show suspects that their situation is hopeless, and they are a "significant factor in virtually *every* police-induced false confession in America."[80] Eventually, Michael Crowe broke down: he told the detectives, "If I did it, I hope she forgives me," and that he "must be subconsciously blocking it out or something like that."[81]

Once, as in Michael Crowe's case, the suspect's resistance breaks down, "police use positive incentives to motivate him to see the act of complying and admitting to some version of the offense as his best available exit strategy and option, given his limited range of choices and their likely outcomes."[82] Such positive incentives include suggestions such as, "this is 'your opportunity to present your side of the story,'"[83] and constructing themes and scenarios that appear to "minimize, reduce, or even eliminate the suspect's culpability because the act now seems less crimi-

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[73] *Id.* at 134.

[74] *Id.* at 139.

[75] *Id.* at 150.

[76] *Id.* at 211.

[77] *Id.* at 146 (describing the rising popularity among interrogators of the Computer Voice Stress Analyzer, which "is said to measure inaudible micro-tremors in the voice that register different decibels of stress based on whether a suspect is telling the truth or lying. Although no such micro-tremors actually exist, it is the perception, not the reality, that determines the success of evidence ploys during interrogation.").

[78] *Id.* at 211.

[79] *Id.* (internal quotation marks omitted).

[80] *Id.* at 147 (emphasis added) (citing Drizin & Leo, *supra* note 24; Richard J. Ofshe & Richard A. Leo, *The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions*, 16 STUD. L. POL. & SOC'Y 189 (1997); Ofshe & Leo, *supra* note 45).

[81] LEO, *supra* note 16, at 212 (internal quotation marks omitted).

[82] *Id.* at 134.

[83] *Id.* at 151.

nal or no longer criminal at all."[84] These scenarios include suggestions that the conduct was in "self-defense," by accident, or a "spur of the moment" reaction.[85] Interrogators use these types of themes and scenarios to create the illusion that complying with the officer is in the suspect's self-interest. That is, "the suspect will perceive the essential, if illusory, quid pro quo of psychological interrogation: in exchange for his compliance and admissions, they will attempt to negotiate the best possible outcome for him."[86]

In Michael Crowe's case, these tactics were effective. Detectives told him that they were going to "help him" with "why it happened" and "help [him] get through this."[87] They told Michael that there were "two paths," one of which was the road to punishment and jail—the other was "the path that says, 'Hey, I'm sorry for what I did.'"[88] While the first path would lead to a murder charge and threatened rape in prison, the second, the path of confession, was the chance to avoid those consequences. Eventually, Michael took what he thought was the safer path: he confessed.[89] Prosecutors charged him with murdering his sister, and he spent seven months in juvenile hall in pretrial detention.[90] The state dismissed the charges when Michael's little sister's blood was found on the clothing of Richard Truite, who had been seen in the neighborhood the night of the murder. Truite was eventually convicted for the murder.[91]

Not every confession looks like Michael Crowe's—not all confessors are juveniles, many confess without ever believing in even the hypothetical possibility of their guilt, and not all confessors escape a wrongful conviction.[92] Rather, people confess for a variety of reasons and in a variety of circumstances. Suspects who make "true confessions" often do so because they want to escape the pressure of interrogation, perceive themselves as having no meaningful choice but to do so, or come to see "the benefits of admitting to some version of the offense [as] out-

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[84] *Id.* at 153.

[85] *Id.* at 152–54; *see also* INBAU & REID (2d ed. 1967), *supra* note 52, at 40–59 (providing, among other techniques, specific techniques for "sex cases"). Inbau and Reid recommend "pursu[ing] a practice of having the subject believe that his particular sexual irregularity is not an unusual one, but rather one that occurs quite frequently, even among so-called normal and respectable persons." *Id.* at 40. With respect to theft, they recommend suggesting to suspects that "most people will steal if given the opportunity." *Id.* at 41.

[86] LEO, *supra* note 16, at 155. For example, interrogators may tell a suspect "that he can choose which role they will assign him—principle, accessory, co-perpetrator, innocent bystander, or witness, for example—in the narrative they are completing for the prosecution. The implication [is] . . . that if he continues to deny their claims he will be cast in the criminal role and thus arrested and prosecuted." *Id.* at 159.

[87] *Id.* at 211 (internal quotation marks omitted).

[88] *Id.* at 212.

[89] *Id.* at 213.

[90] *Id.*

[91] *Id.*

[92] *See infra* Part I.B.

weigh[ing] the costs of continued denial."[93] Police interrogators are not ignorant of these factors—rather, interrogation is designed to promote these feelings and dynamics.[94] Unfortunately, these techniques are not designed to weed out false confessors—those who are innocent are subject to the same coercive pressures.[95]

B. Varieties and Causes of False Confessions

False confessions are caused by a variety of factors—including those that are unique to an individual, those inherent in interrogation practices, and those that derive from practices that are more coercive than average.[96] The primary factor for innocent confessors is coercion—being "frightened, tricked, exhausted or all three."[97] Of the 135 exonerations studied by the National Registry of Exonerations in 2012, 60% (82) were "clearly coerced,"[98] 12% (16) either denied having made the statements or indicated that their words were not meant to be an admission of guilt,[99] and 11% (15) of the confessions were apparently voluntary.[100] Researchers have also categorized confessions into distinct groups to reflect the various phenomena that produce them. Although there continues to be debate surrounding the exact definitions and terms, essentially there are three types of psychological processes that lead to false confessions. These are "voluntary false confessions," "compliant false confessions," and "persuaded false confessions."[101]

A voluntary false confession is one that does not involve police inducement. Voluntary false confessions can be either rooted in psychological disorders or be the result of an independent personal motive—for example, to protect the real perpetrator.[102] "High-profile" crimes often attract confessions from volunteers around the country as well.[103] Laverne Pavlinac's confession is an example of this: she confessed to a crime she did not commit in order to end 10 years of abuse.[104] Although equally unreliable, voluntary false confessions can often present less of a risk of a wrongful conviction. This is because police and prosecutors are more skeptical of unprompted voluntary false confessions than those produced

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[93] LEO, *supra* note 16, at 162.

[94] *Id.* at 162–63; *see also* GARRETT, *supra* note 46, at 19 ("[F]alse confessions do not happen quickly or by happenstance. . . . Confession statements are carefully constructed during an interrogation and then reconstructed during any criminal trial that follows.").

[95] *See* LEO, *supra* note 16, at 245–46.

[96] *Id.* at 197–99, 201.

[97] GROSS & SHAFFER, *supra* note 20, at 57.

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] LEO, *supra* note 16, at 199–201, 210.

[102] *Id.* at 200–01.

[103] *Id.* at 201.

[104] *See supra* text accompanying notes 3–15.

by their own tactics.[105] However, it is difficult to know how often these types of confessions occur or how often police officers recognize them as such.[106]

Compliant false confessions are the most common source of false confessions.[107] This category includes statements "given in response to police coercion, stress, or pressure in order to achieve some instrumental benefit."[108] Distinctively, compliant false confessors know that what they are saying is false and that they are innocent, and these confessors typically recant their statements shortly after the coercive pressure of interrogation is over.[109] There are a variety of psychological influences that provoke compliant false confessions, including a promise (express or implied) of leniency, threats,[110] stress, lack of food or sleep,[111] and police pressure.[112] Typically, the primary causes of compliant false confessions are those external to the individual, although the psychological capacity to resist these stressors varies by individual.[113] Vulnerable individuals, particularly juveniles and those with mental disabilities, are the most likely defendants to produce a false confession.[114] In the National Registry of Exonerations 2012 report, researchers found that 75% of exonerees with mental disabilities confessed.[115] And while one sixth of exonerees (147

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[105] LEO, *supra* note 16, at 201.

[106] GUDJONSSON, *supra* note 52, at 227.

[107] LEO, *supra* note 16, at 202.

[108] *Id.* at 201.

[109] *Id.*

[110] For example, in exoneree David Saraceno's case, officers threatened then-eighteen-year-old Saraceno with going to jail. They told him that sending him there would be "'like throwing a lamb to the lions,'" and that "[h]e would be 'raped by a big black ni**er.'" *Id.* at 205 (expletive removed). Feeling that it was his "only way out" of the interrogation, Saraceno eventually falsely confessed to the officers that he had set a series of bus fires. *Id.* at 206.

[111] *See, e.g.*, *id.* at 208 (providing the case of Corey Beale, who was interrogated without sufficient food, medicine, or sleep over the course of 51 hours).

[112] *Id.* at 202.

[113] *Id.* at 202–03.

[114] GROSS & SHAFFER, *supra* note 20, at 60. Gross and Shaffer also provide, as examples: Paula Gray, a mildly retarded 17-year-old girl who falsely confessed in 1978, implicating four innocent men in a rape and double murder; Jeff Deskovic, a juvenile who falsely confessed after six hours of interrogation to a rape and murder of his high school classmate; and Earl Washington, who was mentally retarded and falsely confessed to brutally raping and murdering Rebecca Lynn Williams along with four additional crimes for which he was not charged. *Id.* at 57, 59–60; *see also* David Boeri, *Anatomy of a Bad Confession, Part 1*, WBUR BOSTON (Dec. 7, 2011), http://www.wbur.org/2011/12/07/worcester-coerced-confession-i (describing the confession of 16-year-old Nga Truong, whose confession was ruled involuntary after detectives lied to her about non-existent medical evidence, used the good cop/bad cop routine, and accused her of lying every time she denied killing her baby).

[115] GROSS & SHAFFER, *supra* note 20, at 60.

out of 873) were juveniles, mentally disabled, or both, that group made up 59% (79 of 135) of false confessions.[116]

Persuaded false confessions, by contrast, occur where a suspect actually doubts his own memory or perceptions and at least temporarily believes that "it is more likely than not that he committed the crime he is being accused of, despite having no memory of committing it."[117] Such a confessor, like Michael Crowe, is not certain of his own guilt but "reasons from inference—rather than actual knowledge or memory—that he must have committed the crime and, as a result, accepts responsibility for it."[118] Social psychologists have documented particular interrogation techniques that may increase the likelihood of producing persuaded false confessions and how to recognize them.[119] While certain personality factors may be evident in documented persuaded false confessions, these factors alone do not need to be pronounced, nor does the confessor need to be mentally ill to succumb to police interrogations.[120] Persuaded false confessions are marked by a series of uncertain, speculative, and hypothetical opinions, referred to by some as "the grammar of confabulation."[121]

C. What Does a False Confession Look Like?

At first glance, many assume that they will be able to distinguish a "false" or an "involuntary" confession from a "true" and "voluntary" one. Although this assumption has been made in a variety of contexts, including in the Supreme Court,[122] most research indicates the opposite is

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[116] *Id.*

[117] LEO, *supra* note 16, at 210.

[118] *Id.* Michael Crowe confessed to murdering his younger sister while sleepwalking. *Id.* at 211, 213. His interrogators told him to, "[u]se [his] imagination" and refused to accept "I do not know" as an answer. *Id.* at 212 (internal quotation marks omitted). Ultimately, Michael Crowe cracked and began hypothesizing, "If I did it" and "I know I did it, but I don't know how." *Id.* at 212–13 (internal quotation marks omitted).

[119] *See, e.g.*, GUDJONSSON, *supra* note 52, at 231 (listing the following factors: (1) an interrogator repeatedly tells the suspect that he is confident in his guilt, (2) isolation, (3) lengthy and emotional interrogation, (4) repeated scientific evidence ploys, (5) an interrogator reminds the suspect of his memory issues, where they exist, (6) an interrogator demands that the suspect "accepts his premises and explanations of the alleged crime," and (7) an interrogator induces fear of negative consequences from repeated denials).

[120] *Id.* at 232 (noting that in a 1989 study, all the suspects had (1) "Good trust of people in authority"; (2) "Lack of self-confidence"; and (3) "Heightened suggestibility," but the personality traits were neither particularly extreme, nor were the suspects considered mentally ill).

[121] LEO, *supra* note 16, at 210–11.

[122] Lego v. Twomey, 404 U.S. 477, 484–85 (1972) (suggesting that due process concerns were "not based in the slightest on the fear that juries might misjudge the accuracy of confessions and arrive at erroneous determinations of guilt or innocence").

true.[123] In spite of the "new awareness among scholars, legislators, judges, prosecutors, police departments, and the public [of false confessions]," the assumption remains that these confessions are easy to spot and will contain very little corroborating information.[124] To investigate this assumption, Professor Brandon Garrett undertook to study the cases of 40 DNA exonerees whose cases involved false confessions. Garrett found that "[a]ll but two of the forty exonerees studied told police much more than just 'I did it.' Instead, police said that these innocent people gave rich, detailed, and accurate information about the crime, including what police described as 'inside information' that only the true culprit could have known."[125] In 95% of the cases studied, the detectives claimed not only that suspects were the ones to volunteer key facts about the crime but also that the police "assiduously avoided contaminating the confession by not asking leading questions."[126] Although almost all of the cases studied involved pretrial constitutional challenges, the statements were ultimately allowed at trial, and they became the centerpiece of the prosecutions' cases.[127]

Although it is impossible to be certain about exactly how these confessions developed into such convincing narratives (because many of them were not fully recorded), one factor is clear—in most of the studied cases, police were able to contaminate the statements by feeding information to suspects, either during the interview, an interrogation, or a visit to the scene.[128] When suspects were asked open-ended questions or asked to volunteer information, most exonerees guessed incorrectly. In 75% of the cases studied, the suspects gave facts that were inconsistent with the objective evidence, which should have been a warning sign that the confessions were false.[129] Nonetheless, the interrogators continued, and these exonerees were convicted based on the corroborative information they incorporated into their statements, while the false guesses were apparently disregarded.[130] Professor Garrett's work is helpful to understanding false confessions because it signals the types of issues to look for in the analysis, including whether there was police contamination and whether the suspect's statements contained *truly* inside information or, instead, demonstrated a lack of personal knowledge.

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[123] *See, e.g.*, G. Daniel Lassiter & Andrew L. Geers, *Bias and Accuracy in the Evaluation of Confession Evidence*, *in* INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT 197, 198 (G. Daniel Lassiter ed., 2004).

[124] GARRETT, *supra* note 46, at 18–19.

[125] *Id.* at 19.

[126] *Id.* at 20.

[127] *Id.* Garrett found that "[o]f the twenty-nine exonerees who went to trial and whose available records indicate whether a challenge to the admission of the confession was made, twenty-eight (97%) made a challenge. All were unsuccessful." *Id.* at 36.

[128] *Id.* at 28, 30, 32–33.

[129] *Id.* at 33.

[130] *Id.* at 33–34.

D. Electronic Recording as a Backdrop

At the outset, it is important to note that any consideration of reliability will depend on an adequate recording of the interrogation as a whole. Of the many reforms proposed to prevent false confessions, the "principle one" is to record interrogations in their entirety.[131] This reform has become considerably more commonplace—more than 800 jurisdictions require recording under various circumstances.[132] Even in jurisdictions that do not require recording, "numerous police departments have voluntarily instituted a policy requiring some type of recording requirement."[133] The benefits of recording accrue to both police and defendants. Prosecutors have better evidence to use at trial, can respond better to suppression motions, and can defend against defendants' false claims of coercive practices.[134] Meanwhile, defendants benefit from a recording of the entire interrogation as it provides a check on state power, protects legal rights, and preserves exculpatory evidence.[135]

Since 2011, Oregon has required recording interrogations for aggravated murder charges and for all felonies that carry a mandatory minimum sentence.[136] Because the law applies to "custodial interviews,"[137] the statutory requirement would likely include the entirety of the interrogation process, tracking the language of *Miranda*. The law also contains several exceptions for "statements made [in response to] routine booking questions, spontaneous statements, statements provided to federal law enforcement, and equipment failure," as well as a general exception for agencies with fewer than six police officers.[138] While failure to record is not a sufficient basis under the statute to exclude the evidence, if the state cannot show that an exception applies by a preponderance of the evidence, the court is required to give a special jury instruction describing the requirements and explaining the superior reliability of recorded statements.[139] Law enforcement agencies are also required to "preserve the recording until the defendant's conviction for the offense is final and all direct, post-conviction relief and habeas corpus appeals are exhausted, or until the prosecution of the offense is barred by law."[140] Thus, Ore-

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[131] ACKER & REDLICH, *supra* note 25, at 204.

[132] *False Confessions*, *supra* note 19.

[133] Alan M. Gershel, *A Review of the Law in Jurisdictions Requiring Electronic Recording of Custodial Interrogations*, 16 RICH. J.L. & TECH. 9, ¶ 4 (2010), http://jolt.richmond.edu/v16i3/article9.pdf.

[134] *Id.* ¶¶ 3, 69–70; *see also* ACKER & REDLICH, *supra* note 25, at 204.

[135] LEO, *supra* note 16, at 299–300.

[136] 2009 Or. Laws 1264 (codified at OR. REV. STAT. § 133.400 (2011)) (effective Jan. 1, 2010) (relating to custodial interrogations); *see also* Gershel, *supra* note 133, ¶¶ 28–30 (describing the Oregon law).

[137] OR. REV. STAT. § 133.400.

[138] Gershel, *supra* note 133, ¶ 29 (citing 2009 Or. Laws 1264).

[139] OR. REV. STAT. § 133.400(3)(a); Gershel, *supra* note 133, ¶ 30.

[140] OR. REV. STAT. § 133.400(4).

gon's statutory scheme provides defendants with a high risk of false confessions and serious consequences with the ability to analyze and argue the reliability of their statements, although the law does not require recording for all offenses.

For the purposes of reliability, recording is critical: without a record of all of the defendant's statements as well as all of the suggestions made by police, it is impossible to make a meaningful comparison between the suspect's statements and the known facts of a crime, to determine the tactics used by officers, or to identify possible sources of contamination.[141] Conversely, a reliability test also encourages recording—the more scrutiny paid to confessions, the more police and prosecutors will seek to preserve a record to rebut a motion to suppress or exclude the evidence.[142] The proposed analysis is intended to supplement additional reforms, not to supplant them.

II. Constitutional Doctrine

The main doctrines that govern admissibility of confession evidence—the Fourtheenth Amendment due process voluntariness standard, the Sixth Amendment right to counsel, and the Fifth Amendment *Miranda* doctrine[143]—do not offer an adequate measure for reliability nor do they sufficiently deter police conduct that tends to create unreliable evidence carrying a high risk of wrongful convictions. Furthermore, by not considering reliability directly, courts often compound the error by "focus[ing] on the apparent reliability of . . . confessions when they admitted [them] and found them voluntary."[144] The constitutional framework also over-relies on the jury's ability to evaluate evidence offered by the state. Finally, in many cases, these doctrines do not apply to benefit the defendant at all: in at least 13% of wrongful convictions, the confessor was not the defendant himself but rather an alleged coconspirator, presenting a distinct set of issues under the Confrontation Clause.[145] In

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[141] *See* Leo, *supra* note 16, at 288.

[142] *See, e.g.*, Acker & Redlich, *supra* note 25, at 204 (quoting a police officer from Montgomery County, Maryland, as saying, "I am a big fan of recordings. They are quicker and more accurate than note taking. Defense attorneys challenge everything as a matter of practice, and it's always great to have a solid piece of evidence showing what occurred during the interrogations.").

[143] Leo, *supra* note 16, at 272.

[144] Garrett, *supra* note 46, at 40.

[145] Thirteen percent of all wrongful convictions based on a false confession were based on the confession or confessions of alleged coconspirator(s). Gross & Shaffer, *supra* note 20, at 58–59. In these cases, unless the codefendant agrees to testify (often in exchange for a plea agreement), the defendant may exclude the evidence pursuant to the *Crawford v. Washington* doctrine under the Confrontation Clause. 541 U.S. 36, 68–69 (2004); *see also* Bruton v. United States, 391 U.S. 123, 126 (1968); State v. Lavadores, 214 P.3d 86, 92 (Or. Ct. App. 2009) (citing *Crawford*, 541 U.S. 36; *Bruton*, 391 U.S. 123). However, as the statistic from Gross and Shaffer's report indicates, coconspirators frequently choose to testify falsely, Gross & Shaffer,

order to understand the limitations of these doctrines, I briefly consider the due process and *Miranda* doctrines in turn. Because the Sixth Amendment right to counsel decoupled from *Miranda* applies only in limited contexts relating to unreliable confessions,[146] I do not examine that doctrine.

A. The "Amphibian" Due Process Standard

Initially, the voluntariness standard was intended to promote two goals. The first was to promote reliability at trial—the theory being that only those confessions that were not products of police coercion or improper influence were likely to be reliable.[147] The second was to deter particular police methods, the view being that confessions elicited by these methods were unfair to the defendant.[148] Gradually over the course of the mid-to-late twentieth century, the due process doctrine began to shift away from untrustworthy or unreliable confessions to a focus primarily on voluntariness.[149]

In *Rogers v. Richmond*, the Supreme Court specifically held that the Due Process Clause excludes involuntary confessions:

> not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system—a system in which the State . . . may

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supra note 20, at 58–59, in which case the protection would not apply. This is because the privilege against compulsory self-incrimination is "limited to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records." Bellis v. United States, 417 U.S. 85, 89–90 (1974) (quoting United States v. White, 322 U.S. 694, 701 (1944)) (internal quotation marks omitted). Thus, a defendant does not have standing to challenge the compelled statements of others when they are otherwise admissible. *E.g.*, United States v. Ward, 989 F.2d 1015, 1020 (9th Cir. 1992).

[146] LEO, *supra* note 16, at 278 ("Because virtually all police interrogation in America occurs prior to charges being filed or judicial proceedings commencing . . . the Sixth Amendment right to counsel is almost always irrelevant to the admissibility of confessions.").

[147] *Id.* at 273; *see also* Malinski v. New York, 324 U.S. 401, 403, 406 (1945) (excluding defendant's confession because he was stripped and left naked for hours without a blanket); Ashcraft v. Tennessee, 322 U.S. 143, 153–54 (1944) (excluding statements made after 36 hours of incommunicado interrogation because of extreme coercive pressure); Chambers v. Florida, 309 U.S. 227, 239–41 (1940) (excluding confessions after week-long interrogations in which the defendants were denied food and sleep and threatened). *See generally* Yale Kamisar, *What Is an "Involuntary" Confession? Some Comments on Inbau and Reid's* Criminal Interrogation and Confessions, 17 RUTGERS L. REV. 728 (1963), *as reprinted in* YALE KAMISAR, POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY 1 (1980) (describing the history and origins of the voluntariness test).

[148] LEO, *supra* note 16, at 273.

[149] *Id.* at 273–75; *see also* Welsh S. White, *What Is an Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001, 2002–04 (1998).

> not by coercion prove its charge against an accused out of his own mouth.[150]

Richmond thus created the due process standard used today.[151] Confessions will be excluded under the Due Process Clause where the police action "was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined—a question to be answered with complete disregard of whether or not petitioner in fact spoke the truth."[152] Rather, this determination is made based on the totality of the circumstances—including factors such as the suspect's youth, her degree of education, intelligence, length of detention, prolonged questioning, and the use of "physical punishment such as the deprivation of food or sleep."[153] Thus, as noted in the dissent, "The privilege against self-incrimination enjoined by the Fifth Amendment is not designed to enhance the reliability of the factfinding determination; it stands in the Constitution for entirely independent reasons."[154]

In 1986, the Supreme Court decided *Colorado v. Connelly*.[155] In *Connelly*, the defendant, Francis Connelly, was a man suffering from a mental illness who approached an off-duty police officer in downtown Denver.[156] Mr. Connelly told the officer that he had murdered someone.[157] The officer warned him of his *Miranda* rights, which Mr. Connelly waived.[158] The next morning, Mr. Connelly met with the public defender's office, during which time he became disoriented and told them "that 'voices' had told him to come to Denver and that he followed the directions of those voices in confessing."[159] Mr. Connelly was later held at the state hospital and diagnosed with chronic schizophrenia from which he was suffering the day that he approached the officer.[160] The Court concluded that, although "[a] statement rendered by one in the condition of [Mr. Connelly] might be proved to be quite unreliable, . . . this is a matter to be governed by the evidentiary laws of the forum and not by the Due Process Clause of the Fourteenth Amendment."[161]

The parallel Oregon standard arises from article I, section 12 of the Oregon Constitution, providing that "[n]o person shall . . . be compelled

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[150] Rogers v. Richmond, 365 U.S. 534, 540–41 (1961).

[151] *See, e.g.*, State v. Lemoine, 827 N.W.2d 589, 594 (Wis. 2013) (applying the test).

[152] *Rogers*, 365 U.S. at 544.

[153] Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973).

[154] Allen v. Illinois, 478 U.S. 364, 375 (1986) (Stevens, J., dissenting) (citing *Rogers*, 365 U.S. at 540–41).

[155] 479 U.S. 157 (1986).

[156] *Id.* at 160–61.

[157] *Id.* at 160.

[158] *Id.*

[159] *Id.* at 161.

[160] *Id.*

[161] *Id.* at 167 (citation omitted).

in any criminal prosecution to testify against himself."[162] Thus, like the federal due process standard, the Oregon constitutional standard likewise protects only those confessions that are deemed "compelled."[163] Under the Oregon Constitution, "police overreaching is an essential predicate of a challenge to the admissibility of a statement or a confession as involuntary."[164] Within that framework, a suspect's personal characteristics alone are not sufficient to render statements inadmissible, and neither is a statement's inherent lack of reliability without a showing that police "exert[ed] coercion."[165] However, Oregon's analysis continues to at least ostensibly embrace the reliability purpose of excluding this evidence. For example, in *State v. Gable*, the Oregon Court of Appeals provided that the key difference between the due process standard and *Miranda* violations is that "[a]dmissions that are the product of coercion are inherently unreliable and, therefore, not admissible for any purpose," whereas "an admission obtained in violation of *Miranda* may be admitted for impeachment purposes," because *Miranda* is a procedural safeguard not coextensive with the Fifth Amendment.[166]

For various reasons, the impact of the Fourteenth Amendment due process standard has never been studied empirically. Still, today many scholars describe the test as largely illusory.[167] This is in part because it was later overshadowed by the Fifth Amendment's *Miranda* warnings,[168] and in part because the immediate impact of the test—elimination of the "third degree" as a mainstream police practice—was accomplished early on.[169] The test has also been criticized as "amphibian" because determinations are made on a case-by-case basis and it provides little guidance to either judges or police because of its "metaphysical" subjective component.[170] Thus, by its own terms, as a means of protecting against unreliable or false confessions, the due process standard actually does very little.

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[162] OR. CONST. art. I, § 12.

[163] State *ex rel.* Juvenile Dep't v. Deford, 34 P.3d 673, 684 (Or. Ct. App. 2001).

[164] *Id.*

[165] *Id.*

[166] State v. Gable, 873 P.2d 351, 354 (Or. Ct. App. 1994).

[167] *See, e.g.*, LEO, *supra* note 16, at 276.

[168] *See id. But see* White, *supra* note 149, at 2019 (drawing a distinction between reliability of a confession in a particular circumstance—not at issue under the Due Process Clause—and reliability of particular methods likely to produce unreliable confessions).

[169] LEO, *supra* note 16, at 276.

[170] *See* Culombe v. Connecticut, 367 U.S. 568, 604–05 (1961) ("The notion of 'voluntariness' is itself an amphibian. It purports at once to describe an internal psychic state and to characterize that state for legal purposes."); LEO, *supra* note 16, at 277 ("The voluntariness test is ultimately a metaphysical inquiry with no clear resolution because there is no way to get inside the head of a suspect and objectively discern whether his will or capacity for free choice was overborne. . . . [V]oluntariness [is] a fiction that allows judges to vilify interrogation techniques they do not approve of and beautify those that they do. The voluntariness test thus provides little guidance to trial judges in individual cases.").

Even a proven "false" confession is neither necessary nor sufficient to satisfy the test absent the additional factor of state coercion.

B. Miranda *Doctrine*

> *An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compulsion to speak. As a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery.*
>
> – *Miranda v. Arizona*, decided in 1966[171]
>
> *[S]ince we're in kind of a formal setting and things like that and because [Detective Munley's] a police officer and I'm a police officer and things like that, sometimes some of the questions that we get into are, are a little bit sensitive and things like that. And what I'd like to do is before we, we go into that is read something to you and, so that you understand some of the protections and things that, that you have. It's not meant to scare you or anything like that. Don't, don't take it out of context, okay.*
>
> – Detective Riley, Phoenix, Arizona, 1991[172]

In 1966, the Supreme Court decided *Miranda v. Arizona*,[173] which established a new approach with a clear rule for dealing with police-induced confessions. That is, once a suspect is deemed constitutionally "in custody," police officers must warn her of her constitutional rights before interrogating her.[174] Until the suspect waives her rights, the police officers cannot continue questioning.[175] This (relatively) bright-line rule "is intended to backstop the right conferred by the Fifth Amendment not to be compelled to incriminate oneself, by excluding from the defendant's trial the confession that the violation enabled the police to elicit when upon arresting they questioned him."[176]

The *Miranda* decision also spoke strongly against coercive police practices[177] that had been endorsed under the Reid technique. While this

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[171] 384 U.S. 436, 461 (1966).

[172] Doody v. Schriro, 548 F.3d 847, 851 (9th Cir. 2008), *on reh'g en banc*, 596 F.3d 620 (9th Cir. 2010), *cert. granted, judgment vacated sub nom.* Ryan v. Doody, 131 S. Ct. 456 (2010).

[173] 384 U.S. 436.

[174] *Id.* at 444–45.

[175] *Id.*

[176] Aleman v. Vill. of Hanover Park, 662 F.3d 897, 905 (7th Cir. 2011), *cert. denied sub nom.* Micci v. Aleman, 133 S. Ct. 26 (2012).

[177] "An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compulsion to speak. As a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery." *Miranda*, 384 U.S. at 461.

initially raised concern among the authors of that technique, they opted against change.

> As we interpret . . . *Miranda v. Arizona*, all but a very few of the interrogation tactics and techniques presented in our earlier publication are still valid if used after the recently prescribed warnings have been given to the suspect under interrogation, and after he has waived his self-incrimination privilege and his right to counsel. . . . If we are in error with regard to our interpretation of the *Miranda* case, then the Supreme Court has but one more move to make, and that is to outlaw all interrogations of criminal suspects.[178]

Instead, they opted to incorporate the warnings into their manual, ultimately including a variety of end-runs around the warnings that made suspects more likely to waive their rights.[179]

Oregon law substantially mirrors the *Miranda* doctrine—both in terms of substance and analysis. Although Oregon courts use article I, section 12 of the Oregon Constitution, as "an independent source for warnings similar to those required under the Fifth Amendment to the United States Constitution, as described in *Miranda v. Arizona*,"[180] they have retained the "single text" of the federal *Miranda* warnings for the sake of convenience.[181] Additionally, the burden-shifting between the state and defense are similar to those under the federal due process standard.[182]

Although when *Miranda* was decided in 1966 the assumption was that most suspects would not waive their rights, this proved not to be the case.[183] For example, in 1996, Dr. Richard Leo observed 122 interrogations and examined 60 taped interrogations in police departments oper-

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[178] INBAU & REID (2d ed. 1967), *supra* note 52, at 1 (footnote omitted).

[179] *See supra* notes 38–40 and accompanying text.

[180] State v. Roble-Baker, 136 P.3d 22, 24 n.1 (Or. 2006).

[181] State v. Quinn, 831 P.2d 48, 51 (Or. Ct. App. 1992) (quoting State v. Sparklin, 672 P.2d 1182, 1184 (Or. 1983)).

[182] *State v. James* lays out the standard in great detail: "The burden of persuasion regarding compliance with the right to counsel remains with the state and does not shift. As the party with the burden of persuasion, the state bears an initial burden of production to show that the police afforded the right to counsel or that defendant validly waived his or her right to counsel. Once the state has offered such evidence, the trier of fact can accept it. . . . The state then can decide to adduce still further evidence that the defendant did not invoke or validly waived his or her rights, or it can risk success on the record as it stands at that point. If the trial court finds from the evidence in the record . . . that the defendant unequivocally invoked his or her right to counsel, and that the authorities continued their questioning, the court must suppress the defendant's subsequent statements. If the trial court finds that the defendant did not invoke his or her right to counsel, or invoked it but validly waived that right after invoking it, the subsequent inculpatory statements are not subject to suppression. And, finally, when . . . the trial court determines that the evidence regarding invocation of the right to counsel is in equipoise, the state necessarily has failed to meet its burden of persuasion, and the state loses." 123 P.3d 251, 260 (Or. 2005) (citations omitted).

[183] *See, e.g.*, White, *supra* note 149, at 2048.

ating in three urban areas and found that approximately 78% of suspects waived their *Miranda* rights.[184] Thus, "the *Miranda* ritual makes almost no practical difference in . . . police interrogation."[185] *Miranda* may also have an additional drawback, which is that it "distract[s] judges from the propriety of the interrogation that follows a waiver of *Miranda* rights."[186] Dicta in the 1991 *Arizona v. Fulminante*[187] case suggests that this comes in the form of a less stringent due process standard than the pre-*Miranda* test while retaining the general doctrine.[188] It also allows police to "construct voluntariness" more easily because of the apparent voluntariness created by a waiver—police insert things like bathroom, cigarette, and food breaks along with the *Miranda* waiver into their reports and testimony, sometimes inserting them into the suspect's post-confession narrative as well.[189] As a result, because none of these doctrines is concerned with reliability *per se*, constitutional doctrines are inadequate for the task of suppressing this damaging evidence.

III. THE *LAWSON* DECISION

As with confessions, unreliability plagues eyewitness identification, particularly those influenced by suggestive police procedures. That is, eyewitness identifications can be both objectively unreliable and likely to play a role in documented wrongful convictions. The Innocence Project found that "[e]yewitness misidentification is the single greatest cause of wrongful convictions nationwide, playing a role in nearly 75% of convictions overturned through DNA testing."[190] Thirty years of social science research has shown that while eyewitness testimony is extremely persuasive evidence when put before a judge or jury, it can also be unreliable.[191] Because jurors tend to over rely on this form of evidence, "eyewitness identifications subjected to suggestive police procedures are particularly

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[184] Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 268, 276 (1996).

[185] LEO, *supra* note 16, at 124.

[186] Aleman v. Vill. of Hanover Park, 662 F.3d 897, 906 (7th Cir. 2011) (citing WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 235 (2011)), *cert. denied sub nom.* Micci v. Aleman, 133 S. Ct. 26 (2012).

[187] 499 U.S. 279, 285–87 (1991) (using the totality of the circumstances test rather than adopting Arizona's proposed "but for" test for excluding the evidence but finding the issue of coercion by means of withholding protection from prison violence "a close one").

[188] *See* White, *supra* note 149, at 2020.

[189] LEO, *supra* note 16, at 174–76.

[190] *Eyewitness Misidentification*, *supra* note 31.

[191] *Id.*; *see also* State v. Lawson, 291 P.3d 673, 678 (Or. 2012) ("In the 30-plus years since *Classen* was decided, there have been considerable developments in both the law and the science on which this court previously relied in determining the admissibility of eyewitness identification evidence.") (citing State v. Classen, 590 P.2d 1198 (1979)). The Court took judicial notice of the data and findings contained in the scientific literature on the issue of eyewitness identification. *Id.* at 685.

susceptible to concerns of unfair prejudice."[192] In November 2012, the Oregon Supreme Court changed that analysis by addressing the reliability of eyewitness identifications *before* considering the due process standard.[193]

The *Lawson* Court began by reviewing the research in social psychology, pointing to the types of identifications that were likely to be unreliable and the factors that produced them. As described and applied in *Lawson*, the relevant scientific literature groups (un)reliability factors into two categories: (1) system variables, referring to the circumstances around the identification, including police procedures; and (2) estimator variables, referring to the characteristics of the witness, alleged perpetrator, and surrounding environmental conditions of the underlying event.[194] System variables include the following: (1) whether the lineup was administered by a "blind" officer who does not know the suspect's identity;[195] (2) pre-identification instructions;[196] (3) lineup construction;[197] (4) simultaneous versus sequential lineups;[198] (5) show-ups;[199] (6) multiple viewings;[200] (7) suggestive questioning and contamination;[201] and (8) suggestive feedback and recording confidence.[202] Estimator variables in-

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[192] *Lawson*, 291 P.3d at 695.

[193] *Id.* at 689.

[194] *Id.* at 685.

[195] *Id.* at 686 ("Ideally, all identification procedures should be conducted by a 'blind' administrator—a person who does not know the identity of the suspect."). Thus, police departments can improve procedures by having someone other than the investigating officers conduct the lineup.

[196] *Id.* (providing "that a suspect may or may not be in the lineup or photo array, and that it is permissible not to identify anyone").

[197] *Id.* ("The known-innocent subjects used as lineup fillers should be selected first on the basis of their physical similarity with the witness's description of the perpetrator; if no description of a particular feature is available, then the lineup fillers should be chosen based on their similarity to the suspect.").

[198] *Id.* ("In a lineup procedure in which the witness is presented with each individual person or photograph sequentially, the witness is less able to engage in relative judgment, and thus is less likely to misidentify innocent suspects.").

[199] *Id.* A show-up is when officers show a suspect, usually one who is under arrest, to a witness—often close in time to the initial crime. Show-ups "are generally regarded as inherently suggestive . . . because the witness is always aware of whom police officers have targeted as a suspect." *Id.*

[200] *Id.* at 686–87.

[201] *Id.* at 687 ("The use of suggestive wording and leading questions tend to result in answers that more closely fit the expectation embedded in the question. Witness memory can become contaminated by external information or assumptions embedded in questions or otherwise communicated to the witness.").

[202] *Id.* ("Post-identification confirming feedback tends to falsely inflate witnesses' confidence in the accuracy of their identifications, as well as their recollections concerning the quality of their opportunity to view a perpetrator and an event. . . . As a result, the danger of confirming feedback lies in its potential to increase the *appearance* of reliability without increasing reliability itself.").

clude all of the following: (1) stress;[203] (2) witness attention;[204] (3) duration of exposure;[205] (4) environmental viewing conditions;[206] (5) witness characteristics and condition;[207] (6) description;[208] (7) perpetrator characteristics—distinctiveness, disguise, and own-race bias;[209] (8) speed of identification;[210] (9) level of certainty;[211] and (10) memory decay.[212] The *Lawson* Court described the purpose of conducting this review as one to "determine whether . . . the test established in *Classen* adequately ensures the reliability of particular eyewitness identification evidence that has been subjected to suggestive police procedures, and, ultimately, whether a factfinder can properly assess and weigh the reliability of eyewitness identification evidence."[213]

Based on these factors, *Lawson* went on to consider the sufficiency of Oregon's previous test, from *State v. Classen*,[214] that emphasized unfair procedures over reliability.[215] That test paralleled the Supreme Court's due process standard of eyewitness identification, which provides for a two-step process: first, the court must consider whether the identification procedure is unnecessarily suggestive; second, if the procedure *was* unnecessarily suggestive, a court will look at several factors to determine if the identification testimony is nevertheless reliable under the totality of the circumstances.[216] Like the due process standard for confessions, the

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[203] *Id.* ("High levels of stress or fear can have a negative effect on a witness's ability to make accurate identifications.").

[204] *Id.* This factor includes concerns for issues such as weapon-focus effect in which witnesses have been shown to focus on the presence of a weapon rather than on facial features. *Id.* at 701.

[205] *Id.* at 687 ("Longer durations of exposure . . . generally result in more accurate identifications.").

[206] *Id.*

[207] *Id.* ("An eyewitness's ability to perceive and remember varies with the witness's physical and mental characteristics.").

[208] *Id.* at 687–88 ("Contrary to a common misconception, there is little correlation between a witness's ability to describe a person and the witness's ability to later identify that person.").

[209] *Id.* at 688 ("Witnesses are better at remembering and identifying individuals with distinctive features than they are those possessing average features. The use of a disguise negatively affects later identification accuracy. Witnesses are significantly better at identifying members of their own race than those of other races.").

[210] *Id.* ("Accurate identifications generally tend to be made faster than inaccurate identifications.").

[211] *Id.* ("Witness certainty, although a poor indicator of identification accuracy in most cases, nevertheless has substantial potential to influence jurors.").

[212] *Id.* ("Memory generally decays over time. Decay rates are exponential rather than linear, with the greatest proportion of memory loss occurring shortly after an initial observation, then leveling off over time.").

[213] *Id.* at 685.

[214] 590 P.2d 1198, 1203 (Or. 1979).

[215] *Lawson*, 291 P.3d at 678.

[216] Neil v. Biggers, 409 U.S. 188, 199 (1972); *see also* Manson v. Brathwaite, 432 U.S. 98, 110 (1977). *But see* United States v. Greene, 704 F.3d 298, 305 n.3 (4th Cir.

burden was on the defendant to demonstrate that suggestive procedures were used before the burden shifted to the state to show that the identification was reliable.[217]

Prior to *Lawson*, courts did not consider OEC 602 (personal knowledge) and OEC 701 (lay opinion testimony) to apply to eyewitness identifications. Because prior statements of identification made by a testifying witness are "not hearsay," OEC 602 and 701 are inapposite. *Lawson* subtly addressed this problem, stating that, "none of the OEC's provisions pertain specifically to eyewitness identification evidence."[218] Nonetheless, by elevating relevancy under OEC 401, the Court used OEC 602 and 701 to assess reliability at the initial stage of the analysis. The Court's brief resolution of the issue simply reasoned that "those rules nevertheless articulate minimum standards of reliability intended to apply broadly to many types of evidence."[219]

Thus, *Lawson* significantly changed the evidentiary analysis: under the *Lawson* test, when a defendant moves to exclude an eyewitness identification, the state bears the initial burden of proving that the identification is reliable.[220] The state must do so by establishing the facts necessary for admissibility under the evidence code—including (1) that the eyewitness has personal knowledge of the matters to which he or she will testify under OEC 602, and (2) that under OEC 701, the identification was rationally based on the witness's first-hand impressions and will be helpful to the jury.[221] For purposes of admissibility under OEC 602, estimator variables are more relevant because they address any issues that the witness had at the time of the original event or offense.[222] System variables are more relevant to OEC 701 because they suggest that a witness's testimony is based not on her perceptions but on contamination from police procedures.[223]

If the state meets its burden, the defense must show that the probative value of the identification is substantially outweighed by the risk of

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2013) (suggesting that the opinions in *Lawson* and *Henderson* "represent a growing awareness that the continuing soundness of the *Manson* test has been undermined by a substantial body of peer-reviewed, highly reliable scientific research") (citing *Lawson*, 291 P.3d 673 and New Jersey v. Henderson, 27 A.3d 872 (N.J. 2011)).

[217] *Classen*, 590 P.2d at 1203.

[218] *Lawson*, 291 P.3d at 691.

[219] *Id.*

[220] *Id.* at 689.

[221] *Id.* at 697.

[222] *See id.* at 687.

[223] *See id.* at 686; *see also* State v. Hickman, 298 P.3d 619, 623 (Or. Ct. App. 2013) ("[A]lthough eyewitness identifications are almost always relevant, the proponent nonetheless has to establish by a preponderance of the evidence that the identification derives from what the witness actually saw, OEC 602, and not from unduly suggestive procedures, OEC 701.") (citing *Lawson*, 291 P.3d at 697). At time of publication, *Hickman* was under review in the Oregon Supreme Court. *Hickman*, 308 P.3d 205 (2013) (granting review).

unfair prejudice to the defendant under OEC 403.[224] *Lawson*'s Rule 403 analysis explicitly provides that in cases of suggestive police procedures, courts, as "evidentiary gatekeeper[s]," have a "heightened role" because, "'traditional' methods of testing reliability—like cross-examination—can be ineffective at discrediting unreliable or inaccurate eyewitness identification evidence."[225] Thus, *Lawson* further encourages trial courts to consider Rule 403's "intermediate remedies," which include both excluding particularly prejudicial forms of testimony such as self-appraisal by eyewitnesses and likely allow for a special jury instruction.[226] As described by the Oregon Court of Appeals, "Notably, the [Supreme Court] relegated the federally-based due process aspect of *Classen* to back-up status."[227] Thus, "like all federal constitutional principles, it would apply only if state law, fully and correctly applied, failed adequately to vindicate a person's federally guaranteed right."[228]

Applying this standard, the Oregon Supreme Court went on to consider the facts of Samuel Adam Lawson's case.[229] Based in part on an eyewitness identification, Mr. Lawson was convicted of murdering a man and shooting the man's wife, Mrs. Hilde, in an Oregon campground.[230] Mrs. Hilde, who identified Mr. Lawson at trial, had only a brief opportunity to view the shooter,[231] and she was badly injured and hysterical following the shooting.[232] Initially, Mrs. Hilde was not able to provide details about the perpetrator's features—skin color, hair color, tattoos, or facial features.[233] Nonetheless, twice following the shooting, officers showed her a photo array including Mr. Lawson, to whom she had spoken earlier the day of the shooting.[234] Mrs. Hilde did not identify him.[235] Two years later, convinced that they had arrested the right person, officers again showed Mrs. Hilde a single photograph of the defendant.[236] Detectives later took her to a pretrial hearing to observe the defendant.[237] Later that same day, Mrs. Hilde observed a photograph of Mr. Lawson and identified him as the perpetrator.[238] This information was not disclosed to the defense, as

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[224] *Lawson*, 291 P.3d at 695.
[225] *Id.*
[226] *Id.*
[227] *Hickman*, 298 P.3d at 622.
[228] *Id.*
[229] *Lawson*, 291 P.3d at 678.
[230] *Id.*
[231] *Id.* at 698.
[232] *Id.* at 679.
[233] *Id.*
[234] *Id.*
[235] *Id.*
[236] *Id.*
[237] *Id.* at 679–80.
[238] *Id.* at 680.

required.[239] At trial, she also identified the defendant in the courtroom, testifying, "I'll never forget his face as long as I live," and adding, "[I] always knew it was him."[240]

Examining these facts, the *Lawson* Court emphasized the series of steps taken by law enforcement suggesting unreliability—repeated exposure to the defendant's face, confirming feedback, and essentially a show-up procedure at Mr. Lawson's pretrial hearing.[241] The Court also discussed the estimator variables that made it unlikely that her testimony was based on personal observation—Mrs. Hilde was under tremendous stress, in poor physical and mental condition, subject to poor environmental viewing conditions (a dark trailer), her face was covered by the perpetrator, and she was able to view the person for only a few seconds at most.[242] The Court held that "[i]n light of current scientific knowledge regarding the effects of suggestion and confirming feedback, the preceding circumstances raise serious questions concerning the reliability of the identification evidence admitted at defendant's trial" and reversed and remanded for a new trial in light of its holding.[243]

Lawson's practical significance is difficult to decipher at this early stage, but its symbolic significance is hard to overstate. The Innocence Project heralded the decision as "ground-breaking," again, largely because of its emphasis on scientific evidence and the shifting of the burden to the state.[244] Defense attorneys point out that the initial burden shift, to show reliability, to the state is an important change.[245] Others, including Clatsop County, Oregon, District Attorney Josh Marquis, deemphasized the holding while focusing on the particular circumstances of Samuel Lawson's case.[246] Although the Oregon Court of Appeals has considered only a handful of cases at the time of this writing, those cases have taken *Lawson* seriously, emphasizing the primacy of the evidentiary

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[239] Press Release, Innocence Project, Oregon Supreme Court Issues Landmark Decision Mandating Major Changes in the Way Courts Handle Identification Procedures (Nov. 29, 2102), *available at* http://www.innocenceproject.org/Content/Oregon_Supreme_Court_Issues_Landmark_Decision_Mandating_Major_Changes_in_the_Way_Courts_Handle_Identification_Procedures.php.

[240] *Lawson*, 291 P.3d at 680.

[241] *Id.* at 698.

[242] *Id.* at 697–98.

[243] *Id.* at 698.

[244] Press Release, Innocence Project, *supra* note 239.

[245] *See* Allison Frost, *Deciphering the High Court Ruling on Eyewitness Testimony*, OR. PUB. BROAD. (Dec. 5, 2012), http://www.opb.org/radio/programs/thinkoutloud/segment/high-court-ruling-eyewitness-testimony/ (Portland defense attorney Bronson James emphasizes the significance of the burden shift).

[246] See *id.*, in which Josh Marquis, the District Attorney for Clatsop County argues it will likely impact very few cases and places greater importance on the particular circumstance of Mrs. Hilde's exposure to media about the case, a fact that was likely not decisive to the outcome of Lawson's case.

test before considering the requirements of due process.[247] *Lawson* has drawn attention from other jurisdictions as well: the Fourth Circuit recently noted that the *Lawson* and *Henderson*[248] decisions call into question the validity of the federal due process standard for eyewitness identifications.[249]

IV. The Lessons of *Lawson*: Applying the Reliability Framework

> *A statement rendered by one in the condition of respondent might be proved to be quite unreliable, but this is a matter to be governed by the evidentiary laws of the forum, and not by the Due Process Clause of the Fourteenth Amendment.*
>
> – *Colorado v. Connelly*, decided in 1986[250]

Despite unreliability created by psychologically coercive tactics, confession evidence is the gold standard for obtaining a conviction.[251] As Dr. Leo states: "False confessions are . . . the most incriminating and persuasive *false* evidence of guilt that the state can bring against an *innocent* defendant."[252] This is in large part because lawyers, judges, and jurors continue to believe in the "myth of psychological interrogation."[253] That is, "[m]ost people continue to view false confessions as irrational and self-destructive, and thus cannot understand why an innocent person would make one, especially to a serious crime."[254] Likewise, although the risks of eyewitness identifications are known, without an adequate reliability test probing the scientific indicators, it is easy to see how a particular eyewitness identification will appear reliable, or at least admissible, and slip through the cracks.[255]

The similarities between eyewitness identification and confessions—the ease with which they may be manipulated by police procedures, the limitations of constitutional protections, the persuasive force of these forms of evidence to juries, and their strong correlation to wrongful convictions—all suggest that Oregon's new method should apply with equal force to confessions. Furthermore, the lack of protection provided by

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[247] State v. Hickman, 298 P.3d 619, 622 (Or. Ct. App. 2013); State v. Wesley, 295 P.3d 1147, 1154 (Or. Ct. App. 2013).

[248] *See supra* note 34 and accompanying text.

[249] United States v. Greene, 704 F.3d 298, 305 n.3 (4th Cir. 2013) (pointing out that the opinions in *Lawson* and *Henderson*, "represent a growing awareness that the continuing soundness of the [federal due process] test has been undermined by a substantial body of peer-reviewed, highly reliable scientific research") (citing State v. Lawson, 291 P.3d 673 (Or. 2012) and New Jersey v. Henderson, 27 A.3d 872 (N.J. 2011)).

[250] 479 U.S. 157, 167 (1986) (citation omitted).

[251] *See, e.g.*, Leo, *supra* note 16, at 245.

[252] *Id.* at 248.

[253] *Id.* at 235.

[254] *Id.*

[255] *See, e.g.*, *Lawson*, 291 P.3d at 695 (explaining the need for increased attention by judges as evidentiary gatekeepers).

constitutional standards does not preclude an evidentiary analysis; rather, the validity of the due process and other doctrines *depends* on an individual consideration of reliability based on evidentiary rules.

Lawson's application to confessions is not direct: both the nature of eyewitness identifications and the evidentiary rules that apply to them present distinct issues that do not always translate directly to false confession evidence. Constitutionally, the due process tests diverge in one critical aspect: under the *Manson v. Brathwaite* test for identifications, a substantial danger of misidentification is *required*;[256] whereas, under the due process test for confessions, untrustworthiness is neither a necessary nor sufficient reason to suppress the statement.[257] In some ways, this makes sense—"a suspect convicted on the basis of a reliable identification that stems from suggestive identification procedure has no legitimate complaint," whereas a suspect subjected to "an interrogation method likely to produce an untrustworthy confession . . . is harmed not only when the confession is in fact untrustworthy, but also when . . . the interrogation method . . . exerted unfair pressure on the suspect."[258] However, this comparison focuses almost exclusively on the degree of harm to a suspect's rights rather than the fairness of the trial. Because a fair trial is itself a protected right, to reserve the protection of a fair trial for those who suffer from coercive procedures while leaving unreliable confessions untouched leaves the constitutional protections wanting.

Under the evidence code, the difference between confessions and eyewitness identification is simple: the difference is the *Lawson* decision itself. Because statements by a party opponent are "not hearsay," Oregon courts have held that OEC 701 (lay opinion) does not apply to confessions, even in cases in which the defendant's statement is in the form of lay opinion.[259] Likewise, although OEC 602 (personal knowledge) does apply to statements of a party opponent and thus confessions, the rule has not been rigorously applied to confessions in the way that *Lawson* applied it to eyewitness identifications based on empirical research.

A. Analyzing the Reliability of False Confessions Under the Evidence Code

Under the evidence rules, statements of a party opponent, like prior statements of identification by testifying eyewitnesses, are governed by OEC 803 and are "not hearsay." Because of that distinction of the evidentiary rules applied to eyewitness identifications in *Lawson*, the only rule

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[256] Manson v. Brathwaite, 432 U.S. 98, 114–16 (1977).

[257] *See* White, *supra* note 149, at 2021–22.

[258] *Id.* at 2023.

[259] *See, e.g.*, Washington v. Taseca Homes, Inc., 802 P.2d 70, 73 (Or. 1990) (providing that "OEC 701 does not provide any ground to exclude statements of a party-opponent that events at which the party was present were not caused by another's carelessness"); Kraxberger v. Rogers, 373 P.2d 647, 652 (Or. 1962) ("[A]n admission by a party may be received in evidence against him even though it assumes the form of an expressed opinion.").

that applies directly to false confessions was OEC 403. However, post-*Lawson*, the specific breadth of OEC 602 (personal knowledge) and 701 (lay opinion), as applied to hearsay statements, has expanded. The Court specifically noted that "none of the OEC's provisions pertain specifically to identification evidence" because they are not hearsay.[260] Nonetheless, and without fanfare, the Court then went on to rigorously apply the non-pertinent evidence rules to eyewitness identifications in order to assess the reliability of identifications.[261] In this way, *Lawson* resembles a heightened due process test in evidentiary clothing—that is, police procedures are still critical, but they are viewed in the light of reliability rather than what might be deemed unconstitutional state action in and of itself. Confessions, on the other hand, are still in a gray area: *Lawson*'s initial burden shift to the state that occurs under OEC 402, and its companion rules under OEC 602 and 701, may not apply wholesale without a change in the evidence code[262] or an extension of *Lawson*'s reasoning due to policy concerns.

However, it is also important to note that most evidence that will be excluded under *Lawson* will likely fall under OEC 403 rather than a failure of the prosecution to make the initial reliability showing.[263] Like eyewitness identifications, confessions will continue to overcome reliability-based objections and most relevance objections.[264] Nonetheless, companion rules such as OEC 602 and 701 can tip the OEC 403 analysis against admissibility when combined with relevant factors suggested by social psychologists. Because of these limitations, *Lawson*'s impact on false confessions, if any, would reflect a policy judgment to create heightened due-process-like protections under the evidence code rather than continuing

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[260] *Lawson*, 291 P.3d at 691 & n.6 (citing OR. REV. STAT. § 40.450 (2011) (OR. EVID. CODE, Rule 801)).

[261] *Id.* at 691.

[262] *See* Milhizer, *supra* note 44, at 34–37, 47 (proposing a new federal evidentiary rule rather than relying on FRE 403 because of related concerns).

[263] *Lawson*, 291 P.3d at 697 ("Although we have revised the *Classen* test to incorporate pertinent rules of evidence, we anticipate that the trial courts will continue to admit most eyewitness identifications. That is so because . . . it is doubtful that issues concerning one or more of the estimator variables that we have identified will, without more, be enough to support an inference of unreliability sufficient to justify the exclusion of the eyewitness identification. In that regard, we anticipate that when the facts of a case reveal only issues regarding estimator variables, defendants will not seek a pretrial ruling on the admission of the eyewitness identification.").

[264] *See, e.g.*, State v. Harberts, 848 P.2d 1187, 1192 (Or. 1993). The exception is that, in Oregon, a defendant's statement can be excluded based on a relevancy objection, in all or in part, where a defendant's statement does not express his "belief or recollection as to an independently relevant fact and does not support an inference as to such a belief or recollection." *Id.* at 1191–92 (footnote omitted). This exception is fairly narrow, except to the extent that it allows a defendant to exclude, in a motion in limine, improper character evidence. For example, in *State v. Painter*, 300 P.3d 179, 183 (Or. Ct. App. 2013), the appellate court held that the defendant's statements, that he hated the police and that they set him up, were inadmissible because they were character evidence and not relevant to his intent at the time of the offense.

to resign them to the constitutional tests that consistently allow unreliable, police-induced evidence to convict innocent suspects at trial.

1. How and When Does OEC 602 Inform the Analysis of a Confession's Reliability?

Under the Oregon Evidence Code, Rule 602, "a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."[265] The purpose of the requirement of personal knowledge is to ensure reliability.[266] Under the corresponding federal rules, the Ninth Circuit has held that, in the context of hearsay statements, "the declarant must also have personal knowledge of what she describes."[267] Thus, OEC 602 may provide an independent basis for excluding the evidence where the statement was not based on personal knowledge. Because the rules of evidence regarding relevance and hearsay are grounded in concerns about reliability,[268] their bases for exclusion inform judges on how best to make that determination. Thus, regardless of the explicit relationship between the hearsay and reliability rules, the underlying threshold for reliability is essential for evaluating a confession's admissibility.

In Professor Garrett's review of proven-false confessions, he found that many times, when allowed to answer open-ended questions, false confessors would, quite predictably, guess wrongly about the facts of the crime. This occurred in a whopping 75% of the cases studied.[269] For example, in the now well-known case of exoneree Earl Washington, Jr.,[270]

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[265] OR. REV. STAT. § 40.315 (2011) (OR. EVID. CODE, Rule 602).

[266] § 40.315 legis. cmt. (OR. EVID. CODE, Rule 602) ("[OEC 602] is 'one of the most pervasive manifestations' of the common law's 'insistence upon the most reliable sources of information.'") (quoting CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 10, at 20 (2d ed. 1972)).

[267] Bemis v. Edwards, 45 F.3d 1369, 1373 (9th Cir. 1995) ("In a hearsay situation, the declarant is, of course, a witness, and neither this rule nor Rule 804 dispenses with the requirement of firsthand knowledge." (quoting FED. R. EVID. 803 advisory committee note) (internal quotation marks omitted)).

[268] LEO, *supra* note 16, at 290 (citing FED. R. EVID. 803 & 804) ("Similarly, the numerous exceptions to the hearsay rule are grounded in the idea that some forms of hearsay are so trustworthy as to be admissible whether or not the declarant is available.").

[269] GARRETT, *supra* note 46, at 33.

[270] In 1983, Earl Washington, Jr., was a 22-year-old African American man with an IQ of around 69. After officers questioned Washington for two days, the officers claimed that he confessed to raping and stabbing 19-year-old Rebecca Lynn Williams. The prosecutor's case relied heavily on Mr. Washington's confession both at the guilt and sentencing phases, and in 1984, Earl Washington, Jr., was sentenced to death. In 1993, after Washington's direct appeal and habeas petitions were denied, DNA testing revealed that Washington was not the source of a seminal stain at the murder scene. In 2000, Governor Gilmore granted Washington an absolute pardon to murder but not to lesser, unrelated charges. Earl Washington Jr. was released to parole supervision in February of 2001. *Know the Cases: Earl Washington*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Earl_Washington.php.

Mr. Washington made several bad guesses in response to open-ended questions. Washington:

> (1) misidentified the race of the victim;
>
> (2) could not accurately describe her weight and height;
>
> (3) said that the victim was alone in the apartment although her two children were present; and
>
> (4) stated that he had stabbed the victim two to three times. She had actually been stabbed 38 times.[271]

All of these statements should have immediately alerted the officers, and later the judge, that Mr. Washington was "ignorant of the crime facts" and innocent of the crime.[272]

Likewise, in exoneree Byron Halsey's case, his initial responses to interrogators were marked by "multiple incorrect guesses as to the manner in which a horrific rape and murder of two children occurred."[273] It took a series of suggestions and a process of elimination before Mr. Halsey began to include the "powerful nonpublic facts" that the prosecutor later emphasized at trial.[274] The prosecutor then further used the inconsistencies themselves to persuade the jury of his guilt, describing Mr. Halsey as, "trying to mislead" and to "lie his way out of this in that confession."[275] This is a somewhat self-contradictory theory considering that the initial (wrong) guesses made by Mr. Halsey were no less inculpatory—Mr. Halsey guessed, in the alternative, that he used either a crowbar or a hammer to put nails in the heads of the two children who were killed, neither of which was consistent with the known facts of the crime.[276] Nonetheless, the confession was powerful evidence before the jury despite the guesswork by Mr. Halsey that demonstrated he was not speaking from personal knowledge.

OEC 602's requirement of personal knowledge is significant for confessions in that it departs from the due process analysis—the evidentiary objection focuses on the reliability of the statement unto itself rather than the external forces that may have produced it. As in eyewitness identifications, this phase would focus not on suggestive procedures but on the alleged observations and experience that gave rise to the statements. The OEC 602 factor also has the benefit of flexibility: attorneys and judges would be able to compare the statements with known crime facts to see how close of a fit they can find. As in the *Lawson* eyewitness identification analysis, this factor would not immediately consider possible alternative bases of knowledge—such as police suggestion or coercion, which would more appropriately be considered under OEC 701.

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[271] *See* LEO, *supra* note 16, at 256.

[272] *Id.*

[273] GARRETT, *supra* note 46, at 34.

[274] *Id.*

[275] *Id.*

[276] *Id.*

2. How and When Does OEC 701 Inform the Analysis of a Confession's Reliability?

Where it applies, OEC 701 "requires that the proponent of lay opinion testimony establish that the proposed testimony is both rationally based on the witness's perceptions and helpful to the trier of fact . . . by a preponderance of the evidence."[277] As the *Lawson* opinion illustrates, OEC 701 may require substantial scrutiny in situations where a person's opinion testimony has been influenced by police procedures.[278] *Lawson*'s application of this rule to eyewitness identifications suggests that the Court is concerned with putting this type of evidence before the jury where the scientific literature suggests that the evidence will carry more weight than it realistically should.[279]

In considering whether to allow the testimony, the *Lawson* Court points out that the trial court may choose to limit the testimony or to exclude it altogether.[280] That is:

> If, for example, a witness testified to observing a tall, dark-haired man of medium build from behind as he ran from the scene of the crime, the trial court permissibly could find that the witness had personal knowledge of the height, build, clothing, and hair color of the perpetrator, but no more, and limit the testimony accordingly.[281]

In the eyewitness context, the proponent must establish by a preponderance of evidence not only that the witness claims to have identified the person, but also that that identification was *not* based on suggestive police procedures, but rather her own observations.[282] Under this factor, courts may consider the "system variables" introduced by *Lawson* relating to police procedures and improper suggestion.[283]

Like OEC 602, the requirements of OEC 701 may inform the court's analysis of whether a confessor's statements are reliable evidence. OEC 701, however, presents an additional hurdle in the context of false confessions—namely, that confessions are generally not expressed in the form of an opinion. Thus, although it would be helpful to include the additional police-suggestion element that comes in under OEC 701, in most cases, the prosecutor would not need to make this initial showing because the rule does not directly apply.

However, the rule may inform the analysis in specific factual scenarios. For example, a defendant whose competency, mental capacity, or intoxication affects his ability to recall or describe events may give statements in the form of an opinion in response to police interrogation.

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[277] State v. Lawson, 291 P.3d 673, 692 (Or. 2012) (citing State v. Carlson, 808 P.2d 1002 (Or. 1991)).

[278] *Id.* at 693.

[279] *Id.* at 693–94.

[280] *Id.*

[281] *Id.* at 693.

[282] *Id.*

[283] *See supra* notes 195–202 and accompanying text, describing system variables.

Outside the context of false confessions, the Oregon Supreme Court has recognized a similar possibility in the past. In *State v. Harberts*, the Court pointed out that:

> [F]or example, if a defendant is asked whether, even though he does not remember doing something, he is capable of committing such an act, his response that "yes, I could do something like that when I'm drunk" as an opinion could be admissible over a hearsay objection as a statement of a party-opponent. However, that does not resolve the issue whether the probative value of the statement is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury" under OEC 403.[284]

In such a circumstance, the state would bear the burden of demonstrating that the statement is relevant,[285] and, if the statement has minimal probative value because it was not rationally based on the defendant's perceptions, it may also be subject to exclusion under OEC 403.[286]

In terms of false confessors, this scenario would most likely resemble the circumstances of "persuaded false confessors," whose statements are frequently marked by "the grammar of confabulation."[287] In evidentiary terms, this means the terms of lay opinion. For example, in exoneree Gary Gauger's case, his interrogators convinced him that he could have murdered his parents while in an alcohol-induced blackout.[288] After hours of interrogation, Gauger was exhausted and confused.[289] Gauger remembers thinking:

> They're not asking me if I killed my parents, they're telling me that I did kill my parents and they wanted to know what happened, and if I would go through a hypothetical account with them, using facts they'd fed me about what I must have done, it might jog my memory.[290]

Mr. Gauger eventually gave a fairly detailed account of what he believed "must have happened," followed with, "But this is just a hypothetical. I have no memory of this."[291] By considering this factor in determining the reliability of Mr. Gauger's statement, combined with the alternative bases for the opinion (repeated police suggestions, lack of sleep, and evidence ploys), a court may have been able to see the inherent unreliability of Mr. Gauger's narrative.

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[284] State v. Harberts, 848 P.2d 1187, 1192 n.11 (Or. 1993) (quoting OR. REV. STAT. § 40.160 (2011) (OR. EVID. CODE, Rule 403)).

[285] *Id.* at 1192 (discussing exclusion of lay opinion statements by defendants that contain references to a polygraph where those statements are not independently relevant).

[286] *Id.*

[287] *See supra* notes 119–21 and accompanying text.

[288] LEO, *supra* note 16, at 215.

[289] *Id.* at 214.

[290] *Id.* at 215 (internal quotation marks omitted).

[291] *Id.* at 216.

While not providing an independent basis for excluding the statements, OEC 701 may still provide a useful analytical tool for assessing a confession's reliability and relevance. Where a confessor, particularly one who may be a "persuaded false confessor," makes hypothetical guesses as to how a crime occurred, the court may be able to look more closely at the context of his statements to determine whether those statements were based on his perceptions and whether the statements will be helpful to the jury.

Additionally, OEC 701 will allow the court to analyze psychological interrogation techniques as providing an independent, and impermissible, source of lay opinion (that is, one that is not derived from the memory of the declarant) just as the *Lawson* test provides for eyewitness identifications. For example, studies have documented that persuaded false confessions are made more frequently when the following factors are present: (1) an interrogator repeatedly tells the suspect that he is confident in his guilt, (2) isolation, (3) lengthy and emotional interrogation, (4) repeated scientific evidence ploys, (5) an interrogator reminds the suspect of his memory issues, where they exist, (6) an interrogator demands that the suspect "accepts his premises and explana-explanations of the alleged crime," and (7) an interrogator induces fear of negative consequences from repeated denials.[292] Additionally, persuaded false confessions in particular are more likely to occur in murder cases and in high-profile cases.[293] These types of documented risk factors, combined with an inquiry into the degree of contamination by police, could be used to analyze whether a confession is likely to be based on an improper influence rather than the suspect's personal knowledge.

By analogy to *Lawson*, an opinion's probative value may be substantially reduced where the source of the defendant's opinion is more likely to be coercive interrogation practices rather than the defendant's own perceptions. *Lawson* thus presents a useful framework for the types of concerns to which courts should be paying attention. It also provides a means of providing background evidence to the judge about the causes and earmarks of false confessions that may suggest that a particular confession is unreliable.[294]

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[292] GUDJONSSON, *supra* note 52, at 231.

[293] LEO, *supra* note 16, at 225 (observing that persuaded false confessions virtually always occurred "only after lengthy . . . interrogation," in response to a murder investigation, and were "either locally or nationally high-profile cases").

[294] *See, e.g.*, GUDJONSSON, *supra* note 52, at 200–02 (describing Dr. Undeutsch's criteria for identifying the objective "reality" of statements). These criteria include: "[o]riginality; [c]larity; [v]ividness; [i]nternal consistency; [d]etailed descriptions which are specific to the type of offense alleged; . . . reporting of subjective feelings; [and] [s]pontaneous corrections or additional information." *Id.* at 201. However, the analysis does not depend on a specific set of factors to be persuasive. Instead, the test has the advantage of allowing for flexible indicators of reliability that may develop as scientific research on the subject develops.

3. The Ofshe–Leo Test for Reliability—Additional Factors Based on the Face of the Confession Itself

In addition to the evidentiary analyses described above, Ofshe and Leo propose "three indicia of reliability that can be evaluated to reach a conclusion about the trustworthiness of a confession."[295] These indicia are as follows:

> (1) whether the confession contains nonpublic information that can be independently verified, would be known only by the true perpetrator or an accomplice, and cannot likely be guessed by chance; (2) whether the confession led the police to new evidence about the crime; and (3) whether the suspect's postadmission narrative fits the crime facts and other objective evidence.[296]

The above factors are based on social psychology and documented false confessions research, although they are not the only factors proposed in the field.[297] Research on documented false confessions demonstrates that in most cases, "there were significant errors in the suspect's account that should have pointed the police officers to the probability that the suspect was guessing and was not involved in the crime."[298] Furthermore, "[i]nnocent false confessors are often most ignorant of many crime scene details, making their postadmission narratives replete with errors."[299] Such errors "cast doubt on the reliability of the suspect's confession and suggest that it is 'of little or no value as evidence of guilt.'"[300] By examining the "fit" between a confession and the crime facts, judges may be better able to analyze the reliability of a statement. However, it is important to note that any such comparison depends on the absence of preexisting knowledge or contamination on the part of the confessor.[301]

The Ofshe–Leo reliability factors are also persuasive in that they align with several of the factors suggested by Reid and Inbau themselves, who include the following as indicators in their training manual on interrogation:

> (1) The suspect's condition at the time of the interrogation [including] [p]hysical condition (including drug and/or alcohol intoxication,) [m]ental capacity, [and] [p]sychological condition;
>
> (2) The suspect's age;
>
> (3) The suspect's prior experience with law enforcement;

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[295] LEO, *supra* note 16, at 287 (citing Leo & Ofshe, *supra* note 45, at 438–39).

[296] *Id.* at 289.

[297] *See, e.g.*, *supra* note 194 (providing alternative criteria for judging reliability of statements).

[298] LEO, *supra* note 16, at 289 (citing Leo & Ofshe, *supra* note 45; Drizin & Leo, *supra* note 24).

[299] *Id.*

[300] *Id.* (quoting Leo & Ofshe, *supra* note 45, at 997).

[301] *Id.* at 286–87.

(4) The suspect's understanding of the language;

(5) The length of the interrogation;

(6) The degree of detail provided by the suspect in his confession;

(7) The extent of corroboration between the confession and the crime;

(8) The presence of witnesses to the interrogation and confession;

(9) The suspect's behavior during the interrogation;

(10) The effort to address the suspect's physical needs; and

(11) The presence of any improper interrogation techniques.[302]

Thus, this test not only helps criminal defendants seeking to exclude their statements, but it also improves the goals of the police to ensure that they are securing valid confessions. Additionally, the factors reiterate the basic interrogation training that police officers are accustomed to: "police have long been trained to never contaminate a confession by feeding or leaking crucial facts."[303] Police know as well as the other players involved that a confession is only as good as its detail and reliability.[304]

The merits of any given test have been discussed in a variety of contexts,[305] but the essential premise is that one way of determining reliability is to look more closely at the causes and factors present in known false confessions and to analyze individual confessions under that lens. Regardless of which specific factors come to be most easily applied in practice, Ofshe and Leo's indicia, as well as other researchers' indicia of reliability can always inform the analysis under OEC 403 just as the enumeration of specific "system" and "estimator" variables informs the *Lawson* analysis in this respect.

B. Balancing Under OEC 403

Whether under OEC 602, OEC 701, or the Ofshe–Leo test, these types of psychologically suggestive practices present the same concern: preventing juries from considering evidence with a high risk of unreliability, for overreliance by jurors, and for wrongful convictions. Under OEC 403, judges must consider the following four factors: "(1) the need for the evidence; (2) the certainty of the evidence; (3) the relative strength or weakness of the evidence; and (4) its possible inflammatory effect on the jury."[306] This analysis provides judges with some necessary flexibility in making a determination in any given case—that is, "one

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[302] INBAU ET AL., *supra* note 23, at 238.

[303] GARRETT, *supra* note 46, at 23.

[304] *See* LEO, *supra* note 16, at 300–01.

[305] *See, e.g.*, GUDJONSSON, *supra* note 52, at 201; LEO, *supra* note 16, at 283–91; Leo et al., *supra* note 44, at 515–16, 531; Milhizer, *supra* note 44, at 34–37; White, *supra* note 149, at 2002–30.

[306] State v. Mason, 785 P.2d 378, 379 (Or. Ct. App. 1990).

that will enable the state to hold offenders accountable and, at the same time, protect a criminal defendant's right to a fair trial."[307] In essence, this analysis is simply a weighing of the probative value compared to its prejudicial effect.[308]

1. Analyzing the Confession's Probative Value

At the outset, it is important to note that social psychologists view "[c]onfessions [as] among the least reliable forms of evidence because they are based on the vagaries and fallibilities of human testimony, perception, and belief, and are products of a guilt-assumptive influence process that relies on pressure, manipulation, deception, and sometimes even coercion."[309] As discussed above, the combination of OEC 602 and 701 factors as well as indicia from the Ofshe–Leo test may all potentially reduce a statement's probative value.

Additionally, a statement's probative value may also be outweighed where the theory of relevance contains a series of dubious inferences. In *State v. Sarich*, for example, decided shortly before *Lawson*, the Oregon Supreme Court affirmed the trial court's exclusion of a video in which the defendant's son, "Z," who was found not competent to testify because of a mental disability, accompanied detectives to the scene where a murder victim's body was recovered.[310] Affirming that the evidence was properly excluded, the Court pointed out the series of inferences the jury would have to draw in order for the evidence to be probative:

> Although the video is probative only to the extent that it exhibits Z's independent knowledge, the video is riddled with suggestive remarks and leading questions by the investigators that could have indicated to Z which way to point and when. In addition, the fact of Z's knowledge is probative of defendant's guilt only if the factfinder makes a series of assumptions and inferences, and even then results in only circumstantial evidence of guilt. To rely on that evidence, the factfinder first would have to determine that . . . Z already had independent personal knowledge of the location to which he purportedly directed the investigators on the tape. Second, the factfinder would have to assume that Z gained that knowledge by accompanying the murderer to that location nearly three years earlier, and not from some other source. Third, the factfinder would have to assume that it was defendant, and not some other person, who took Z to that location. Finally, even assuming that the factfinder did make all of those inferences and assumptions, the proposed evidence still provides only circumstantial evidence of defendant's guilt, because it establishes only that defendant was present at the location where the victim's body was found. To determine the ultimate issue of guilt from that evidence, the factfinder would have to make the additional assumption or inference that,

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[307] State v. Lawson, 291 P.3d 673, 697 (Or. 2012).

[308] *Id.* at 690.

[309] LEO, *supra* note 16, at 267.

[310] State v. Sarich, 291 P.3d 647, 657–58 (Or. 2012).

> even if defendant was present at that location, that it was defendant, and not another person also present, who caused the victim's death.[311]

Thus, even though the tape and included statements were not strictly subject to OEC 602 and 702 because offered to prove "knowledge" (and by extension the perpetrator's identity), the Court took the same types of considerations into account in analyzing the evidence's reliability. In making this consideration, the Court looked at: the questionable personal knowledge of the child, the source of that knowledge, the influence of leading questioning by detectives, and the series of assumptions necessary on the part of the jury in order for the evidence to be deemed relevant.[312] These considerations mirror the considerations of systemic and estimator variables described in *Lawson*,[313] their application to the victim's identification,[314] and the false confession analysis outlined above.

2. Analyzing the Confession's Prejudicial Effect on the Defendant

In *Lawson*, the Court pointed out that OEC 403 requires judges to play a particularly heightened role as gatekeepers where an eyewitness identification is subject to suggestive procedures. This is because, "'traditional' methods of testing reliability—like cross-examination—can be ineffective at discrediting unreliable or inaccurate eyewitness identification evidence."[315] The same risks arise in confessions. Too often, juries "allow the power of confession evidence to bias their judgments, and they tend to selectively ignore and discount evidence of innocence in false confession cases."[316] This creates a scenario in which confessions, even when false, "appear to be such powerful evidence of guilt that they almost automatically trigger tunnel vision and confirmation bias among [jurors], blinding them to the possibility of error."[317]

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[311] *Id.* at 657 (footnote omitted).

[312] *Id.*

[313] *See supra* notes 119–40 and accompanying text.

[314] In *Lawson*, the Court looked closely at the series of procedures the police used to secure identification. Specifically, the Court was concerned by the following sequence in which the witness identified the defendant: "The alterations in [the witness's] statements over time are indicative of a memory altered by suggestion and confirming feedback. She initially told the police that she had not seen the perpetrator's face and could not identify him. After a series of leading questions inculpating defendant, she agreed with police that defendant was the perpetrator, but still could not identify him. After several viewings of defendant in person and in photographs, she was able to pick defendant out of a series of photographs. And finally, at trial, over two years after the initial incident, [the witness] identified defendant as the perpetrator under circumstances comparable to a show-up. When asked if she had any doubt as to her identification, [the witness] said, '[a]bsolutely not. I'll never forget his face as long as I live,' and later added that she 'always knew it was him.'" State v. Lawson, 291 P.3d 673, 698 (Or. 2012).

[315] *Id.* at 695.

[316] LEO, *supra* note 16, at 266.

[317] *Id.*

Furthermore, like in eyewitness identifications, this is a *known* risk by virtue of its part in 250 documented wrongful convictions.[318] These convictions occurred despite traditional methods available to refute the evidence—cross-examination, arguments, and (sometimes) expert testimony. The convictions also occurred despite the fact that in most of the exoneree trials studied, there is "every reason to believe that most of the police, prosecutors, forensic analysts, defense lawyers, and jurors acted in good faith."[319] Thus, "[b]ecause juries often see confession evidence as dispositive of guilt even when it is false, its prejudicial effect can be devastating to an innocent defendant."[320] In fact, "[t]here is no piece of erroneous evidence that is more likely to lead to a wrongful conviction than a false confession."[321] Just as with eyewitness identifications, the prejudicial effect of this evidence clearly outweighs the value of bringing in a confession that is demonstrably unreliable.

C. Intermediate Remedies Under Rule 403

Lawson's approach to eyewitness identifications is particularly unique in that it addressed what might appear to be a single piece of evidence (Witness W pointed to a photograph of Defendant D) by looking at its component parts: the initial observation by the witness,[322] the process by which the initial identification was made,[323] the specifics of the identification as they assist the trier of fact,[324] and the witness's self-appraisal of certainty.[325] For each of these components, the Court identified the sources of potential error and suggested, directly or indirectly, possible intermediate remedies to mitigate the prejudice to the defendant.[326] As the Court stated, the balance should be "a flexible one that will enable the state to hold offenders accountable and, at the same time, protect a criminal defendant's right to a fair trial."[327]

The same is true with respect to a confession: as discussed above, errors can come from a variety of sources, and false confessions may still include true circumstantial evidence helpful to the prosecution. For example, the portion of a defendant's statement in which he admits to knowing a victim, if true, could still be reliable and helpful to the prosecutor even if

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[318] *Id.* at 244; *see also False Confessions*, *supra* note 19 (stating that 25% of DNA exonerations involved a false confession).

[319] GARRETT, *supra* note 46, at 12.

[320] Leo et al., *supra* note 44, at 531–32. *See generally* Saul M. Kassin & Holly Sukel, *Coerced Confessions and the Jury: An Experimental Test of the "Harmless Error" Rule*, 21 LAW & HUM. BEHAV. 27 (1997).

[321] LEO, *supra* note 16, at 266.

[322] State v. Lawson, 291 P.3d 673, 693 (Or. 2012).

[323] *Id.* at 687–88.

[324] *Id.* at 693.

[325] *Id.* at 695.

[326] *Id.* at 693, 695.

[327] *Id.* at 697.

the later confession of guilt is unreliable and inadmissible. Conversely, particular portions of a defendant's statement, such as those that include the "language of confabulation," may have diminished probative value compared to a high prejudicial effect. Analyzing the reliability of confessions under the evidence code, and in keeping with *Lawson*, would provide courts with a tool to balance these interests in a way that is not available under constitutional analyses. That is, the most apparent intermediate remedy is to use the detailed reliability analysis described above to determine whether certain portions of the confession should be excluded while leaving others intact. Thus, the OEC 403 analysis, as well as its component parts, would give defense attorneys the opportunity to argue for their clients' interests while allowing judges to take these concerns in balance with the state interests that may prevent them from granting a motion to suppress because of the comparatively absolute remedy.

Conclusion

Lawson is a dramatic step forward for eyewitness identifications in Oregon and potentially a beacon of good judgment for other jurisdictions as well. Due to the advocacy of Mr. Lawson's attorneys, the Office of Public Defense Services, the Innocence Project, the Oregon Criminal Defense Lawyers' Association, and others who submitted briefs as amici curiae,[328] the Oregon Supreme Court looked seriously at the scientific evidence and documented wrongful convictions. In doing so, the Court used old tools in the Oregon Evidence Code to create a framework that takes reality into account and provides an analysis and remedy tied to the documented risks.

False confessions may occur less frequently, but they present an equal, if not greater, risk for wrongful convictions when they occur. The constitutional tools that defense attorneys have to challenge confessions serve compelling purposes where they apply, but they nevertheless miss the mark when it comes to reliability. The *Lawson* framework and its emphasis on a serious role for the Oregon Evidence Code presents defendants with the opportunity to educate their judges and prosecutors about the risks and to ensure that the jury hears only reliable evidence of the defendant's guilt or innocence.

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[328] *Id.* at 683 (accepting the "invitation" of amici curiae to revisit the *Classen* test); *see also* Brief for Petitioner, State v. James, 291 P.3d 673 (Or. 2012) (No. CF080348), 2011 WL 7627648; Brief of Amici Curiae College & University Professors Solomon Fulero et al. in Support of Defendant Samuel Adam Lawson's Petition for Review, *Lawson*, 291 P.3d 673 (No. 03CR1469FE), 2011 WL 5866956; Brief of Amicus Curiae the Innocence Network in Support of Petition for Review, *Lawson*, 291 P.3d 673 (No. 03CR1469FE), 2011 WL 5866953; Brief of Amicus Curiae Oregon Criminal Defense Association in Support of the Defendant Lawson's Petition for Review, *Lawson*, 291 P.3d 673 (No. 03CR1469FE), 2011 WL 5866952; Brief on the Merits of Amicus Curiae Oregon Criminal Defense Lawyers Association in Support of Defendant Lawson, *Lawson*, 291 P.3d 673 (No. 03CR1469FE), 2011 WL 5866954.