

Going to the Source: The “New” Reid Method and False Confessions

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We cannot expect perfection from the criminal justice system. Inevitably, some innocent people will be punished and many guilty unpunished. We can and must, however, expect a good-faith effort to address systematic flaws which predictably produce injustice. A long and growing literature establishes and seeks to explain the surprising prevalence of false confessions. The question arises: are those in position to ameliorate the problem taking appropriate steps?

To some extent, yes. Law enforcement increasingly records the interrogations of felony suspects,¹ and courts increasingly permit expert testimony about interrogations and confessions.² Such reforms, however, are too little too late—too little because juries may convict the false confessor even if they see the interrogation and hear the expert testimony, and too late because, even if the jury acquits, great harm will already have occurred.³ To address the tragedy of false confessions most effectively, we must go to the source—the interrogation methods that all too often produce such confessions in the first place.⁴

The leading interrogation manual, setting forth what has come to be known as the “Reid Technique,” turned fifty in 2012.⁵ Just four years after its publication in 1962, this manual, published by the firm (Reid and Associates) that conducts the

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¹ See Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 L. & HUM. BEHAV. 3, 26 (2010).

² See Nadia Soree, *When the Innocent Speak: False Confessions, Constitutional Safeguards, and the Role of Expert Testimony*, 32 AM. J. CRIM. L. 191 (2005) (citing cases).

³ The obvious harms to the wrongly accused but eventually exonerated defendant—prolonged incarceration, loss of income and reputation, and fear of worse—are compounded by the fact that the actual culprit will remain at large. See Kassin et al., *supra* note 1, at 23 (“Numerous false confession cases reveal that once a suspect confesses, police often close their investigation”).

⁴ There are many causes of false confessions, e.g., some people come forward and confess voluntarily. See generally SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, *CONFESSIONS IN THE COURTROOM* (1993). However, the most common cause appears to be interrogation methods widely utilized by law enforcement. See Richard J. Ofshe & Richard A. Leo, *The Decision To Confess Falsely: Rational Choice and Irrational Action*, 74 DEN. L. REV. 979, 983 (1997) (“confessions by the innocent still occur regularly, and will likely continue until police and other criminal justice officials develop a better understanding of the dangers of contemporary interrogation practices”).

⁵ FRED E. INBAU ET AL., *CRIMINAL INTERROGATIONS AND CONFESSIONS* (1962).

most widely attended training sessions for interrogators,⁶ attracted scathing commentary from the United States Supreme Court. In the seminal case of *Miranda v. Arizona*,⁷ the Court crafted its famous warning to criminal suspects in large part to protect against the psychological coercion at the heart of the Reid Technique.⁸ A year later, in 1967, Reid and Associates produced a second edition that incorporated *Miranda* warnings into its course of instruction, even as the authors brushed aside the Court's criticism.⁹

1986 brought forth a third edition of the manual, "an entirely new book" responsive to developments in the law governing confessions and interrogations and to improvements in the "art of interrogation."¹⁰ Though there would be refinements in subsequent editions, the 1986 manual set forth the essentials of the Reid Technique as we know it today. However, while expressing opposition to "any interrogation tactic or technique that is apt to make an innocent person confess,"¹¹ the manual had little to say about the risk of false confessions.¹² The omission was understandable, as this edition pre-dated the work of the Innocence Project, which awakened legal scholars and social scientists to the frequency of false confessions and spurred intense inquiry into their causes.¹³

Subsequently, Reid and Associates has produced two new editions of its manual, a fourth edition in 2001 and fifth in 2011, which include new material

⁶ See FRED E. INBAU ET AL., CRIMINAL INTERROGATIONS AND CONFESSIONS viii (5th ed. 2011) (stating that "the Reid Technique of Interviewing and Interrogation is now taught in seminars across the United States, Canada, Europe, and Asia" and "hundreds of thousands of investigators hav[e] received this training.").

⁷ *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁸ *Id.* at 457 ("It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity.").

⁹ They opined that "[t]he Court's critical comments about the procedures we advocated were, we believe, for the purpose of establishing the necessity for the warnings rather than as a condemnation of the procedures themselves." JOHN E. REID ET AL., CRIMINAL INTERROGATIONS AND CONFESSIONS 1 (2d ed. 1967). They added that if the Court disapproves of the Reid Technique, it would have no choice but "to outlaw all interrogations of criminal suspects. We say this because of our confidence that effective interrogations can only be conducted by such procedures as the ones we herein describe." *Id.*

¹⁰ FRED E. INBAU ET AL., CRIMINAL INTERROGATIONS AND CONFESSIONS v (3d ed. 1986).

¹¹ *Id.* at xiv (emphasis in original).

¹² There were a few scattered references to the issue, e.g., "an interrogator should view with considerable skepticism any 'conscience-stricken' confession. Such a confession is very likely to be false." *Id.* at 197.

¹³ See *False Confessions*, THE INNOCENCE PROJECT, available at www.innocenceproject.org/understand/False-Confessions.php (last visited Apr. 17, 2014) (as of July 7, 2012, "[i]n about 25%" of the 292 cases of wrongful convictions established by DNA testing, "innocent defendants made incriminating statements, delivered outright confessions or pled guilty").

ostensibly responsive to the increased concern about false confessions.¹⁴ This essay focuses on the adequacy of the response. It concludes that while in certain respects Reid and Associates has made important concessions and accommodations, in crucial respects it has ignored or distorted what has been learned about false confessions, thereby assuring that this disturbing phenomenon will remain pervasive.

I. THE REID METHOD EXPLAINED AND CRITIQUED

The Reid Technique of interrogation is presented as a nine-step process, but the various steps can usefully be reduced to three: isolation, confrontation, and minimization.¹⁵ The process begins by placing the suspect in a small, barely-furnished room, apart from friends, family, familiar surroundings, or any support system. This isolation increases the suspect's anxiety and eagerness to extricate himself from the situation.

The interrogation itself typically begins with an accusation of the suspect, buttressed by the suggestion that the interrogators have irrefutable evidence, sometimes fabricated.¹⁶ Denials of guilt are aggressively cut off. The idea is to communicate to the suspect the futility of maintaining innocence. Subsequently, the interrogators seek to minimize the nature or consequences of the crime. Minimization themes, which include (but are not limited to) accident, justification, provocation, mitigating circumstances, and secondary role, lead the suspect to infer that he will be treated leniently if only he confesses. Confrontation brings on despair; minimization supplies a lifeline. Together, they break down many suspects.

The problem is that these tactics are *too* powerful, i.e., can break down the innocent as well as the guilty. Evidence that the Reid Technique breaks down

¹⁴ John Reid passed away in 1982, and his original collaborator, Fred Inbau, passed away in 1998. The lead authors of the fourth and fifth editions are Joseph Buckley, who also assisted with the third edition, and Brian Jayne. For the sake of convenience, I shall use "Reid authors" throughout this essay to denote authors of all editions of the Reid Manual.

¹⁵ The full nine steps are: Step 1—Direct, positive confrontation. Step 2—Theme development. Step 3—Handling denials to get a confession. Step 4—Overcoming objections. Step 5—Procurement and retention of suspect's attention. Step 6—Handling the suspect's passive mood. Step 7—Presenting an alternative question. Step 8—Having the suspect orally relate various details of the offense. Step 9—Converting an oral confession into a written confession. INBAU, *supra* note 6, at 185–328.

¹⁶ The Reid Manual takes a somewhat elliptical approach to confronting suspects with claims of evidence that does not actually exist. At one point it states, with seeming approval, that "[i]n some cases, an investigator may falsely imply, or outright state, that evidence exists that links the suspect to the crime," *id.* at 351, and the authors observe that "[i]t is our clear position that merely introducing fictitious evidence during an interrogation wouldn't cause an innocent person to confess." *Id.* at 352. For tactical reasons, however, they advise "great caution" in making such claims, *id.* at 42, at one point suggesting it only as a "last resort effort," *id.* at 352, both because courts may look askance at such tactics, and the interrogator risks losing credibility in the eyes of the suspect.

innocent suspects is threefold. First, as an empirical matter, we find these measures utilized in many cases of proven false confessions.¹⁷ Second, we find this effect reproduced in laboratory studies.¹⁸ Third, social scientists have explicated how, applying basic principles of decision-making, we should *expect* the Reid Technique to produce false confessions, i.e., this seemingly counterintuitive phenomenon makes perfect sense once we understand the method's basic workings.¹⁹ After all, the very purpose of the Reid Technique is to put the suspect in an untenable situation where confession appears to be the only means of escape.²⁰

It might seem obvious that the confrontation/minimization combination, employed by authority figures on an isolated and powerless individual, risks breaking down the innocent as well as the guilty.²¹ Yet the purveyors of the Reid

¹⁷ See Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891 (2004).

¹⁸ In the seminal study, college students were instructed to type on a desktop computer but warned that the Alt key was off limits, as hitting it would cause the computer to crash. Saul M. Kassin & Katherine Kiechel, *The Social Psychology of False Confessions: Compliance, Internalization and Confabulation*, 7 PSYCHOL. SCI. 125 (1996). Subsequently, each subject was told that the computer had crashed and was accused, falsely, of having hit the Alt key. All students denied their guilt. But when a confederate of the experimenter confronted the suspect with the claim that she witnessed them hitting the forbidden key, many of the students acknowledged guilt and signed a written confession. Interviews afterward revealed that some of these students actually came to believe they were responsible; some even concocted details of how they hit the Alt key. One limitation of this study is that the participants faced no penalty for confessing. However, subsequent studies replicated the effects even when the subjects were told that they would be fined or otherwise punished for hitting the prohibited key. See Robert Horselenberg et al., *Individual Differences and False Confessions: A Conceptual Replication of Kassin and Kiechel*, 9 PSYCHOL. CRIM. & L. 1 (2003); Allison Redlich & Gail Goodman, *Taking Responsibility for an Act Not Committed: The Influence of Age and Suggestibility*, 27 L. & HUM. BEHAV. 141 (2003).

A different experiment concerns the risks of minimization. People were assigned tasks in pairs but also given tasks they were supposed to do alone. Subjects were then accused of having impermissibly cooperated—in effect, cheating. Most of them denied guilt. But interrogators introduced minimization themes to some of the subjects, implying that their offense was not so bad, and they might not be punished severely if they confessed. Within this group, the false confession rate tripled. See Melissa Russano et al., *Investigating True and False Confessions Within a Novel Experimental Paradigm*, 16 PSYCHOL. SCI. 481, 484 (2005).

¹⁹ See Ofshe & Leo, *supra* note 4, at 983 (1997) (“[P]olice-induced false confessions, like truthful ones, are rational responses to the influence tactics and manipulation strategies that American police use during interrogation.”).

²⁰ There is another category of false confessions where the suspect actually comes to believe in his own guilt, or at least to regard it as possible. The “internalized false confession” is discussed *infra*, see text accompanying notes 31–35.

²¹ I have elsewhere noted (and tried to explain) the irony that in fact the risks used to be recognized as obvious—which is why, in the nineteenth century, the Supreme Court banned the admissibility of confessions that followed even the slightest or most indirect threats or minimization. See Alan Hirsch, *Threats, Promises, and False Confessions: Lessons of Slavery*, 49 HOW. L.J. 31, 32 (“Though it may seem odd, the judicial system has taken a huge step backwards from the Nineteenth Century” in safeguarding against false confessions.).

Technique clearly did not envision this result—no servants of law enforcement would endorse a method that predictably endangers the innocent.²² How, then, could Reid and Associates be confident that its method does not, in fact, break down innocent as well as guilty suspects?

The answer emerges from a careful reading of the Reid Manual. Perhaps the single most important sentence of the 450 page manual occurs near the outset—in full italics, suggesting the authors’ recognition of its significance: “*An interrogation is conducted only when the investigator is reasonably certain of the suspect’s guilt.*”²³ Later, in the course of describing the confrontational nature of a typical interrogation, the authors see fit to reiterate this key point: interrogation techniques are confined to situations “where the suspect’s guilt seems to the investigator to be definite or reasonably certain.”²⁴ Or, as one of the authors told a skeptical questioner at a conference, he does not worry about eliciting confessions from the innocent because “we do not interrogate innocent people.”²⁵

How do Reid-trained interrogators assess guilt prior to an interrogation? In some cases, they do so through the investigatory process, gathering evidence that objectively establishes guilt. Of course, in such cases a confession, while welcome, is less important. But Reid-trained investigators learn that in most cases the onerous fact-gathering process can be side-stepped. The assessment of innocence and guilt can instead be made in the course of a non-accusatory interview, during which the interrogator sizes up the suspect’s body language and response to verbal cues. In fact, the Reid Manual devotes almost as much space to this pre-interrogation interview process, which determines whether the interviewee will subsequently be interrogated, as to the actual interrogation process itself. As the authors state, where evidence is lacking, “conducting a nonaccusatory [pre-interrogation] interview of the suspect is indispensable with respect to identifying whether the suspect is, in fact, likely to be guilty.”²⁶

Unfortunately, this crucial aspect of the Reid approach fails to survive scrutiny. Study after study establishes that humans, trained interrogators included,

²² Indeed, seeking to remove any doubt on this point, the Reid authors see fit to clarify that “we are opposed to the use of any interrogation tactic or technique that is apt to make an innocent person confess.” INBAU, *supra* note 6, at xi. Such a statement was present as early as the third edition in 1986, *see* INBAU, *supra* note 10.

²³ INBAU *supra* note 6, at 5.

²⁴ *Id.* at 201.

²⁵ Saul M. Kassin & Gisli Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 PSYCHOL. SCI. PUB. INT. 33, 36 (2004).

²⁶ INBAU, *supra* note 6, at 6.

are poor lie detectors.²⁷ No one, or virtually no one, can determine a person's guilt through the interviewing process at the heart of the Reid approach.²⁸

The propensity of the Reid Technique to cause false confessions follows inexorably from the two points developed above: detectives determine whom to interrogate based on a deeply flawed screening process,²⁹ then subject those who slip through the screen (that is, those wrongly betrayed by their body language or verbal responses) to an interrogation potent at overcoming resistance by convincing people they are better off confessing.

The above is sufficiently well established as to command near unanimity from those conversant with the relevant literature developed over the last few decades.³⁰ And Reid and Associates, in the newer editions of its manual, has offered at least somewhat of a response to these discomfiting truths. The 2001 edition included a lengthy new chapter, "Distinguishing between True and False Confessions," and the 2011 edition added material to that chapter. Both the 2001 and 2011 editions also added important material to a chapter on "Behavior Symptom Analysis"—the methods used to screen out the innocent in the pre-interrogation interview.

To determine the adequacy of these additions to meet the problem of false confessions, we shall look primarily at the most recent and comprehensive edition of the Reid Manual, the fifth edition published in 2011. Do the authors candidly acknowledge the scope of the problem of false confessions? Do they recommend measures that substantially ameliorate the problem?

II. CONCESSIONS AND ACCOMMODATIONS

In at least four respects, the Reid authors deserve credit for learning from the confessions literature and making appropriate adjustments. First, the authors make useful recommendations to prevent the "internalized false confession," where a

²⁷ See, e.g., Christian Meissner & Saul M. Kassin, "He's Guilty!": Investigator Bias in Judgments of Truth and Deception, 26 L. & HUM. BEHAV. 469, 470 (2002) (citing and summarizing studies).

²⁸ One study suggests that the occasional very rare person does indeed possess the power to detect lies. In this study, the researchers tested over 20,000 individuals' ability to detect lies and found that 50 (or .25%) had an accuracy rate of 80% or higher. Maureen O'Sullivan & Paul Ekman, *The Wizards of Deception Detection*, in DECEPTION DETECTION IN FORENSIC CONTEXTS 269 (Granhag & Stromwall eds. 2004). The issue of behavior symptom analysis is discussed in much greater detail *infra*, notes 77–84 and accompanying text.

²⁹ See Richard A. Leo & Stephen Drizin, *The Three Errors: Pathways to False Confession and Wrongful Conviction*, in POLICE INTERROGATIONS AND FALSE CONFESSIONS 12 (Lassiter & Meissner eds., 2010) (The path to false confession begins when "investigators first misclassify an innocent person as guilty.").

³⁰ The qualification is necessary because of a few high-profile skeptics. See, e.g., Paul Cassell, *The Guilty and the Innocent: An Examination of Alleged Cases of False Confessions of Wrongful Conviction from False Confessions*, 22 HARV. J.L. & PUB. POL'Y 526 (1999).

person confronted with allegedly objective evidence of his guilt actually comes to believe he committed the crime.³¹

To be sure, the manual commences its discussion of this counterintuitive phenomenon with skepticism,³² and its later claim that the internalized false confession phenomenon is “not implausible” seems unnecessarily grudging given that quite a few such cases have been documented.³³ Nevertheless, the authors propose that, when confronted with a suspect distrustful of his memory, “the investigator must be certain not to . . . suggest that the suspect committed the crime even if he has no recollection of doing so. . . . [A]t no time should an investigator attempt to persuade a suspect that he is guilty of a crime he claims not to remember committing.”³⁴ Further, they admonish interrogators not to confront such a suspect claiming to have evidence against him that they do not in fact have.³⁵

Unfortunately, the Reid authors’ commendable effort to prevent internalized false confessions may not go far enough. They warn against expressing certainty of guilt and introducing false evidence *after* a suspect claims not to remember committing the crime. But internalized false confessors may exhibit no uncertainty of memory *until* they are confronted with false evidence.³⁶ Nevertheless, the recommended prophylactic measures are at least steps in the right direction.

Another step in the right direction stems from recognition that certain populations—particularly juveniles and those with diminished mental capacity or suffering from mental illness—are especially prone to false confessions. The Reid authors recommend that such groups be spared the more aggressive aspects of the

³¹ For the leading analysis of this phenomenon, see Saul M. Kassin, *Internalized False Confessions*, in 1 HANDBOOK OF EYEWITNESS PSYCHOLOGY 175 (Toglia, Read, Ross, & Lindsay, eds., 2007).

³² See INBAU, *supra* note 6, at 341–42 (“A claim that a confession was coerced internalized is an inviting defense for a guilty defendant who chooses to retract his confession . . . [A]ll a defendant has to do, when claiming a coerced internalized confession, is take the position that he believed he was guilty of the crime at the time of the confession.”).

³³ See Kassin, *supra* note 31, at 181–82.

³⁴ See INBAU, *supra* note 6, at 350–51.

³⁵ *Id.* at 352. Indeed, the introduction of false evidence seems to trigger most internalized false confessions, such as the well-publicized case of Marty Tankleff. In a state of shock after having discovered his parents’ brutalized corpses, Tankleff was told (falsely) by the police that his father, in a dying declaration, declared his son the culprit. Concluding that he must have committed the crime and blacked out, Tankleff confessed. His conviction was later reversed under circumstances leaving little doubt as to his innocence, and the government did not retry him. See Bruce Lambert, *No Retrial in ‘88 Double Killing on Long Island*, N.Y. TIMES, (July 1, 2008), http://www.nytimes.com/2008/07/01/nyregion/01tankleff.html?_r=0.

³⁶ See Kassin, *supra* note 31, at 181.

Reid Technique.³⁷ If that admonition is followed, the prevalence of false confessions will surely be reduced.³⁸

To their credit, in the fourth and fifth editions of their manual, the Reid authors also emphasize the importance of corroborating confessions and the suspicious nature of confessions that remain uncorroborated.³⁹ They correctly note that “the best type of corroboration is in the form of new evidence that was not known before the confession.”⁴⁰ Related, but even more important, the authors insist that “[w]hen developing corroborative information, the investigator must be certain that the details were not somehow revealed to the suspect through the questioning process, news media, or the viewing of crime scene photographs.”⁴¹ This admonition is most welcome in light of the frequent failure of interrogators to follow such a course. In many cases of proven false confessions, the interrogators apparently supplied the suspect details of the crime.⁴²

Finally, the Reid authors endorse the electronic recording of interrogations,⁴³ a measure enthusiastically promoted by most reformers in this area and increasingly embraced by law enforcement.⁴⁴ To their credit, they note that the idea of mandatory recording was “not embraced with open arms by the law enforcement community” but that concerns proved unwarranted.⁴⁵

With respect to each of the issues discussed in this section, Reid and Associates is now in substantial agreement with its long-time critics, a noteworthy development.⁴⁶ In several other areas, however, sharp disagreement persists, beginning with the very purpose of the Reid Technique.

³⁷ INBAU, *supra* note 6, at 352–54.

³⁸ See Drizin & Leo, *supra* note 17, at 944 (in study of proven false confessions, almost one-third were juveniles, and almost one-third were either mentally retarded or suffered from mental illness).

³⁹ INBAU, *supra* note 6, at 354–60.

⁴⁰ *Id.* at 306.

⁴¹ *Id.*

⁴² See Brandon Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051 (2010).

⁴³ INBAU, *supra* note 6, at 325.

⁴⁴ See Brian Jayne, *Empirical Experiences of Required Electronic Recording of Interviews and Interrogations on Investigators' Practices and Case Outcomes*, 4 LAW ENFORCEMENT EXECUTIVE FORUM 103 (2003) (in survey of investigators in Alaska and Minnesota, which require recording, 85% supported the law or said their interrogations were unaffected by it); Kassir et al., *supra* note 1, at 25 (electronic recording of confessions has “drawn advocates from a wide and diverse range of professional, ideological, and political perspectives”). Recorded interrogations put judges (in suppression hearings and bench trials) and juries in better position to consider the interrogative pressures applied to a suspect, to evaluate whether details in the confession may have been supplied, and to resolve factual disputes over exactly what transpired prior to the confession. In addition, a policy of recording can deter interrogative excesses.

⁴⁵ INBAU, *supra* note 6, at 50.

⁴⁶ Another important area of potential agreement, the need to avoid lengthy interrogations, is difficult to assess because of the Reid Manual's vagueness. Data establish a correlation between the length of interrogations and risk of false confessions; in 84% of false confessions the interrogation

III. DENIAL

A. Frequency of False Confessions

In assessing the adequacy of the new material in the latest editions of the Reid Manual, one crucial threshold question concerns the extent to which the authors acknowledge the underlying problem. Notwithstanding their endorsement of certain reforms, they are unlikely to craft meaningful changes in their approach unless they consider the problem of false confessions sufficiently widespread as to warrant a serious response.

Near the outset of their new chapter on false confessions (added in the fourth edition and revised in the fifth), the authors address that issue directly: "There is no question that interrogations have resulted in false confessions from innocent suspects. However, . . . [e]ven critics of police interrogation agree that most confessions are true."⁴⁷ This statement sets the bar absurdly low. Of course *most* confessions are true. It is horrifying to imagine a regime of law enforcement that produced mostly false confessions. But are the critics of the Reid Technique correct to maintain that false confessions are surprisingly prevalent? The Reid authors dismiss that possibility, declaring toward the end of the chapter on false confessions that "the research findings presented in this chapter reveals that false confessions do occur but that they are rare occurrences."⁴⁸

However, the basis of this conclusion is unclear. The chapter's only "findings" with respect to the frequency of false confessions are references to outdated or irrelevant works. Drawing on an oft-cited 1987 study by Hugo Bedau and Michael Radelet of wrongful convictions⁴⁹ (not limited to cases involving confessions), the Reid authors note forty-nine "possible false confession[s]."⁵⁰ Later, they cite the "60 possible false confessions" identified by Professors Richard Ofshe and Richard Leo in a 1998 essay.⁵¹ But Professors Bedau and Radelet were

exceeded six hours. See Drizin & Leo, *supra* note 17. The Reid Manual says virtually nothing about the appropriate length of interrogations, but a few comments are potentially significant: "A properly conducted interrogation that lasts 3 or 4 hours, for the ordinary suspect, is certainly not so long as to cause the levels of emotional or physical distress that constitute duress," but "[a] suspect who has maintained his innocence and made no incriminating statements for 8 or 10 hours has not offered any behavior to account for this lengthy period of interrogation." INBAU, *supra* note 6, at 347, 348. To the extent these statements together can be read as suggesting that interrogations should rarely exceed four hours, and almost never reach eight, they represent welcome cautions.

⁴⁷ *Id.* at 339.

⁴⁸ *Id.* at 367.

⁴⁹ Hugo Bedau & Michael Radelet, *Miscarriage of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987).

⁵⁰ INBAU, *supra* note 6, at 340.

⁵¹ *Id.* at 363, citing Richard Ofshe & Richard Leo, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429 (1998).

studying only capital cases—not to mention doing so a quarter century ago. The Ofshe/Leo article is also more than a decade old.

The Reid authors also mention a 1996 observational study of 182 interrogations by three police departments and declare that “not a single false confession was reported.”⁵² But this study made no effort to identify true or false confessions. Its purpose was entirely different: to identify what interrogation techniques law enforcement utilizes in practice.⁵³

Inexplicably, the Reid authors ignore much more recent and relevant data, particularly the most important empirical study of false confessions—one by Professors Richard Leo and Steven Drizin published in 2004 that identifies and analyzes 125 cases of proven false confessions.⁵⁴ The omission of this study (published seven years before the fifth edition of the Reid Manual) leads the Reid authors astray in crucial respects. They ask rhetorically, “how does a researcher go about proving that any given confession is actually false?”⁵⁵ Their implicit answer: he cannot. Thus, in the course of dismissing the Ofshe/Leo study of sixty false confessions, they note that only thirty-four were classified as “proven” false⁵⁶ and further observe that one commentator studied these cases and opined that several of the defendants were in fact guilty.⁵⁷ More generally, they assert that alleged identification of false confessions fails because of an “inherent weakness” of such efforts, the “failure to establish ground truth.”⁵⁸ The Drizin/Leo study ignored by the Reid authors, however, not only dispensed with confessions that

⁵² *Id.* at 366.

⁵³ See Richard Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 268 (1996). Similarly, the Reid authors cite a survey of 112 investigators in Alaska and Minnesota who received training in Reid, and note that only eighteen out of 3,162 confessions were suppressed by trial courts. INBAU, *supra* note 6, at 366. They assert that such data “indicate that the vast majority of confessions obtained through interrogation are noncoercive and held to be admissible as evidence.” *Id.* Here, the Reid authors have constructed a straw man. No one disputes that most confessions are legitimate. Certainly no one disputes that courts routinely uphold confessions, even those obtained by aggressive use of the Reid Technique. Indeed, reformers protest that courts have become a rubber-stamp for law enforcement, failing to protect against unreliable and improperly obtained confessions. See, e.g., RICHARD LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 265 (2008) (because judges, too, are “subject to tunnel vision and confirmation bias” and thus assume confessions to be true, “the formal presumption of innocence is quickly transformed into an informal presumption of guilt.”). To cite the courts as proof that confessions are obtained properly is to proceed circularly, since the wisdom of the courts in this area is itself at issue. See, e.g., Alan Hirsch, *Confessions and Harmless Error: A New Argument for the Old Approach*, 12 BERKELEY J. CRIM. L. 1, 7–13 (2007) (noting tendency of judges, like everyone else, to find false confessions counterintuitive).

⁵⁴ Drizin & Leo, *supra* note 17.

⁵⁵ INBAU, *supra* note 6, at 363.

⁵⁶ *Id.*

⁵⁷ *Id.* at 376, n.32 (referring to Cassell). The Reid authors do not note or cite Ofshe’s and Leo’s reply, *The Truth About False Confessions and Advocacy Scholarship*, 37 CRIM. L. BULL. 293 (2001).

⁵⁸ INBAU, *supra* note 6, at 363.

were probably or likely false, sticking to those *proven* false, but also explained the bases for determining that a particular confession was false. These bases leave little room for skepticism.

Professors Leo and Drizin identified four ways confessions were proven false to their satisfaction.⁵⁹ First, in many cases, scientific proof—typically DNA tests—established that the person who confessed could not have been the culprit. Second, in some cases the actual culprit was apprehended and irrefutable evidence established his guilt. Third, in a few cases, evidence turned up that established the physical impossibility that the confessor committed the crime (e.g., it turned out he was in prison or out of the country when the crime was committed). Fourth, in a few cases it turns out there was no crime at all (e.g., someone confessed to murder, but later the alleged victim turned up alive). Although, as noted, one commentator has questioned the innocence of some of the alleged false confessors in the earlier Ofshe/Leo study,⁶⁰ no one has disputed the innocence of the 125 false confessors cited in the Drizin/Leo study.⁶¹

For a variety of reasons, experts in the area are virtually unanimous in the view that the cases of proven false confessions represent only the tip of a large iceberg. First, as noted, in the aforementioned Drizin/Leo study, the authors were conservative—they omitted many confessions that they identified as *probably* false because they were not quite proven false.

Second, most criminal cases take place under the public radar, such that, if they resulted in a false confession, it would go undetected. For one thing, most cases are resolved by guilty plea.⁶² We know that some guilty pleas involve false confessions,⁶³ but once the party has pled guilty there is usually no mechanism for probing or challenging the confession.

Third, the majority of proven false confessions have been so identified by virtue of scientific evidence. But in many cases there is no relevant scientific evidence available, or the prosecution opts not to have what is available adequately tested, and the defense lacks the resources to do so.⁶⁴

⁵⁹ Drizin & Leo, *supra* note 17, at 924–26.

⁶⁰ Cassell, *supra* note 30, at 524. His basis for doing so was at times dubious. For example, if anyone, including the prosecutor, maintained that the defendant was guilty, Cassell considered the confession disputed rather than proven false. However, prosecutors have insisted on guilt even in cases of DNA exoneration. See, e.g., Alan Hirsch, *The Tragedy of False Confessions (and a Common Sense Proposal)*, 81 N.D. L. REV. 343, 348–49 (2005) (citing cases and seeking to explain the phenomenon).

⁶¹ Supplementing the Drizin/Leo study with cases of proven false confessions from other studies, Professor Leo subsequently identified 250 such cases. LEO, *supra* note 53, at 244.

⁶² See, e.g., ROBERT P. BURNS, *THE DEATH OF THE AMERICAN TRIAL* 85 (2011) (fewer than 5% of criminal cases go to trial).

⁶³ See Drizin & Leo, *supra* note 17, at 961 (eleven cases of guilty pleas in the study of 125 proven false confessions).

⁶⁴ See Frank Horvath & Robert Meesig, *The Criminal Investigation Process and the Role of Forensic Evidence: A Review of Empirical Findings*, 41 J. FORENSIC SCI. 963 (1996).

Fourth, there is reason to believe that large numbers of false confessions occur in specialty courts like juvenile courts and mental health courts that deal with vulnerable populations, precisely those defendants at the greatest risk of falsely confessing. In many jurisdictions, these proceedings are confidential, and the media tend not to cover these courts as part of their regular beats.

Finally, interrogators themselves indicate that false confessions are surprisingly frequent. In one self-report study of more than six hundred professional interrogators, based on their personal experience and observation they estimated that, on average, almost five percent of innocent suspects confess.⁶⁵

The Reid authors make no mention of the latter survey, just as they ignore the Drizin/Leo study of proven false confessions. They conclude their cavalier treatment of the frequency of false confessions as follows: "This is not to suggest that the issue of possible false confessions be ignored but rather that it be kept in perspective."⁶⁶ Employing selective data and analysis, they have not so much kept the issue in perspective as they have trivialized it.

B. Purpose of Interrogations

Even allowing that false confessions are a serious problem, it does not follow that the Reid Technique contributes substantially to the problem. In new material that surfaces in the fifth edition of their manual in 2011, the Reid authors insist that their critics misunderstand and misrepresent the Reid Technique, starting with its very purpose.

They cite as representative of the distortion an expert report submitted by Professor Richard Leo in a case where he served as an expert witness.⁶⁷ Leo's report declared that "[t]he sole purpose for custodial interrogation is to elicit a confession. Contemporary American interrogation methods are structured to persuade a rational person who knows he is guilty to rethink his initial decision to deny culpability and instead choose to confess."⁶⁸ The Reid authors responded: "we certainly take issue with the stated purpose of an interrogation being to elicit a confession. On page 5 of Chapter 1 of this book, we state . . . [that] '[t]he purpose of an interrogation is to learn the truth.'"⁶⁹ Indeed, they emphasize, when an innocent suspect is cleared, "the interrogation must be considered successful because the truth was learned."⁷⁰

⁶⁵ Kassin et al., *Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs*, 31 L. & HUM. BEHAV. 381 (2007).

⁶⁶ INBAU, *supra* note 6, at 366.

⁶⁷ *Id.* at 367 (citing EXPERT REPORT IN CASE OF BRENDAN DASSEY, (Richard Leo)) [hereinafter, LEO REPORT].

⁶⁸ INBAU, *supra* note 6, at 367 (citing LEO REPORT).

⁶⁹ *Id.* at 368.

⁷⁰ *Id.*

It may be that Professor Leo should have acknowledged that the Reid Manual declares discovery of truth to be its goal and the clearing of an innocent suspect a successful outcome. But the Reid authors' response ignores a critical point discussed in Part I above: their manual instructs interrogators to screen out the innocent *before* interrogation and thus to interrogate only the guilty. With that point in mind, it seems hard to question Professor Leo's claim that the purpose of the interrogation is to produce a confession. If Reid-trained investigators screen out the innocent as per instructions, their interrogations will indeed succeed only when they elicit confessions. Presumably this is behind the following accounting by the authors: "The most experienced and skilled investigators achieve a confession rate of only about 80%. With respect to the remaining 20% . . . there is a high probability that most, *if not all* of this group were guilty of the crime."⁷¹

Indeed, earlier in the very chapter where they take Professor Leo to task for allegedly misrepresenting the purpose of their technique, the Reid authors explicitly declare that "[t]he purpose of an interrogation is to learn the truth *and persuade a suspect whom the interrogator believes to be lying about involvement in a crime to tell the truth about the crime that they committed*."⁷² The alleged conflict between Professor Leo and the Reid authors dissolves: Yes, the purpose of the Reid Technique is to elicit truth, but that is not in conflict with the assertion that the purpose is to elicit a confession. In the guilt-presumptive Reid environment,⁷³ eliciting truth and eliciting a confession amount to the same thing.⁷⁴

Critically, steps eight and nine of the interrogation process, presented as the culmination of the interrogation, are "Having the Suspect Orally Relate Various Details of the Offense" and "Converting an Oral Confession into a Written Confession."⁷⁵ This is not presented as one possible outcome, with other protocols recommended if it turns out the suspect is innocent. Rather, obtaining a confession is presented as *the* culmination of a successful interrogation. Thus, Professor Leo's characterization of the purpose of the Reid interrogation is supported by a fair reading of the entire manual, notwithstanding the authors' contention that they seek truth, not necessarily confessions.

⁷¹ *Id.* at 371–72 (emphasis added).

⁷² *Id.* at 344 (emphasis added).

⁷³ For development of the notion of the Reid approach as "guilt-presumptive," see Kassir & Gudjonsson, *supra* note 25, at 41–42.

⁷⁴ At other points in their manual as well, the Reid authors implicitly acknowledge as much. The manual notes that the defense attorney will likely argue that the interrogation tactic of cutting off denials "prevented his client from presenting his side of the story," and proposes that law enforcement give the following response: in the pre-trial interview, the defendant "was provided with ample opportunity to tell the truth." INBAU, *supra* note 6, at 193. Here, the analysis tracks the different goals of the two parts of the Reid process: the interview, but not the interrogation, gives the suspect the opportunity to establish his innocence.

⁷⁵ *Id.* at 303–27.

C. Causes of False Confessions

The Reid authors part company with their critics not only with respect to the purpose but also the effects of their approach to interrogation. They emphatically reject the contention that the Reid Technique contributes substantially to the problem of false confessions.⁷⁶

1. The Screening Interview

To the extent the Reid authors believe in the ability of investigators to screen out the innocent during a non-accusatory interview and thus interrogate only the guilty, interrogation cannot create a risk of false confessions. Accordingly, it is crucial to evaluate their response to the contention, buttressed by many studies, that humans are poor lie detectors and the screening process is accordingly doomed.

The 2011 edition of the Reid Manual includes no fewer than six chapters instructing investigators how to determine guilt from “behavior symptom analysis” [BSA] during the pre-interrogation interview. The most important chapter includes instruction with respect to three different aspects of behavior: verbal behavior, paralinguistic behavior, and nonverbal behavior.

In terms of verbal behavior, the Reid authors promote propositions like: “Truthful subjects respond to questions directly; deceptive subjects may answer evasively.” “Truthful subjects may deny broadly; deceptive subjects may offer specific denials.” “Truthful subjects offer confident and definitive responses; deceptive subjects may offer qualified responses.” “Truthful subjects will offer spontaneous responses; deceptive subjects may offer rehearsed responses.”⁷⁷

In the section on “paralinguistic behavior,” interrogators are taught to determine the truthfulness of interviewees based on, among other things, “response length,” “response delivery,” “continuity of the response,” and “erasure behavior.”⁷⁸ In the section on non-verbal behavior, they are taught to distinguish truthfulness from deception by analyzing the interviewee’s posture and gestures. This section includes photographs of interviewees accompanied by labels such as, “truthful frontally aligned posture” and “deceptive non-frontal alignment.”⁷⁹

Unfortunately, overwhelming evidence suggests that these methods do not work. In the 2001 edition of their manual, the Reid authors touted their own studies in the 1990s conducted pursuant to grants from the National Security

⁷⁶ To the contrary, the authors conclude that “our experience has been that [our] interrogation techniques, if used in accordance with the guidelines offered in this text, greatly reduce the risk of an innocent suspect confessing.” *Id.* at 366.

⁷⁷ *Id.* at 111–17.

⁷⁸ *Id.* at 117–21.

⁷⁹ *Id.* at 121–36.

Agency.⁸⁰ The experimenters selected and edited interview tapes from the Reid collection, showed them to several staff members of Reid and Associates, and reported that they accurately determined truthfulness more than 80% of the time. In an essay in 2008, Professor Saul Kassin noted that, among other problems, the data were extremely limited, and ground truth was not established with certainty.⁸¹ Related and more importantly, Kassin noted that studies in “laboratories all over the world” during the next decade produced very different results—an accuracy rate barely better than fifty percent, or what you would get flipping a coin.⁸²

In the 2011 edition of their manual, published three years after Professor Kassin’s appraisal that their own studies are “grossly out of step with basic science,”⁸³ the Reid authors ignored such criticisms and simply repeated the results of their studies and the claim that they establish the viability of BSA. They do acknowledge that subsequent studies produce “rather dismal results” for BSA,⁸⁴ but they argue that such studies are essentially useless.

The Reid authors note that many of the studies use a mock crime paradigm which fails to simulate real-life interrogations for several reasons: 1) unlike interviewees in the real world, those assigned roles “had low levels of motivation to be believed (in the case of innocent) or to avoid detection (in the case of guilty suspects).”;⁸⁵ 2) the interviews of the role-playing suspects “were not conducted by investigators trained in interviewing criminal suspects” and did not employ “the type of structured interview process that is commonly utilized by interrogators in the field”;⁸⁶ 3) in most of the studies, “there was no attempt to establish behavioral baselines for each suspect so as to identify [his] unique behaviors”;⁸⁷ 4) these studies were “based on the faulty premise that there are specific behavior symptoms that are unique to truth or deception”; and 5) insufficient consideration was given to “context.” In the real world, but not in these studies, interrogators can assess “whether specific nonverbal behaviors are appropriate given the verbal

⁸⁰ Horvath et al., *Differentiation of Truthful and Deceptive Criminal Suspects in Behavior Analysis Interviews*, 39 J. FORENSIC SCI. 793 (1994).

⁸¹ Saul M. Kassin, *Confessions Evidence: Commonsense Myths and Misconceptions*, 35 CRIM. JUST. AND BEHAV. 1309, 1310 (2008).

⁸² *Id.* An essay by Professor Kassin in 2010 summarized the literature on police-induced confessions as follows: “Research has consistently shown that most commonsense behavioral cues are not diagnostic of truth and deception. Hence, it is not surprising as an empirical matter that laypeople on average are only 54% accurate at distinguishing truth and deception; that training does not produce reliable improvement; and that police investigators, judges, customs inspectors and other professionals perform only slightly better, if at all.” Kassin et al., *supra* note 1, at 6.

⁸³ Kassin, *supra* note 81, at 1310.

⁸⁴ INBAU, *supra* note 6, at 103.

⁸⁵ *Id.*

⁸⁶ *Id.* at 104.

⁸⁷ *Id.*

content of the suspect's response, identifying the consistency of a suspect's statements across time and with known evidence, and so on."⁸⁸

The Reid authors summarize these criticisms of the various studies as follows: "[R]esearch based on artificially motivating subjects to lie or tell the truth does not identify the ability of appropriately trained investigators to assess the credibility of people or the information that they receive from real life subjects during properly structured investigative interviews."⁸⁹ Or, more succinctly, the laboratory fails to approximate the real world of criminal investigation.

This critique is obviously correct to some extent but proves too much; *no* laboratory experiment perfectly mirrors the real world, but it is clearly counterproductive to dismiss the best evidence available because of its limitations. In addition, the Reid authors' specific assertions overlook the heterogeneity of the relevant studies. While some of the studies involve low-stake lies, others involve high-stake ones⁹⁰—yet still fail to consistently produce impressive rates of accuracy.⁹¹ So too, the contention that investigators' personal involvement would produce more accuracy has been tested and refuted.⁹²

Professor Kassin, one of the leading critics of the Reid Technique, has acknowledged that it "remains a reasonable goal to seek future improvements in training—to make police better" at lie detection,⁹³ but the purveyors of the Reid Technique refuse to meet critics like Kassin halfway and acknowledge what emerges from an objective view of the evidence: there is currently no basis for confidence that investigators can reliably screen out the innocent through BSA.

Apart from their own limited studies in the 1990s, the Reid authors claim that several subsequent studies at least indirectly support the viability of BSA. In fact, the studies they rely on fail to justify resort to BSA as a screening mechanism.

For example, the Reid authors assert that "[a]ccuracy in detecting deception with real-life suspects is significantly higher than suggested by studies that use subjects in a mock crime scenario."⁹⁴ But the only documentation they offer in support of this proposition is a 2004 study in which ninety-nine British police officers were shown videotapes of interviews with fourteen actual suspects and asked to judge their veracity. The study found that the "[a]ccuracy rates were

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Indeed, one article cited favorably by the Reid Authors (and discussed *infra* notes 104–05) analyzed the existing literature on lie detection and characterized thirteen studies as "using high stakes lie scenarios." Maureen O'Sullivan et al., *Police Lie Detection Accuracy: The Effect of Lie Scenario*, 33 L. & HUM. BEHAV. 530, 534 (2009).

⁹¹ See Kassin & Gudjonsson, *supra* note 25, at 39.

⁹² See *id.* (citing and summarizing studies).

⁹³ *Id.* at 217.

⁹⁴ INBAU, *supra* note 6, at 103.

higher than those typically found in deception research.”⁹⁵ The mean accuracy of lie detection rate in this study, however, was only sixty-five percent. While this at least represents lie detection above the level of chance, it is a rate far from acceptable for screening out innocent suspects. If Reid-trained interrogators averaged this rate of success utilizing BSA, far be it from never interrogating innocent suspects, they would subject roughly one in every three innocent suspects to interrogation.

Moreover, the very study cited approvingly by the Reid authors actually offers a devastating critique of the BSA taught by Reid and Associates. To the extent the British police officers were somewhat successful at detecting lies, it was *despite* the methods taught by Reid. When they utilized Reid’s BSA, they failed. The officer-subjects were asked to describe what cues they relied on to detect truthfulness, and “the more they endorsed Inbau’s view on cues to deception . . . the worse they became at distinguishing between truths and lies.”⁹⁶ Indeed, one of the primary conclusions of the study is that, “[o]n the basis of the available deception research . . . paying attention to cues promoted in police manuals (gaze aversion, fidgeting, etc.) *actually hampers ability to detect truths and lies.*”⁹⁷

Significantly, the authors of the study in question have published a much more recent work on lie detection which summarizes the state of knowledge in this area as follows:

Five decades of lie detection research have shown that people’s ability to detect deception by observing behavior and listening to speech is limited—with, on average, 54% of truths and lies being correctly classified. . . . Other researchers have taught investigators “diagnostic” cues to deceit. The success of such training programs has been limited, with only a few percentage points, on average, gained in accuracy.⁹⁸

The Reid authors also maintain that research shows that “training and experience in the field of behavior symptom analysis significantly increases the ability to detect true and false statements.”⁹⁹ Once again, they rely on a single study allegedly establishing this point,¹⁰⁰ and the study in question offers no support for BSA. The study is not directed at evaluating BSA, but something

⁹⁵ Samantha Mann et al., *Detecting True Lies: Police Officers’ Ability to Detect Suspects’ Lies*, 89 J. APPLIED PSYCHOL. 137 (2004).

⁹⁶ *Id.* at 144. “Inbau” refers to Fred Inbau, co-author of the Reid Manual.

⁹⁷ *Id.* at 137 (emphasis added).

⁹⁸ Aldert Vrij et al., *Outsmarting the Liars: Toward a Cognitive Lie Detection Approach*, 20 CURRENT DIRECTIONS PSYCHOL. SCI. 28 (2011). Aldert Vrij and Samantha Mann were among the authors of both this study and the one the Reid authors cite for support. See *supra* notes 95–97.

⁹⁹ INBAU, *supra* note 6, at 103.

¹⁰⁰ Maria Hartwig et al., *Strategic Use of Evidence During Police Interviews: When Training to Detect Deception Works*, 30 L. & HUM. BEHAV. 603 (2006).

rather different: whether training in the “strategic use of evidence” during an interview enhances the ability to detect deception. A major concern of Reid’s critics is that BSA is often utilized in the absence of evidence,¹⁰¹ so the findings of this study—that training in use of evidence can indeed enhance lie detection—offer small comfort.¹⁰²

Finally, the Reid authors cite research showing that “[h]igh-stake lies are detected at higher rates than low-stake lies.”¹⁰³ They cite as the support for this proposition an article that looks at the existing literature, spanning thirty-one studies of lie detection, and analyzes separately those it classifies as “low stakes” and “high stakes.”¹⁰⁴ The mean accuracy rate found in the high-stakes studies is roughly sixty-seven percent—once again, a rate that qualifies as small comfort if such lie detection efforts are relied on to shield the innocent from an aggressive interrogation designed to break them down. Worse still, while no group of law enforcement officials scored higher than a mean accuracy of seventy-three percent, some groups “obtained mean lie detection accuracy scores that were at chance.”¹⁰⁵ Since BSA is not limited to officials who demonstrate relative facility with lie detection (and, it should be stressed, even those at the very high end fail one quarter of the time), we can infer that numerous innocent persons are judged deceptive during the screening interview and thus subjected to interrogation.

As it happens, there have been important developments in human lie detection in recent years, as researchers have uncovered a new approach that seems promising.¹⁰⁶ However, Reid and Associates has pointedly not adopted this approach.¹⁰⁷ Indeed, those in the vanguard of this work assess Reid harshly. Reid’s BSA is “widely taught to practitioners . . . [y]et empirical evidence that such tools actually work is either weak or non-existing.”¹⁰⁸

¹⁰¹ The Reid authors themselves acknowledge that “[t]he majority of interrogations are conducted under circumstances in which the investigator does not have overwhelming evidence that implicates the suspect—indeed, the decision to conduct an interrogation is an effort to possibly obtain such evidence.” (meaning a confession). INBAU, *supra* note 6, at 6. Indeed, “[f]requently prior to an interrogation, the only evidence to support a suspect’s guilt is circumstantial or behavioral in nature.” *Id.*

¹⁰² Even as regards this specific issue, the study offers no support for Reid’s proponents. To the contrary, the authors specifically criticize the Reid Manual with respect to the treatment (specifically the timing of disclosure) of evidence during an interview. Hartwig et al., *supra* note 100, at 604.

¹⁰³ INBAU, *supra* note 6, at 103.

¹⁰⁴ See O’Sullivan et al., *supra* note 90.

¹⁰⁵ *Id.* at 535.

¹⁰⁶ Aldert Vrij & Pär Granhag, *Eliciting Cues to Deception and Truth: What Matters are the Questions Asked*, 1 J. APPLIED RES. MEMORY & COGNITION 110 (2012).

¹⁰⁷ See Saul M. Kassir, *Paradigm Shift in the Study of Human Lie-Detection: Bridging the Gap Between Science and Practice*, 1 J. APPLIED RES. MEMORY & COGNITION 118, 119 (2012) (“It is disappointing that the latest edition [of Reid] does not take account of the cognitive load research.”).

¹⁰⁸ Vrij & Granhag, *supra* note 106, at 115.

In sum, while the later editions of the Reid Manual acknowledge the existence of a body of work calling into question its BSA approach, Reid and Associates continues to promote that approach and justify doing so by way of a highly selective and distorted analysis of the data. Extensive evidence belies the suggestion that Reid-trained investigators interrogate only the innocent.

2. The Interrogation

Even if Reid and Associates conceded that their screening process does not reliably succeed, they would not concede that the Reid Technique produces false confessions. They essentially argue in the alternative; on the one hand, they continue to maintain that their screening interview ensures that they avoid (if not infallibly at least very effectively) interrogating the innocent. But they also argue that interrogating the innocent poses little problem in any event; their interrogation method, they insist, causes only the guilty, not the innocent, to confess.

This argument, made at several points in the fifth edition of the Reid Manual, is mitigated by an important acknowledgment pervading the manual; *explicitly* telling suspects that they face certain punishment unless they confess and *promising* leniency if they do confess can indeed break down the innocent. The Reid authors admonish interrogators not to use these tactics, which are in any case generally illegal. But, they maintain, anything short of such behavior will not break down the innocent (except, perhaps, juveniles and persons with serious mental infirmities).

The Reid authors suggest clear limits to interrogative confrontation. They note, for example, the impropriety of an interrogator telling a suspect that, if he maintains his innocence, “I will not only charge you with this offense but also with obstruction of justice, which involves a mandatory prison sentence.”¹⁰⁹ This is improper “because this incentive could cause an innocent person to confess.”¹¹⁰ But such a risk extends only to a direct threat of inevitable consequences; “[m]erely discussing real consequences” is unproblematic.¹¹¹

The Reid authors make a similar move with respect to minimization. They declare it off-limits to tell a suspect, “if this is the first time you did something like this, I’ll talk to the judge and make sure that he gives you probation,”¹¹² because such an explicit promise of leniency could cause an innocent person to confess. By contrast, it is unproblematic to tell the suspect that, “if this is something that happened on the spur of the moment, that would be important to include in my report.”¹¹³ Such a statement, according to the authors, provides incentive for the

¹⁰⁹ INBAU, *supra* note 6, at 344.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 345.

¹¹³ *Id.*

guilty to confess, but not the innocent. The Reid position is summarized most clearly in the following passage:

Because of the fundamental differences between innocent and guilty suspects, [the innocent] respond differently to the investigator's persuasive efforts during an interrogation, provided those efforts do not explicitly state promises of leniency in exchange for a confession or threaten inevitable harm absent a confession.¹¹⁴

The issue is joined. As noted in Part I, critics of the Reid Technique argue that interrogators can break down an innocent suspect by communicating the futility of maintaining innocence and the likelihood that leniency will result from a confession, without making explicit threats and promises.¹¹⁵ By contrast, the Reid authors draw a hard and fast distinction between the explicit and implicit, considering it unproblematic to communicate that a confession will produce a better result than maintaining innocence, provided interrogators do not cross the line into definitive threats and punishments.¹¹⁶

How to resolve this crucial impasse between Reid and Associates and their critics? A place to start is with a puzzling passage in the Reid Manual, where the authors acknowledge (albeit in curiously grudging fashion) the possibility that implied threats and promises can lead people to draw conclusions about their prospective treatment—while still emphatically rejecting the idea that such inferences will affect the innocent suspect's decision-making:

For example, if during a homicide interrogation the investigator places blame onto the victim for causing the suspect to become angry and lose emotional control, could that statement cause some suspects to believe that they might be sentenced less severely? Does the investigator's sympathetic and understanding approach imply to some suspects that a judge will also be understanding and sympathetic? Will the investigators intentional avoidance of mentioning negative consequences lead some suspects to believe that the consequences of their crime are not severe? In truth, we cannot answer any of these questions with definitive

¹¹⁴ *Id.* at 422.

¹¹⁵ Thus, for example, social scientists have long argued that minimization leads suspects to expect leniency by "pragmatic implication." See Saul M. Kassin & Karlyn McNall, *Police, Interrogations, and Confessions: Communicating Promises and Threats by Pragmatic Implication*, 15 L. & HUM. BEHAV. 233 (1991).

¹¹⁶ As the Reid authors repeatedly emphasize, courts tend to draw the line in the same place. It was not always so. In the nineteenth century, the Supreme Court took a hard line on even the most indirect threats and suggestions of leniency. See *Bram v. United States*, 168 U.S. 532, 542–43 (1897) (confession "must not be extracted by any sorts of threats or violence, nor obtained by any direct or implied promises, however slight"); see also Hirsch, *supra* note 21, at 40–45 (tracing how courts in the twentieth century circumvented and eventually discarded *Bram*).

certainty, but we would have to acknowledge the possibility that some suspects may form these beliefs. However, the important question to ask is, Would an *innocent* suspect be likely to form these beliefs and decide to confess because of them? To this, the answer is clearly “No!”¹¹⁷

It seems odd that the authors only “acknowledge the possibility” that suspects may be led by minimization themes to consider themselves better off confessing. The tendency of such tactics, in conjunction with confrontation, to produce that conclusion by a suspect is essential to the Reid Technique. Suddenly, 350 pages in, the authors seem uncertain about the effectiveness of their own methods.

Moreover, here and elsewhere they elide a crucial point. They insist on the irrationality of an innocent person responding to implicit threats and inducements, ignoring the fact that the conditions of interrogation can produce a feeling of stress and eventually despair.¹¹⁸ The Reid authors essentially parrot the conventional sense of false confessions as counterintuitive: why would an innocent person act so contrary to self-interest? But they ignore the fact that they have themselves carefully cultivated conditions that create desperation to escape and thus compromise the rationality of the innocent suspect’s calculations.¹¹⁹

As this suggests, when discussing the risk of false confessions, the Reid Manual virtually ignores what the Reid Technique is all about. Thus, in the course of arguing that innocent and guilty suspects act differently, the authors give the following example: “An innocent suspect who is told that it is important to explain the reason behind committing the crime will predictably reject the investigator’s entire premise and explain that he had no involvement in the crime whatsoever.”¹²⁰ That may be true at the outset of the interrogation, but it ignores the fact that Reid interrogators are taught to cut off such denials aggressively in order to convince the suspect of the futility of maintaining innocence. When that is done over the course of hours, why should we be confident that the innocent suspect will remain steadfast? Reid and Associates simply takes this on faith.

¹¹⁷ INBAU, *supra* note 6, at 346 (emphasis added).

¹¹⁸ See Ofshe & Leo, *supra* note 4, at 997–98 (“Interrogation in America is anxiety-provoking by design . . . [S]uspects are confined in an unfamiliar setting, isolated from any social support, and perceive themselves to be under the physical control of the investigator . . . To overcome a suspect’s resistance, an investigator employs influence techniques that are intended to induce significant distress and anxiety . . . [The suspect] may continue the interaction until he can no longer stand the strain and must escape the physical confinement, fatigue, and distress of relentless questioning.”).

¹¹⁹ That is why Leo and Ofshe refer to the false confession elicited by Reid as “rational choice, irrational action.” See *generally id.* Given the circumstance deliberately created by the Reid interrogation, a suspect understandably feels that confession is the only or best escape. In fact, contrary to what he is led to believe, maintaining innocence is usually not futile, and confessing guilt will not produce a benign result. But the interrogators go out of their way to create a setting in which the suspect will conclude otherwise.

¹²⁰ INBAU, *supra* note 6, at 346.

Closely related, the Reid Manual makes another puzzling statement when seeking to correct what the authors perceive as the mischaracterization of their technique. It cites the aforementioned expert report by Professor Leo, specifically his contention that “the first step of an interrogation is to convince the suspect that his situation is helpless.”¹²¹ The authors respond that “[t]his is a completely inaccurate statement. We have stated numerous times in this text (as well as in our seminar training materials) that it is improper to tell the suspect that he is facing inevitable consequences.”¹²²

It is true that the Reid Manual does not explicitly state as a goal making the suspect feel helpless. However, Professor Leo never claims otherwise. Rather, he posits that the suspect’s feeling of helplessness is a predictable effect of the Reid Technique, and he and others have explained at length the basis for that belief.¹²³ Indeed, such a characterization follows from language that the Reid Manual does use. For example, the manual instructs interrogators not simply to accuse the suspect of criminal behavior, but to communicate “absolute certainty” of the suspect’s guilt.¹²⁴

Moreover, the manual discusses at length two key steps—“handling denials” and “overcoming objections”—that seem calculated to produce a feeling of helplessness.¹²⁵ A seventh and often climactic step in the nine-step process involves presenting the suspect with two alternatives, one substantially more severe than the other: e.g., he committed pre-meditated murder or negligent homicide. But why would most suspects—innocent or guilty—opt for *either* alternative unless they felt helpless? Producing a feeling of helplessness via relentless confrontation is central to the Reid Technique, even though the Reid Manual eschews that characterization.

So too, the Reid authors downplay the effects of minimization—the various ways of making the suspect believe that his case is “likely to be processed more favorably by all actors in the criminal justice system if he confesses.”¹²⁶ They insist that such inducements merely “take advantage of one of the fundamental principles of human nature, namely that criminal suspects justify their crime in some manner . . . [But] an innocent suspect who has not gone through the process of justifying the crime” will be immune to such an appeal.¹²⁷ Here again, we see their basic contention: implicit threats and promises have no effect on the innocent suspect. But the Reid authors make that claim solely by combination of misdirection and *ipse dixit*. The innocent suspect will not be prone to

¹²¹ *Id.* at 368 (citing LEO REPORT).

¹²² *Id.*

¹²³ *See, e.g.,* Ofshe & Leo, *supra* note 4.

¹²⁴ INBAU, *supra* note 6, at 193.

¹²⁵ *Id.* at 254–81.

¹²⁶ *Id.*

¹²⁷ *Id.*

minimization because it helps him justify a crime, but for a different reason: it suggests he will get off relatively easy. The Reid authors offer no reason to believe that an innocent person, in desperate straits, would not take comfort from the suggestion of leniency and determine that he was better off confessing.

In the end, the Reid authors offer no justification for the bright line they insist on—explicit promises and threats forbidden, anything short of that permitted. The closest they come is to flip the burden of proof. The notion that implied threats or promises might suffice to cause a false confession cannot be sustained, they say, because “[t]here are absolutely no data, empirical or statistical, to support such a claim.”¹²⁸

That statement is true only if one ignores the use of the Reid Technique in many cases of proven false confessions and the laboratory studies which buttress this fact¹²⁹ and dovetail with what decades’ worth of literature in psychology and decision-making suggests we should expect.¹³⁰

There is, in any event, no reason to acquiesce in the notion that the burden of proof lies with those seeking to safeguard against false confessions. Even if one is not satisfied that the causal connection between the Reid Technique and false confessions has been sufficiently established, should not the criminal justice system err in the direction of resisting a method widely believed (by those who have studied it) to contribute to false confessions? While we await more definitive proof, numerous innocent people are at risk.

IV. CONCLUSION

As recognized in Part II of this essay, the fifth edition of the Reid interrogation manual includes new and useful material that should help mitigate the serious problem of false confessions. However, as argued in Parts II and III, in crucial respects the new manual downplays the severity of the problem and turns a

¹²⁸ INBAU, *supra* note 6, at 347.

¹²⁹ See INBAU, *supra* note 6. The Reid authors are dismissive of laboratory studies which support the proposition that the confrontation/minimization combination predictably causes false confessions. They note, correctly, that “it is impossible to reproduce the real life motivational incentives of someone facing serious consequences as in an actual interrogation.” *Id.* at 363. Any and all laboratory studies of interrogations are “inherently inadequate.” *Id.* at 365. This conclusion is somewhat unfair. The authors of these studies acknowledge their limitations, claiming only that they reinforce knowledge gained outside the laboratory. For example, the Alt key study, Kassir & Kiechel, *supra* note 18, illustrates that confrontation can cause an innocent suspect to internalize guilt and even fabricate details about his non-existent guilt. This serves as useful reinforcement—not independent proof—of a counterintuitive phenomenon.

¹³⁰ For example, the Reid Manual makes no mention of the prominent essay by Professors Ofshe and Leo that is directly on point. See Ofshe & Leo, *supra* note 4. Ofshe and Leo explained that the dangers of the Reid Technique become apparent when we focus on the cost-benefit analysis it forces on isolated suspects: the belief that maintaining innocence will doom the suspect whereas confessing will produce a relatively benign outcome. Why would an innocent person, so convinced, *not* confess?

blind eye to the growing body of knowledge about it, either omitting mention of crucial data or offering unconvincing denials of their relevance.¹³¹ There will be, no doubt, future editions of the Reid Manual. Let us hope that they are undertaken in an open-minded spirit and produce substantial changes in methods of interviewing and interrogation.

¹³¹ The 2011 edition also adds a brief discussion on the admissibility of expert testimony about confessions, something long promoted by critics of the Reid Technique who want juries educated in the risks of police-induced confessions. INBAU, *supra* note 6, at 367–72. The Reid Manual’s discussion of this issue consists primarily of the claim that courts generally disallow such testimony; it cites and quotes from nine such cases. But one must keep in mind that criminal appeals typically follow a conviction, and never an acquittal. Accordingly, the published opinions are skewed toward cases in which such testimony was excluded. In addition, courts of appeals typically find decisions about admissibility to be within the discretion of the trial court; most of the cases cited by the manual uphold decisions not to admit the proffered testimony, but do not require such a result. Most importantly, the manual is highly selective, citing a handful of cases and simply ignoring the many cases to the contrary. Indeed, one observer maintains that “courts that have considered this issue have generally concluded that this type of expert testimony is sufficiently reliable to meet the prevailing standards for the admission of expert testimony.” Welsh S. White, *Confessions in Capital Cases*, 979 U. ILL. L. REV. 1030–31, n.445 (2003). The Reid authors do acknowledge that “there have been cases in which the courts have found that it was important to hear from experts on the issue of false confessions.” INBAU, *supra* note 6, at 372. They then cite and quote from a single case—in the military system.