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LOWERING THE BAR AND RAISING EXPECTATIONS: RECENT COURT DECISIONS IN LIGHT OF THE SCIENTIFIC STUDY OF INTERROGATION AND CONFESSION

*William Douglas Woody**

In January 2013, the Colorado Supreme Court decided *People v. LaRosa*, which provided greater flexibility to corroborate confessions by overturning the *corpus delicti* rule in favor of the trustworthiness standard.¹ The recent 10th U.S. Circuit Court of Appeals decision in *Sanchez v. Hartley* raises a separate yet related concern: qualified immunity no longer protects law enforcement officers who fail to corroborate confessions thoroughly. In *Sanchez*, a failure to fit Sanchez's confession cleanly to the existing evidence led the court to conclude that police either knew the suspect's confession was false or recklessly disregarded this possibility.² This decision raised the bar to corroborate a confession, particularly for police, who must evaluate the truth or falsity of confessions and seek corroboration during an investigation without the benefit of hindsight.

This article applies scientific scholarship about interrogation and confession to these decisions, one of which lowers the legal standard for corroboration to admit a disputed confession to trial and one of which raises expectations for corroboration for police officers. Legal decision rules, human thinking biases,

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¹ *People v. LaRosa*, 293 P.3d 567 (Colo. 2013); Samuel A. Evig, *Burying the Body—Dismantling the Corpus Delicti Rule and Adopting the Trustworthiness Standard*, 42 THE COLORADO LAWYER, 59, 59–67 (2013).

² *Sanchez v. Hartley*, 810 F.3d 750 (10th Cir. 2016); Kirk Mitchell, *Ruling Clears Way for False Arrest Lawsuit Against Douglas County*, THE DENVER POST, January 12, 2016, http://www.denverpost.com/news/ci_29374134/ruling-clears-way-for-false-arrest-lawsuit-against-douglas-county.

and other factors interfere with the abilities of police and other observers to evaluate confession evidence accurately. Part I reviews the *corpus delicti* rule and the more flexible trustworthiness standard. Part II examines the process of corroboration in light of current scientific scholarship, particularly the difficulties faced by police and others who must evaluate corroboration and who risk losing qualified immunity, and the limits of existing legal safeguards. Part III reviews the *Sanchez* case in light of these issues. Part IV provides recommendations for police, legal scholars, legislators, and others to navigate the complex terrain of the trustworthiness standard, corroboration of confession evidence, and limits to police officers' qualified immunity.

I. THE *CORPUS DELICTI* RULE AND THE TRUSTWORTHINESS STANDARD

Questions regarding corroboration of confession evidence extend across the jurisdiction of the 10th Circuit. States within the 10th Circuit have become increasingly variable in their approaches to confession evidence. For example, Wyoming has retained the *corpus delicti* rule,³ whereas Utah and Oklahoma have moved to the trustworthiness standard.⁴ To complicate these questions further, Kansas recently moved to a modified *corpus delicti* rule that applies unless the alleged crime is not likely to result in forensic evidence. Under these circumstances, Kansas courts then apply the trustworthiness standard.⁵ Similarly, New Mexico uses a modified *corpus delicti* rule called the Paris rule, in which the confession itself (i.e., not only independent evidence) can establish *corpus delicti*.⁶

A. *The corpus delicti rule*

The *corpus delicti* rule applies to cases involving an extrajudicial confession.⁷ In these cases, the prosecution must prove that the crime to which the suspect confessed actually occurred,⁸ and the prosecution must do so with evidence other than the confession.⁹ The rule reflects the recognition that false confessions occur and implies that risk of an erroneous conviction is more important than

³ David A. Moran, *In Defense of Corpus Delicti Rule*, 64 OHIO STATE L. J., 817, 833 n.106 (2003).

⁴ For Utah, see *State v. Mauchley*, 67 P.3d 477 (Utah 2011); for Oklahoma, see *Fontenot v. State*, 742 P.2d 31 (Okla. Crim. App. 1987); *Fontenot v. State*, 881 P.2d 69 (Okla. Crim. App. 1994).

⁵ *State v. Dern*, 362 P.3d 566 (Kan. 2015); *State v. Walker*, 153 P.3d 1257 (Kan. 2007).

⁶ *State v. Hardy*, 268 P.3d 1278 (N.M. Ct. App. 2011). *LaRosa*, 293 P.3d at 573–75 and *Evig*, *supra* note 1, at 59–65, provide legal analyses of these issues; therefore, this paper only summarizes.

⁷ Moran, *supra* note 3, at 817.

⁸ Typically, this involves proving that “(1) that a death, loss, or injury occurred and (2) that criminal agency was responsible for that death, injury, or loss” Saul M. Kassir et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 23 LAW & HUM. BEHAV. 3, 10 (2010); Richard A. Leo et al., *Bringing Reliability Back in: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WISCONSIN L. REV. 479 (2006).

⁹ Kassir et al., *supra* note 8, at 10; Leo et al., *supra* note 8, at 501–502.

the risk of an erroneous acquittal.¹⁰ The risk of erroneous acquittal may be more substantial than expected; in Colorado, the *corpus delicti* rule has led to the prevention or overturning of a conviction in at least eight cases involving confession evidence, and even these numbers may be an underestimation.¹¹ If prosecutors decline to prosecute a defendant's confession that does not have external corroboration that meets the standards of the *corpus delicti* rule, such cases appear likely to remain uncounted.¹²

With *LaRosa*, the Colorado Supreme Court reversed more than a century of precedent related to the *corpus delicti* rule and joined Utah and Oklahoma in embracing the trustworthiness standard.¹³ The Colorado Supreme Court outlined four criticisms of the *corpus delicti* rule.¹⁴ First, they noted its limited function.¹⁵ Although the *corpus delicti* rule protects innocent people from the effects of falsely confessing to nonexistent crimes, it does not protect innocents who falsely confess to actual crimes.¹⁶ Second, the Colorado Supreme Court argued that the rule is "outdated"¹⁷ because *Miranda v. Arizona* and other cases have limited coercive police interrogation tactics and that the *corpus delicti* rule is no longer necessary to protect suspects from coercion during police interrogation.¹⁸ The movement away from physically coercive police interrogation techniques reflects cultural and legal changes in the perceptions of police interrogation techniques.¹⁹

¹⁰ *LaRosa*, 293 P.3d at 574; Evig, *supra* note 1, at 60.

¹¹ Evig, *supra* note 1, at 60.

¹² *Id.*

¹³ *LaRosa*, 293 P.3d at 577; Evig, *supra* note 1, at 59.

¹⁴ *LaRosa*, 293 P.3d at 573–575; see also *State v. Dern*, 362 P.3d 566, 578–80 (Kan. 2015).

¹⁵ *LaRosa*, 293 P.3d at 573.

¹⁶ *Id.* (citing *State v. Lucas*, 152 A.2d 50, 60 (N.J. 1959)). Kassin et al., *supra* note 8, at 10 also argued that in some cases applications of the *corpus delicti* rule can make it easier to convict both innocent and guilty suspects; see also *State v. Mauchley*, 67 P.3d 477 (Utah 2011).

¹⁷ *LaRosa*, 293 P.3d at 573.

¹⁸ *Miranda v. Arizona*, 284 U.S. 436 (1966); *LaRosa*, 293 P.3d at 573–574. Despite protections provided by *Miranda*, most suspects waive their rights. Richard A. Leo, *Inside the Interrogation Room*, 86 J. OF CRIM. L. & CRIMINOLOGY 266, 275 (1996). Also, innocent suspects are more likely to do so. Saul M. Kassin, *On the Psychology of Confessions: Does Innocence Put Innocents at Risk?* 60 AMER. PSYCHOLOGIST, 215, 218 (2005).

¹⁹ *LaRosa*, 293 P.3d at 574. Physical coercion during police interrogation was typical in the United States into the 1930s, and these behaviors, including physical beatings, the sweat box, the water cure (i.e., waterboarding), and other abuses, led to journalistic, legal, and public resistance. Richard A. Leo, *From Coercion to Deception: The Changing Nature of Police Interrogation in America*, 18 CRIME, L., AND SOCIAL CHANGE, 35 (1992); EARNEST JEROME HOPKINS, OUR LAWLESS POLICE; A STUDY OF THE UNLAWFUL ENFORCEMENT OF THE LAW (1931); GEORGE W. WICKERSHAM, NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT (1931). Early reformers of police interrogation, including W. R. Kidd and Fred E. Inbau, led the move from physical coercion to deception and trickery, see Yale Kamisar, *Torture During Interrogations: A Police Manual's Foresight*, NATIONAL LAW JOURNAL, SAN DIEGO LEGAL STUDIES PAPER NO. 08-021 (March 10, 2008) https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=1115906; FRED E. INBAU, LIE DETECTION AND CRIMINAL INTERROGATION (2nd ed. 1948).

Third, the Colorado Supreme Court cited the Utah Supreme Court decision in *State v. Mauchley* and noted that the *corpus delicti* rule remains difficult to define due to the proliferation and increasing complexity of criminal statutes.²⁰ In particular, the Utah Supreme Court stated that the greater precision and detail in contemporary statutes as compared to common law introduces potential conflicts with the *corpus delicti* rule.²¹ In *State v. Mauchley*, the Utah Supreme Court made this argument and as an example cited *State v. Archuleta*, in which the same court decided that the *corpus delicti* rule did not extend to the aggravating factors required to define capital murder; the *corpus delicti* rule applied to the homicide, but the rule was not required for admission to trial of each aggravating factor.²²

Fourth, the most pressing concern expressed by the Colorado Supreme Court in *LaRosa* is that the *corpus delicti* rule “may operate to reward defendants” by obstructing justice.²³ Reliance on the *corpus delicti* rule may lead perpetrators to commit crimes that lack tangible evidence of injury (e.g., as in some sexual assault cases), to seek victims who cannot testify due to age or cognitive disability, or to ensure the victim’s body cannot be found.²⁴ These concerns formed the central issue in *LaRosa*. Although he retracted his confession, LaRosa initially confessed that he sexually assaulted his two-and-a-half-year-old daughter in a way that would not be likely to leave forensic evidence.²⁵ On appeal, the defense argued that the *corpus delicti* rule prevented LaRosa’s conviction due to the lack of forensic evidence or testimony from the victim.²⁶ The Colorado Supreme Court imposed the trustworthiness standard in their ruling but decided that this change could not retroactively apply to LaRosa due to *ex post facto* laws; therefore, the court upheld the reversal of LaRosa’s conviction.²⁷

B. *The trustworthiness standard*

In *LaRosa*, the Colorado Supreme Court moved from the *corpus delicti* rule to the trustworthiness standard to admit a confession to trial.²⁸ To be admissible at trial, the prosecution must present evidence to corroborate the confession, and

²⁰ *LaRosa*, 293 P.3d at 574; *Mauchley*, UT 10, 67 P.3d 477 at 487.

²¹ *Mauchley*, UT 10, 67 P.3d 477 at 487.

²² *LaRosa*, 293 P.3d at 574; *Mauchley*, UT 10, 67 P.3d 477 at 487; *State v. Archuleta*, 850 P.2d 1232 (Utah 1993).

²³ *LaRosa*, 293 P.3d at 574.

²⁴ See also *State v. Ray*, 926 P.2d 904 (Wash. 1996); Kassir et al *supra* note 8, at 10; B. Don Taylor, *Evidence Beyond Confession: Abolish Arizona’s Corpus Delicti Rule*, 41 ARIZONA ATTORNEY, 22 (2005).

²⁵ *LaRosa*, 293 P.3d at 570.

²⁶ *LaRosa*, 293 P.3d at 570.

²⁷ *LaRosa*, 293 P.3d at 578–579; Evig, *supra* note 1, at 59.

²⁸ *LaRosa*, 293 P.3d at 578.

in *LaRosa* the court outlined three methods by which evidence can corroborate a confession under the trustworthiness standard.²⁹ The court, however, “provided no examples or guidance to illustrate those methods.”³⁰ This paper provides only a brief review of the methods.

As opposed to the *corpus delicti* rule which requires independent evidence of the crime, the first method of corroboration requires “facts that corroborate facts contained in the confession.”³¹ This method of corroboration does “not require independent corroboration for *each fact* articulated in a confession”; rather, it requires that “that *some* facts corroborate *some* parts of the confession.”³² As discussed subsequently, this low bar for corroboration reflects legal confidence that jurors can serve as safeguards for defendants because jurors are expected to be able to recognize and reject false confessions.

The *Sanchez* case is described in greater detail below, but at least one aspect is relevant here. Sanchez confessed falsely in 2009, before the change to the trustworthiness standard in Colorado, and his confession included details of the crime presented to him by police interrogators.³³ Therefore, his confession included details that fit available evidence and appears likely to meet the flexible corroboration threshold of the trustworthiness standard.³⁴

The second method of corroboration listed by the Colorado Supreme Court is through “facts that establish the crime which corroborate facts contained in the confession.”³⁵ This method differs from the first method in that “the first [method of corroboration] uses corroboration to prove a crime occurred, while the second [method of corroboration] uses corroboration to show who committed a crime.”³⁶ To use this second method of corroboration, evidence of the crime must exist independently of the confession.³⁷ One use of this method occurred in *Fontenot*; the police had independent evidence of the crime, but none of the independent evidence proved Fontenot’s guilt. His confession to police as well as similarities between his confession and the independent evidence allowed the court to apply the trustworthiness standard and uphold his conviction, even

²⁹ *Id.*

³⁰ *LaRosa*, 293 P.3d at 574; Evig, *supra* note 1, at 62.

³¹ *LaRosa*, 293 P.3d at 578.

³² Evig, *supra* note 1, at 62 (emphasis added).

³³ *Sanchez v. Hartley*, 810 F.3d 750, 757 (10th Cir. 2016).

³⁴ *Id.* at 752; Mitchell, *supra* note 2, ¶ 12.

³⁵ *LaRosa*, 293 P.3d at 578.

³⁶ Evig, *supra* note 1, at 62.

³⁷ *Id.*

without independent evidence of Fontenot's involvement.³⁸ Below, this paper returns to the *Fontenot* case as an illustration of potential difficulties with the trustworthiness standard.

The third method of corroboration provided by the Colorado Supreme Court relies on the "facts under which the confession was made."³⁹ This method can involve "facts of any sort whatever, provided only that they tend to produce a confidence in the truth of the confession."⁴⁰ Several considerations may drive a court's judgment of the trustworthiness of a confession.⁴¹ For example, a confession to a family member may not raise the same issues of coercion as confession during police interrogation.⁴² Additionally, if a suspect confessed without clear motives to confess falsely or if the suspect confessed repeatedly in differing circumstances, these and similar factors could provide corroborating evidence; some courts have not accepted these arguments.⁴³ Beyond these methods, some courts have viewed a suspect's confession as corroboration when the confession contained information believed to be known only to the police and the perpetrator.⁴⁴ In several cases, however, false confessions containing details believed to be known

³⁸ *Fontenot v. State*, 881 P.2d 69 (Okla. Crim. App. 1994); Evig, *supra* note 1, at 62–63.

³⁹ *LaRosa*, 293 P.3d at 578.

⁴⁰ *LaRosa*, 293 P.3d at 577–578 (citing *Wigmore on Evidence*, § 2071 at 511).

⁴¹ Evig, *supra* note 1, at 63.

⁴² Evig, *supra* note 1, at 63. For a different perspective, see comments by Colorado First Judicial District Chief Deputy District Attorney Hal Sargent in response to the extra-judicial confession of Austin Sigg. Sigg was a juvenile when he confessed to his mother that he had murdered Jessica Ridgeway. Sargent stated, "We wondered if it was a mistake. That was the first question: Was this a false confession?" Jordan Steffen, *Evidence Details Twisted Path That Led Austin Sigg to Jessica Ridgeway*, THE DENVER POST, December 1, 2013, <http://www.denverpost.com/2013/11/30/evidence-details-twisted-path-that-led-austin-sigg-to-jessica-ridgeway/>.

⁴³ Evig, *supra* note 1, at 63; For another example of disagreement about the role of context in corroborating confessions, in 2013 Juan Manuel Velasquez turned himself in and voluntarily confessed to the murder of his wife. Despite the potential argument that the voluntary nature of this statement could serve as corroboration of his confession as "facts under which the confession was made," Greeley Police Chief Jerry Garner stated, "Even in one where the guy comes in and confesses, you've still got a lot of work to do to see if there's some reason he'd falsely confess," Whitney Phillips, *Greeley police above national average in rates of crime solving; crime rate holds steady*, THE GREELEY TRIBUNE, April 17, 2014, <http://www.greeleytribune.com/news/crime/11054934-113/crime-percent-garner-greeley>.

⁴⁴ Evig, *supra* note 1, at 63; the paper returns to this question subsequently, particularly with concerns regarding what Leo calls "misleading specialized knowledge." RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 254 (2008). Kassin calls it "corroboration inflation." Saul M. Kassin, *Why Confessions Trump Innocence*, 67 AMER. PSYCHOLOGIST, 431, 440 (2012).

only to the police and the perpetrator have been very influential for detectives, district attorneys, and jurors.⁴⁵ Across this third method of corroboration, any form of evidence can corroborate a confession.⁴⁶

II. SCIENTIFIC RESEARCH AND CHALLENGES TO THE CORROBORATION OF CONFESSION EVIDENCE

There exists a growing body of scientific literature related to police interrogation and confession. These findings can inform police officers, judges, attorneys, and jurors as they make legal decisions regarding whether to go to trial, how to seek or challenge the admissibility of confession evidence, and how to evaluate confession evidence.⁴⁷ The materials that follow review scientific findings that can inform corroboration and evaluation of confession evidence.

A central misconception throughout evaluations of confession evidence is the *myth of psychological interrogation*: the false and persistent belief that no one would falsely confess to a crime in the absence of physical coercion (i.e., torture) or mental illness.⁴⁸ Contrary to this popular belief, false confessions exist. False confession contribute to approximately 12% of the mistaken convictions listed in the National Registry of Exonerations, and in the Innocence Project files approximately 25% of DNA exonerees falsely confessed, falsely pleaded guilty, or otherwise incriminated themselves.⁴⁹ Despite the growing awareness of the

⁴⁵ Brandon L. Garrett, *The Substance of False Confessions*, 62 STANFORD L. REV. 1051, 1066 (2010); Richard A. Leo et al., *Promoting Accuracy in the Use of Confession Evidence: An Argument for Pretrial Reliability Assessment to Prevent Wrongful Convictions*, 85 TEMPLE L. REV. 759, 763–65 (2013). In Part III, the paper examines important concerns raised by this form of corroboration, particularly the possibilities of unintentional contamination and corroboration inflation, both of which raise risks for police who now face limits to their qualified immunity.

⁴⁶ *People v. LaRosa*, 293 P.3d 567, 577–578 (Colo. 2013).

⁴⁷ For reviews, see GISLI H. GUDJONSSON, *THE PSYCHOLOGY OF INTERROGATION AND CONFESSIONS: A HANDBOOK* (2003); Kassin et al., *supra* note 8; Saul M. Kassin & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 PSYCHOL. SCI. IN THE PUB. INT. 33 (2004); Leo, *supra* note 44; WILLIAM DOUGLAS WOODY ET AL., *FALSE CONFESSIONS: THE ROLE OF POLICE DECEPTION IN INTERROGATION AND JURORS' PERCEPTION OF THE TECHNIQUES AND THEIR OUTCOMES, IN CRIME: CAUSES, TYPES AND VICTIMS 1–37* (Alicia E. Hasselme ed., 2011).

⁴⁸ RICHARD A. LEO, *FALSE CONFESSIONS: CAUSES, CONSEQUENCES AND SOLUTIONS, IN WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE 36–54, 37* (Saundra D. Westervelt & John A. Humphrey eds., 2001); Leo, *supra* note 44; Woody et al., *supra* note 47.

⁴⁹ % *exonerations by contributing factor*, NATIONAL REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx#> (last visited Jan. 19, 2017); *False Confessions or Admissions*, INNOCENCE PROJECT, <http://www.innocenceproject.org/causes/false-confessions-admissions/> (last visited Apr. 20, 2016). Examples of false confessors include: *Jeff Deskovic*, INNOCENCE PROJECT, <http://www.innocenceproject.org/cases/jeff-deskovic/> (last visited Apr. 20, 2016), Marty Tankleff (RICHARD FIRSTMAN & JAY SALPETER, *A CRIMINAL INJUSTICE: A TRUE CRIME, A FALSE CONFESSION, AND THE FIGHT TO FREE MARTY TANKLEFF* (2008), and Danial Williams, Joseph Dick, Derek Tice, and Eric Wilson, the four sailors known as the Norfolk Four, TOM WELLS & RICHARD A. LEO, *THE WRONG GUYS: MURDER, FALSE CONFESSIONS, AND THE NORFOLK FOUR* (2008).

possibility of false confession, there exist three primary reasons for the persistence of the myth.⁵⁰ First, observers are not typically aware of the pressures present in a police interrogation,⁵¹ including the potential for deception.⁵² Second, it is generally hard to believe that someone would act so thoroughly against his or her own self-interest by falsely confessing to a crime, particularly in cases in which the penalties for conviction are severe.⁵³ Third, because observers strongly believe (or even *know*) that they would never falsely confess, they apply this belief to others.⁵⁴ The pervasive yet erroneous myth of psychological interrogation brings several important obstacles to any evaluation of confession evidence.

A. Causes of false confessions

The three well-recognized factors that increase the risk of false confession include vulnerability of suspects, psychologically manipulative interrogation techniques, and investigatory biases.⁵⁵ First, some suspects are particularly vulnerable to the pressures of police interrogation. In actual cases, experimental studies, and studies of self-reported false confessions, juveniles are more likely

⁵⁰ Leo, *supra* note 44.

⁵¹ Leo, *supra* note 44; Richard A. Leo & Brittany Liu, *What Do Potential Jurors Know About Police Interrogation Techniques and False Confessions?*, 27 BEHAV. SCI. AND THE L. 381, 397 (2009). For an additional example of lack of knowledge about police interrogation, people who were asked to evaluate police interrogation tactics on a list rated the deceptiveness and coerciveness of the techniques lower than did people who evaluated interrogation tactics embedded in realistic interrogation transcripts. Potential jurors' assumptions about specific police interrogation techniques did not line up with observers' evaluations of the same techniques embedded in realistic interrogation transcripts. Krista D. Forrest et al., *False-Evidence Ploys and Interrogations: Mock Jurors' Perceptions of Ploy Type, Deception, Coercion, and Justification*, 30 BEHAV. SCI. AND THE L. 342, 359 (2012).

⁵² Deception during police interrogation is common; in specific, a study of police detectives revealed that 92% report using deception about evidence at least some of the time. Saul M. Kassin et al., *Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs*, 31 L. AND HUM. BEHAV. 381, 388 (2007). Additionally, Rogers et al. found that a majority of recent offenders mistakenly believed that it was illegal for police to lie about eyewitness evidence. Richard Rogers et al., *"Everyone Knows Their Miranda Rights": Implicit Assumptions and Countervailing Evidence*, 16 PSYCHOL., PUB. POL'Y, AND L. 300, 310 (2010).

⁵³ Leo, *supra* note 44.

⁵⁴ Leo, *supra* note 44. Woody and colleagues found that, compared to participants who believed that it was possible that they could falsely confess, participants who did not believe that they would ever falsely confess were more likely to convict a defendant who had recanted his confession. Woody et al., *False Confession Plausibility as a Predictor of Juror's Decisions and Evaluations of Police Deception*, AMERICAN PSYCHOLOGY-LAW SOCIETY CONVENTION, (March 2010) (this paper was presented at the convention).

⁵⁵ Kassin et al., *supra* note 8; Christian A. Meissner et al., *The Need for a Positive Psychological Approach and Collaborative Effort for Improving Practice in the Interrogation Room*, 34 L. AND HUM. BEHAV. 43 (2010); RICHARD A. LEO, FALSE CONFESSIONS AND THE CONSTITUTION: PROBLEMS, POSSIBILITIES, AND SOLUTIONS, THE CONSTITUTION AND THE FUTURE OF CRIMINAL JUSTICE IN AMERICA 169–186 (John T. Parry & L. Song Richardson eds., 2013).

than adults to confess falsely⁵⁶ as are people with cognitive disabilities⁵⁷ or mental illnesses⁵⁸ and those with some personality traits such as suggestibility.⁵⁹ As discussed subsequently, Sanchez had a cognitive disability that shaped his behavior during interrogation; the police accepted Sanchez's confession despite their recognition of his atypical behavior related to his difficulty understanding questions.⁶⁰

Second, some interrogation tactics raise the likelihood of false confession. For example, false-evidence ploys (FEPs) are false claims by police to have incriminating evidence against the defendant when this evidence does not exist. FEPs "have been implicated in the vast majority of documented false confession cases."⁶¹ Additionally, a wide range of experimental studies have found that FEPs increase the likelihood of false confessions.⁶² Further, a recent meta-analysis revealed that FEPs increase false confession rates across a range of methods

⁵⁶ See Allison D. Redlich & Gail S. Goodman, *Taking Responsibility for an Act Not Committed: Influence of Age and Suggestibility*, 27 L. AND HUM. BEHAV. 141, 152 (2003); Gisli H. Gudjonsson et al., *Custodial Interrogation, False Confession, and Individual Differences: A National Study Among Icelandic Youth*, 41 PERSONALITY AND INDIVIDUAL DIFFERENCES 49 (2006); JL Viljoen, *Legal Decisions of Preadolescent and Adolescent Defendants: Predictors of Confessions, Pleas, Communication with Attorneys, and Appeals*, 29 L. AND HUM. BEHAV. 253 (2005).

⁵⁷ According to Kassir et al, *supra* note 8, at 19, "of the first 200 DNA exonerations in the U.S., 35% of the false confessors were 18 years or younger and/or had a developmental disability." Gudjonsson and Clare found that a sample of false confessors had the lower IQ scores and higher suggestibility scores than true confessors or those who resisted confession. Gisli H. Gudjonsson & Isabel C.H. Clare, *The Relationship Between Confabulation and Intellectual Ability, Memory, Interrogative Suggestibility, and Acquiescence*, 3 PERSONALITY AND INDIVIDUAL DIFFERENCES 333–38 (1995).

⁵⁸ Allison D. Redlich et al., *Comparing True and False Confessions Among Persons with Serious Mental Illness*, 17 PSYCH., PUB. POL'Y, AND L., 394 (2011); Allison D. Redlich et al., *Self-Reported False Confessions and False Guilty Pleas Among Offenders with Mental Illness*, 34 L. AND HUM. BEHAV., 79, 90 (2011); Allison D. Redlich, *Mental Illness, Police Interrogations, and the Potential for False Confession*, 55 PSYCHIATRIC SERVICES 19, 21 (2004). There also exist important concerns about juveniles who have mental illnesses. See Allison D. Redlich, *Double Jeopardy in the Interrogation Room: Young Age and Mental Illness*, 62 AM. PSYCHOLOGIST 609, 610 (2007).

⁵⁹ Personality factors associated with increased likelihood of false confession include compliance and suggestibility (see Gudjonsson, *supra* note 47) as well as higher authoritarianism (which includes submission to legitimate authorities, e.g., police) and lower internal locus of control. See Krista D. Forrest et al, *Suspect Personality, Police Interrogations, and False Confessions: Maybe It Is Not Just the Situation*, 40 PERSONALITY AND INDIVIDUAL DIFFERENCES, 621, 626 (2005).

⁶⁰ Sanchez v. Hartley, 810 F.3d 750, 752 (10th Cir. 2016); Mitchell, *supra* note 2.

⁶¹ Kassir et al., *supra* note 8, at 12.

⁶² See e.g., Saul M. Kassir & Katherine L. Kiechel, *The Social Psychology Of False Confessions: Compliance, Internalization, and Confabulation*, 7 PSYCHOL. SCI., 125, 127 (1996); Jennifer T. Perillo & Saul M. Kassir, *Inside Interrogation: The Lie, the Bluff, and False Confession*, 35 L. AND HUM. BEHAV. 327, 335 (2011); Robert M. Nash & Kimberley A Wade, *Innocent But Proven Guilty: Eliciting Internalized False Confessions Using Doctored-Video Evidence*, 23 APPLIED COGNITIVE PSYCHOL. 624, 633 (2009). As noted by John E. Reid and Associates and others, experimental studies have important limitations. John E. Reid and Associates, *Detection and Deception: Research*

and studies.⁶³ In one study, 100% of innocent suspects falsely confessed when presented with claims of fabricated video evidence or when shown fabricated video evidence.⁶⁴ Other deceptive techniques, such as minimization (i.e., minimizing the legal or moral severity of the crime) and maximization (i.e., maximizing the legal or moral severity of the crime),⁶⁵ have also been found to increase false confession rates in experimental studies.⁶⁶

A third source of false confessions arises from investigatory biases and is directly related to questions of corroboration of confessions under the trustworthiness standard. Police have a well-documented guilty bias, such that they are more likely to assume that suspects are guilty rather than innocent.⁶⁷ Beyond these general biases, other issues exist. Some of those who train interrogators recommend a behavioral analysis interview to assess whether the suspect is lying.⁶⁸ If the police decide that the suspect's behavior indicates deception, police then move from the interview to an interrogation, generally starting with "direct, positive confrontation."⁶⁹ Despite some observers' high confidence in the deception detection abilities of police, there exists a robust scientific literature involving hundreds of peer-reviewed studies and several meta-analyses demonstrating that

v. Reality (last visited Apr. 20, 2016), <http://www.reid.com/pdfs/RealityvsResearch.pdf>. Within the bounds of ethical research, scholars cannot induce the stress of an actual interrogation, interrogate research participants for hours, or employ consequences that simulate the actual consequences of conviction for a serious crime; for a review see Woody et al., *supra* note 47).

⁶³ Stewart et al., *Meta-Analysis of Confession Research*, AMERICAN PSYCHOLOGY-LAW SOCIETY CONVENTION (March, 2012) (paper was presented at the convention).

⁶⁴ Nash & Wade, *supra* note 62, at 633. Participants engaged in a computer-based gambling task and were instructed not to cheat. No participants cheated, but researchers confronted all participants with one of two forms of an FEP. Half of participants were told that incriminating video evidence existed, and the other half were shown fabricated video of themselves cheating. Across both conditions, *all* participants confessed falsely, but participants who saw fabricated video confessed with less resistance. These and other findings led Perillo & Kassir to call FEPs "Perhaps, the most controversial tactic permissible within [the Reid technique of interrogation]." *Id.* at 327.

⁶⁵ Jerome H. Skolnik & Richard A. Leo, *The Ethics of Deceptive Interrogation*, 11 CRIM. JUST. J. 3, 5–6 (1992).

⁶⁶ For minimization see Melissa B. Russano et al., *Investigating True and False Confessions Within a Novel Experimental Paradigm*, 16 PSYCHOL. SCI. 481, 485 (2005); for both minimization and maximization (i.e., exaggerating the legal or moral severity of the crime), see Allyson J. Horgan et al., *Minimization and Maximization Techniques: Assessing The Perceived Consequences of Confessing and Confession Diagnosticity*, 18 PSYCHOL., CRIME, AND L. 65, 76 (2012).

⁶⁷ Christian A. Meissner & Saul M. Kassir, "He's Guilty!": *Investigator Bias in Judgments of Truth and Deception*, 26 L. AND HUM. BEHAV. 469, 478 (2002).

⁶⁸ FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS V (5th ed. 2011); BRIAN C. JAYNE & JOSEPH P. BUCKLEY, BEHAVIOR SYMPTOM ANALYSIS, IN THE INVESTIGATOR ANTHOLOGY (John E. Reid and Associates, Inc. ed., 1999).

⁶⁹ Direct, positive confrontation is an unambiguous statement that the suspect is guilty and that police are overwhelmingly confident in the suspect's guilt, Inbau et al., *supra* note 68, at V.

the accuracy of these methods remains far closer to chance than many assume.⁷⁰ This combination of factors—police who are biased toward guilt and highly confident of their abilities to detect deception but likely to perform close to chance—can lead to the interrogation of innocent suspects as well as the misinterpretation of innocent suspects' responses by police.⁷¹ These biases then affect evaluations of evidence, particularly attempts to corroborate confession evidence.⁷²

For example, in Oakland, California, police arrested a sixteen-year-old suspect for homicide.⁷³ The police were highly confident in his guilt, and they viewed his interrogation and confession through the lens of their biases.⁷⁴ During the interrogation, the juvenile drew the crime scene in a way that did not fit witnesses' descriptions of the perpetrator's actions, and the suspect did not include a relevant alley in his description of the crime scene until police told him about it.⁷⁵ Neither this apparent indication of contamination—the inclusion in the confession of relevant details only after these were provided by officers—nor the failure of his confession to fit the evidence raised concerns about his confession or guilt.⁷⁶ As officers who remained highly confident in his guilt shouted at him, the innocent suspect thought of a way to end the intense interrogation and to demonstrate that his confession was false.⁷⁷ He stated that he gave the murder

⁷⁰ William R. King & Thomas M. Dunn, *Detecting Deception in Field Settings: A Review and Critique of the Criminal Justice and Psychological Literatures*, 33 *POLICING: AN INT'L J. OF POLICE STRATEGIES & MGMT* 305, 312–16 (2010); see also Bella M. DePaulo et al., *Cues to Deception*, 129 *PSYCHOL. BULL.* 74 (2003); Charles F. Bond & Bella M. DePaulo, *Accuracy of Deception Judgments*, 10 *PERSONALITY & SOC. PSYCHOL. REV.* 214 (2006); Charles F. Bond & Bella M. DePaulo, *Individual Differences in Judging Deception: Accuracy and Bias*, 134 *PSYCHOL. BULL.* 477 (2008). For challenges to these claims, see J. Pete Blair et al., *The Gap Between Reality and Research: Another Look at Detecting Deception in Field Settings*, 35 *POLICING: AN INT'L J. OF POLICE STRATEGIES & MGMT*, 723 (2012); John E. Reid and Associates, *Detection and Deception: Research v. Reality* (last visited Apr. 20, 2016), <http://www.reid.com/pdfs/RealityvsResearch.pdf>.

⁷¹ These biases may be particularly pronounced for suspects who are African-American. Cynthia J. Najdowski, *Stereotype Threat in Criminal Interrogations: Why Black Suspects Are at Risk for Confessing Falsely*, 17 *PSYCHOL., PUB. POL'Y & L.* 562, 565 (2011).

⁷² An example related to interrogation but not false confession involves Robert Dewey. During his interrogation and in other settings, Dewey behaved in ways that police believed were consistent with guilt (e.g., Dewey appeared agitated, lied to police about his name, and hid from police during the investigation), and police were highly and justifiably confident in his guilt. In fact, he *was* guilty of multiple crimes; Dewey was a convicted felon who had stolen a handgun and was using illegal drugs. But, Dewey was not guilty of the sexual assault and murder for which he was convicted, Nancy Lofholm & Jessica Fender, *Newly Freed Robert Dewey's Odd Behavior in the 1990s Didn't Help Him*, *DENVER POST*, May 5, 2012, http://www.denverpost.com/news/ci_20526167/newly-freed-robert-deweys-odd-behavior-1990s-didnt?source=pkg.

⁷³ David K. Shieler, *Why Do Innocent People Confess?*, *NEW YORK TIMES* February 23, 2012, <http://www.nytimes.com/2012/02/26/opinion/sunday/why-do-innocent-people-confess.html>.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

weapon to his grandfather, and police accepted this claim.⁷⁸ The suspect hoped that this obvious falsehood in his confession would save him—both of his grandfathers were deceased.⁷⁹ These and other inconsistencies did not lead police to drop charges or reduce their confidence in his guilt.⁸⁰ The juvenile suspect avoided the consequences of his false confession only because he discovered exonerating evidence that had been overlooked by *everyone*, including police, prosecutors, the trial judge, his own defense attorneys, and other investigators: he had been incarcerated at the time of the crime.⁸¹

Similar inconsistencies have existed in cases in which the defendant was convicted. As noted previously, in *Fontenot*, for example, prosecutors sought and courts upheld a conviction despite substantial conflicts between the confession and the evidence, including the manner of homicide, the location of the body, and whether the body had been burned.⁸² In these and other examples, confession evidence that fit existing police biases overwhelmed other considerations related to corroboration. Unlike the 10th Circuit's decision in *Sanchez*, courts in *Fontenot* and similar cases did not raise questions about recklessness or challenge the officers' qualified immunity.⁸³

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* As discussed below, *Sanchez* included a known falsehood in his confession, but, as in the case with the juvenile in Oakland, this false detail did not prevent police from accepting his confession.

⁸¹ Shipler, *supra* note 73.

⁸² Although courts have emphasized that facts contained in the confession must be consistent with facts known via other means, see *Fontenot v. State*, 881 P.2d 69 (Okla. Crim. App. 1994); *Fontenot v. State*, 742 P.2d 31 (Okla. Crim. App. 1987), as described by Evig, *supra* note 1, at 63, and note 57, for a case in which prosecutors sought and courts upheld a conviction using the trustworthiness standard despite substantial inconsistencies between the confession and the details of the crime. The *Fontenot* case raises particular issues. Evig, *supra* note 1, at 63, embraced *Fontenot*'s conviction as a productive example of the application of the trustworthiness standard. Despite this enthusiasm, the Oklahoma Innocence Project views *Fontenot*'s confession as false and his conviction as a miscarriage of justice, these contentions remain unresolved. Jaelyn Cosgrove, *Report Sparks Debate Over Innocence of Karl Fontenot*, NEWSOK, Aug. 4, 2013, <http://newsok.com/article/3868927>. See also the confession of Damon Thibodeaux, who falsely confessed to using a grey or white cord to commit a murder that was actually committed with a red cord; the lack of fit of his confession to the evidence in these and many other details did not preclude his conviction *Damon Thibodeaux*, INNOCENCE PROJECT, (last visited Apr. 15, 2016), <http://www.innocenceproject.org/cases/damon-thibodeaux/>. As presented throughout this paper, numerous other examples exist in which defendants were convicted despite failure of the evidence to corroborate their confessions.

⁸³ For another example, in the highly publicized case of the teenagers wrongly convicted in the Central Park Jogger case, almost all details from their confessions differed from each other, from the physical evidence, and from the facts in the case; as noted by Garrett, "those inconsistencies did not prevent a conviction at trial." Garrett *supra* note 40 at 1090. See also the case of Jeff Deskovic, who was not implicated by the DNA evidence (which indicated a different perpetrator) or any other material evidence in the case beyond his confession; he was wrongfully convicted and spent 16 years in prison. *Jeff Deskovic*, *supra* note 49. As discussed subsequently, with very few exceptions, this paper does not suggest that these wrongful convictions result from intentional police misconduct.

B. *Confessions, contamination, and corroboration inflation*

As demonstrated above, confessions carry so much power that people often ignore inconsistencies between the confession and the independent evidence, regardless of whether states rely on the *corpus delicti* rule or the trustworthiness standard. Several factors increase the likelihood of corroboration errors in cases involving confessions, many of which were present in *Sanchez*, as discussed below.⁸⁴

First, police, district attorneys, and others want to be correct in their decisions, particularly in high-stakes questions such as guilt in cases involving severe crimes. As humans, we are motivated reasoners,⁸⁵ we want to be correct, and we are subject to human biases in our thinking. We tend to seek confirmation rather than falsification of our beliefs.⁸⁶ These biases are strongest when our beliefs are important to us, as we expect decisions about a suspect's guilt to be for police officers, prosecutors, courts, and legal observers.⁸⁷

Second, as described previously, confessions are so influential that police, prosecutors, and even defense attorneys may overlook or misinterpret exculpatory evidence, as they did with the Oakland juvenile, and confessions may corrupt other evidence. For example, confessions can lead to such confidence in guilt that some prosecutors have aggressively attacked and devalued DNA evidence in trial and post-conviction appeals when the DNA evidence challenges confession evidence.⁸⁸ Confessions carry such power that several cases exist in which defendants have been convicted at trial after being excluded by DNA evidence.⁸⁹ For example, in *People v. Rivera*, despite DNA evidence that indicated

⁸⁴ *Sanchez v. Hartley*, 810 F.3d 750 (10th Cir. 2016).

⁸⁵ Our goals affect our reasoning, and we are more critical of claims that criticize our pre-existing beliefs and less critical of claims that support our pre-existing beliefs. Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480, 482 (1990).

⁸⁶ For a specific legal example of motivated reasoning, scholars have also found that experienced investigators rate the credibility and reliability of a witness as lower when that witness provided testimony that was inconsistent with an existing hypothesis about the identity of the perpetrator in a criminal case, see Karl Ask & Par Anders Granhag, *Motivational Bias in Criminal Investigators' Judgments of Witness Reliability*, 37 J. OF APPLIED SOC. PSYCHOL. 561, 579 (2007).

⁸⁷ SUSAN T. FISKE & SHELLEY E. TAYLOR, *SOC. COGNITION: FROM BRAINS TO CULTURE* (1st ed., 2008).

⁸⁸ See Andrew Martin, *The Prosecution's Case Against DNA*, NEW YORK TIMES MAGAZINE, November 25, 2011, http://www.nytimes.com/2011/11/27/magazine/dna-evidence-lake-county.html?pagewanted=all&_r=0. For an additional example, after Bruce Godschalk's DNA exoneration, the district attorney in his case maintained that Godschalk was guilty. Mark Stroh & Ralph Vigoda, *DNA Frees Man Jailed for 15 Years*, PHILADELPHIA INQUIRER, February 15, 2002.

⁸⁹ See Kassir, *supra* note 44, at 433. In the case of the Norfolk Four, the DNA evidence did not indicate any of the four sailors who falsely confessed, and the person matched by the DNA confessed to having committed the crime alone; these details did not prevent the wrongful conviction of all four false confessors. Wells & Leo, *supra* note 49. See also Jeff Deskovic, *supra* note 49.

another perpetrator, prosecutors sought and gained the conviction of Juan Rivera on the basis of his confession.⁹⁰ To maintain that the Rivera's confession was valid, prosecutors claimed that the eleven-year-old victim must have engaged in consensual sexual relations with an unknown man before being assaulted by Rivera, who, they argued, left no evidence.⁹¹

Police confidence in a suspect's guilt may affect corroboration of confessions in other ways, including contamination of the confession. Contamination occurs when interrogators or others provide crime details, intentionally or otherwise, to the suspect so that the suspect's confession contains misleading information that appears to indicate guilt.⁹² Garrett evaluated the contents of proven false confessions (i.e., confessions by convicted defendants who were later exonerated by DNA or other evidence), and his review of these cases demonstrated that contamination is nearly ubiquitous in documented false confessions.⁹³ He found that thirty-six of the thirty-eight defendants confessed to details of the crime known only to police and to the perpetrator, and these defendants did so despite not being the actual perpetrator.⁹⁴ Despite consistent recommendations to avoid contamination and to seek independent corroboration to evaluate confession evidence,⁹⁵ the overwhelmingly likely source of information about the crime is the interrogation itself.⁹⁶ Yet, in twenty-seven of the thirty-eight cases, officers provided sworn testimony in court that they had not provided the crime details to the suspect.⁹⁷ Police officers may, however, unintentionally contaminate a confession.⁹⁸ In cases in which the confession is contaminated,

⁹⁰ See *People v. Rivera*, 962 N.E. 2d 53 (Ill. App. Ct. 2011).

⁹¹ Martin, *supra* note 88; see also *Jeff Deskovic*, *supra* note 49.

⁹² Garrett, *supra* note 45, at 1053.

⁹³ Garrett, *supra* note 45, at 1066.

⁹⁴ *Id.* at 1057.

⁹⁵ Inbau et al., *supra* note 68; Jayne & Buckley, *supra* note 68.

⁹⁶ In some cases, contamination has other sources. For example, highly confident police viewed 15-year old Timothy Masters's knowledge that the victim's body had been mutilated as evidence of Masters's guilt, but Masters learned about the mutilation through his classmate, a member of the Explorers group who helped search the field where the victim's body was found. MASTERS & LEHTO, *DRAWN TO INJUSTICE: THE WRONGFUL CONVICTION OF TIMOTHY MASTERS* (2012). Despite this example and the possibility of other sources of contamination (e.g., mistakenly publicized facts, a separate guilty suspect who shared crime information with other jail inmates, or even suspects' guesses), Garrett, *supra* note 45, argues that interrogators are the most likely source of contamination.

⁹⁷ Garrett, *supra* note 45, at 1057.

⁹⁸ Garrett, *supra* note 45, at 1074. Although Garrett made no claim regarding officers' intent, this author argues that most if not all of the examples of contamination described by Garrett and others were unintentional, that officers believed in good faith that the suspects were genuinely guilty, and that the officers believed that the confessions were true. Simply stated, police seek to be right, and, in every situation in which this author has inquired, police interrogators have universally stated that inducing and believing a false confession (and using that false confession to

false confessions contain details that match police knowledge of evidence, as in the *Sanchez* case discussed subsequently,⁹⁹ and the apparent, though incorrect, corroboration of the confessions by the evidence can powerfully influence police and other observers.

State v. Bloodsworth provides another example of unintentional contamination.¹⁰⁰ Kirk Bloodsworth was wrongly convicted and spent more than eight years in prison.¹⁰¹ Police had strong reasons to suspect that Bloodsworth committed a heinous crime with a rock. Multiple eyewitnesses testified (incorrectly) that they had seen Bloodsworth with the victim, and Bloodsworth made ambiguous statements to police.¹⁰² Additionally, the first police interrogators placed a rock covered in fake blood in the interrogation room to observe Bloodsworth's interactions with potential evidence (i.e., an orchestrated FEP).¹⁰³ This technique affected his later conviction in two ways. First, his interactions with the rock further convinced police of his guilt. Indeed, Bloodsworth believed any interaction would appear to indicate his guilt to the highly confident interrogators. As Bloodsworth stated, "If I brought up the rock, asked about it, it would look like I knew something. If I didn't look at it, didn't ask about it; it

support a conviction that turns out to be wrongful) would be the one of the worst events of an entire career in law enforcement. Therefore, this paper argues that most, if not all of these cases, reveal errors, potentially reflecting negligence or recklessness, rather than malfeasance.

⁹⁹ *Sanchez v. Hartley*, 810 F.3d 750, 752 (10th Cir. 2016); Mitchell, *supra* note 2.

¹⁰⁰ *State v. Bloodsworth*, No. 03-K-84-003138, Seq. No: 92-93 (Cir. Ct. for Balt. Cnty. Ct. May 7, 1992); Meredith L. Pendergrass, *Maryland Repeals the Death Penalty, But Leaves Five on Death Row: What Has the State Learned from Kirk Bloodsworth?* 44 U. OF BALTIMORE LAW FORUM 109 (2014).

¹⁰¹ *Kirk Bloodsworth*, INNOCENCE PROJECT, (last visited April 20, 2016), <http://www.innocenceproject.org/cases/kirk-bloodsworth/>

¹⁰² *Id.*; *Bloodsworth*, No. 03-K-84-003138. Bloodsworth stated that he had done something that would impact his marriage. Highly confident police presented these statements at trial as evidence of Bloodsworth's guilt. Bloodsworth noted that his statements involved his failure to buy groceries as requested by his wife, not involvement in the murder or any other crime. The perception that he had incriminated himself persisted through officers' introduction of these statements at trial and then beyond. Even the Innocence Project website listed Bloodsworth as someone who had falsely confessed; when Professor Krista D. Forrest from the University of Nebraska at Kearney shared this with Bloodsworth, he immediately contacted the Innocence Project, and they reclassified him. Personal Communication with Krista D. Forrest, Professor, University of Nebraska at Kearney (2009).

¹⁰³ See Innocence Project, *supra* note 96. An orchestrated false-evidence ploy is a deceptive strategy in which police ask a suspect to interact with fabricated evidence, Wagner & Forrest, "Ploy complexity and its influence on mock jurors' interrogation evaluations and verdicts," presented at the American Psychology-Law Society convention in Vancouver, BC (2010). The police officers assumed, incorrectly, that observing Bloodsworth's interaction with the rock would enable them to determine whether he was guilty.

looked like I was avoiding something. There was no right thing to do.”¹⁰⁴ Second, a subsequent team of investigators did not know that the initial interrogators had presented Bloodsworth with a bloody rock, and the subsequent investigators incorrectly believed that only the police and the perpetrator could possibly identify the murder weapon. Therefore, when Bloodsworth mentioned a rock during a later interrogation, police viewed his knowledge of the rock as further evidence of his guilt rather than evidence of contamination by the first group of interrogators.¹⁰⁵

In these and other cases, defendants included details in their confessions that only the perpetrators could know, even though these defendants were not the perpetrators. Observers, including jurors, judges, prosecutors, and defense attorneys, believe that the inclusion of crime details in the suspect’s confession (i.e., “misleading specialized knowledge”)¹⁰⁶ shows that he or she must be guilty, even when the suspect is repeating material learned during the interrogation. Even the officers who conduct the interrogation may believe firmly but erroneously that they did not provide these details.¹⁰⁷ One officer who publicly described his experience inducing and believing a false confession noted that he, his police colleagues, the district attorney, and the defense attorney believed the false confession.¹⁰⁸ As the officer lamented, “we all still believed that she was guilty . . . How did she know the details that she did?”¹⁰⁹ Years later, a review of the video-recorded interrogation demonstrated what the officer did not realize at the time. “To demonstrate the strength of our case, we [had] showed the suspect our evidence, and unintentionally fed her details that she was able to parrot back to us at a later time.”¹¹⁰ Only the video-recording enabled observers to verify the contamination despite the confidence of all observers in the suspect’s guilt.

A second aspect of contamination—formatting—increases the difficulty of discovering false yet contaminated confessions. Formatting:

¹⁰⁴ William Douglas Woody & Krista D. Forrest, *Effects of False-Evidence Ploys and Expert Testimony on Jurors’ Verdicts, Recommended Sentences, and Perceptions of Confession Evidence*, 27 BEHAV. SCI. & THE L. 333, 349–50 (2009) (citing personal communication with Krista D. Forrest and Kirk Bloodsworth (2007)).

¹⁰⁵ *Kirk Bloodsworth*, *supra* note 101.

¹⁰⁶ Leo, *supra* note 44, at 254.

¹⁰⁷ As noted, Garret, in his review of proven false confessions, in 71% of cases, police officers provided sworn testimony that they did not contaminate the confession. Garret, *supra* note 45, at 1074.

¹⁰⁸ Jim Trainum, *I Took a False Confession- So Don’t Tell Me it Doesn’t Happen!*, SEEING THE FOREST, Sept. 20, 2007, <http://seeingtheforest.com/i-took-a-false-confession-so-dont-tell-me-it-doesnt-happen/>.

¹⁰⁹ *Id.* In this case the confession did not lead to a miscarriage of justice only because, unlike some other cases, the police continued their investigation and found the suspect’s alibi to be credible; the charges were then dismissed.

¹¹⁰ *Id.*

goes beyond the mere feeding or leaking of details. In addition, interrogators format a suspect's postadmission narrative by suggesting how and why the crime occurred, providing possible motives and plausible explanations, correcting, suggesting and filling in missing crime-relevant information, and directing the suspect to . . . conclusions about his alleged actions and the events of the crime.¹¹¹

Formatting by police improves the apparent fit between the evidence and the confession as police suggest motives (sometimes called "themes" as discussed below) and guide the confessor to include known details of the evidence.¹¹² The resulting strong fit between the confession and the known evidence makes future attempts at meeting the corroboration requirements of the trustworthiness standard more likely to be successful, even if the confession is false. The formatting of confessions has other long term implications; as discussed below, jurors find confessions more believable when confessions are rich in detail as is common in formatted and contaminated confessions.¹¹³ The ubiquity of contamination and formatting in false confession cases increases available detail and presents severe obstacles to police in any attempt to corroborate the confession and to defendants in any attempt to recant a confession. Only a video-recording of the interrogation can provide evidence regarding presence or absence of potential contamination by police, and proposed reforms for uses of confession evidence should address the difficulties raised by contamination and formatting.

If contamination and formatting raise these difficulties, what signs exist to suggest that a confession is reliable rather than contaminated? If a video-recording exists, police, other investigators, and courts should examine the complete recording and apply the Ofshe-Leo Test to evaluate the fit of the evidence with the confession and the post-admission narrative.¹¹⁴ The Ofshe-Leo Test identifies three markers of reliability in confessions and post-admission narratives.¹¹⁵ Does the confession: (1) lead to evidence unknown to police; (2) include unusual details of the crime that have not been publicized; and/or (3) include typical details of the crime that have not been publicized and that would be difficult to guess?¹¹⁶ These criteria must be used in conjunction with a video-recording to assess the

¹¹¹ Leo et al., *supra* note 45, at 776.

¹¹² Leo, Neufeld, Drizin & Taslitz, *supra* note 45, at 776. For interrogation themes see Inbau et al. *supra* note 68; Jayne & Buckley, *supra* note 68.

¹¹³ Sara C. Appleby et al., *Police-Induced Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 19 *PSYCHOL., CRIME, AND L.* 111, 124 (2013).

¹¹⁴ Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confession: Deprivation of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 *J. OF CRIM. L & CRIMINOLOGY* 429, 438–39 (1998); Leo et al., *supra* note 8, at 520–522.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

reliability of the confession and the fit to the evidence. Unfortunately, unusual or unpublicized details sometimes exist in contaminated false confessions, and a video-recording is essential to evaluate potential contamination and formatting and to ensure that investigators did not provide these details. For example, in *Commonwealth v. Godschalk*, Bruce Godschalk's confession contained detailed reports of both unusual and mundane details known only to the perpetrator and to police investigators.¹¹⁷ Investigators who interrogated Godschalk, however, audio-recorded only the confession; without a video-recording of the entire interrogation, no evaluation of potential contamination and formatting was possible.¹¹⁸ Later observers could not evaluate whether Godschalk provided nonpublicized details on his own or only after learning with these details by the police. Similarly, in the Bloodsworth case, the lack of a video-recording of the initial interrogation prevented investigators from learning how Bloodsworth knew about the unpublicized murder weapon.¹¹⁹ Below, the paper returns to these issues of mandatory video-recording and reliability assessment in subsequent discussions of statutory reforms in Colorado and other states in the district of the 10th Circuit.

Beyond omission or misinterpretation of relevant evidence, a third concern related to corroboration is that confessions are so powerful that they can corrupt other forms of evidence such as eyewitness testimony, fingerprint identification, and polygraph results. This contention has support from both experimental studies and archival analyses of actual cases.¹²⁰ For example, in one experimental study, participants observed a crime and then attempted to identify the suspect, who was not present in the photographic lineup.¹²¹ Two days later, researchers informed some participants that specific members of the lineup denied guilt or confessed during an interrogation; many participants who learned that a particular lineup member confessed then erroneously identified the confessor as the perpetrator.¹²² In addition to eyewitness testimony, experimental studies

¹¹⁷ *Commonwealth v. Godschalk*, 679 A.2d 1295 (Pa. Super. Ct. 1996); *Bruce Godschalk*, INNOCENCE PROJECT, (last visited April 20, 2016) <http://www.innocenceproject.org/cases/bruce-godschalk/>; Leo, Neufeld, Drizin, & Taslitz, *supra* note 45, at 761–764.

¹¹⁸ Garrett, *supra* note 45, at 1080.

¹¹⁹ *Kirk Bloodsworth*, *supra* note 101.

¹²⁰ *E.g.*, Lisa.E. Hasel & Saul M. Kassin, *On the Presumption of Evidentiary Independence: Can Confessions Corrupt Eyewitness Identifications?* 20 PSYCHOL. SCI. 122, 123 (2009); Iritel Dror & David Charlton, *Why Experts Make Errors*, 56 J. OF FORENSIC IDENTIFICATION 600, 612 (2006); Eitan Elaad et al., *The Effects of Prior Expectations and Outcome Knowledge on Polygraph Examiners' Decisions*, 7 J. OF BEHAV. DECISION MAKING 279 (1994).

¹²¹ Hasel & Kassin, *supra* note 120, at 123.

¹²² *Id.* at 124. The actual perpetrator was never present in the lineup. In particular, for participants who had (incorrectly) identified a perpetrator, 61% changed their identification to the purported confessor, and for participants who had (correctly) failed to identify a perpetrator, 50% then (incorrectly) identified the purported confessor.

have demonstrated that confession evidence can corrupt experts' fingerprint identifications¹²³ and experts' interpretations of polygraph results as well as other forensic evidence.¹²⁴

In addition to the experimental scholarship about the power of confession evidence to affect forensic analyses, other substantial concerns exist regarding the interaction of forensic science and confessions. One particular concern is that the errors overwhelmingly favor the prosecution. For instance, a recent study revealed that twenty-six of twenty-eight FBI analysts provided erroneous statements about microscopic hair analysis in 96% of 268 examined cases, including 94% of thirty-five cases in which defendants were sentenced to death.¹²⁵ These forensic errors interact with confession evidence in important ways that affect perceived corroboration. Other scholars have examined documented false confessions and revealed important findings about the power of confessions to affect other evidence.¹²⁶ In particular, errors of evidence are more common in cases involving false confession than in other cases.¹²⁷ Additionally, the errors are disappointingly common; two thirds of false confession cases include errors in forensic science, and 65% of false confession cases involve multiple additional errors.¹²⁸ Furthermore, in cases involving multiple errors, "confessions were most likely to have been obtained first," likely increasing the confidence in forensic examiners' pro-guilt yet erroneous conclusions regarding corroboration of confessions.¹²⁹

Beyond biased forensic science, confessions impact other aspects of trials. For example, researchers examined the first 273 DNA exoneration cases from the files of the Innocence Project and evaluated the prevalence of what the

¹²³ Dror & Charlton, *supra* note 113 at 612.

¹²⁴ Elaad et al., *supra* note 113. Additionally, Dror and Hampikian reported that "DNA mixture interpretation is subjective" and may also be subject to biases related to confession evidence. Itiel E. Dror & Greg Hampikian, *Subjectivity and Bias in Forensic DNA Mixture Interpretation*, 51 *SCI. & JUST.* 204, 204. Additionally, confession evidence affects handwriting comparisons of lay observers. Jeff Kukucka & Saul M. Kassin, *Do Confessions Taint Perceptions of Handwriting Evidence? An Empirical Test of the Forensic Confirmation Bias*, 37 *L. AND HUM. BEHAV.* 256, 265 (2013).

¹²⁵ Paul Cates et al., National Association of Criminal Defense Lawyers, *FBI Testimony on Microscopic Hair Analysis Contained Errors In At Least 90% of Cases In Ongoing Review: 26 of 28 FBI Analysts Provided Testimony Or Reports With Errors*, Apr. 20, 2015, <http://www.nacdl.org/NewsReleases.aspx?id=37023>.

¹²⁶ Saul M. Kassin et al., *Confessions That Corrupt: Evidence from the DNA Exoneration Case Files*, 23 *PSYCHOL. SCI.* 41, 42–43 (2012).

¹²⁷ *Id.*

¹²⁸ *Id.* at 43.

¹²⁹ *Id.* at 43.

Innocence Project called “bad lawyering” and “government misconduct.”¹³⁰ They found that both were more prevalent in cases with false confessions.¹³¹ “These differences suggest that confession cases skew the adversarial process in ways that are detrimental to the defense.”¹³² Simply stated, what a trial or appellate court may view as independent corroboration of a confession may not be so.¹³³

Confession evidence may influence investigators and district attorneys (particularly in decisions about whether to continue an investigation or to evaluate additional suspects), affect investigators’ interactions with and evaluations of the suspect, and corrupt other evidence. Among other effects, a confession may lead to “tunnel vision;”¹³⁴ police may view all evidence through the lens of the confession and may focus extensively on the confessor, close cases prematurely, and cease reviewing other leads and other suspects.¹³⁵ These choices may leave a perpetrator at large in the community during the process of corroboration of the confession or, if the confession wrongfully appears corroborated, indefinitely.¹³⁶ These findings raise important legal concerns for the corroboration of confessions under either the *corpus delicti* rule or the trustworthiness standard. The list of potential factors that could artificially inflate corroboration suggests that the flexibility of the trustworthiness standard sets the bar for perceived corroboration very low, particularly if a confession occurs before evaluation of other evidence and affects the collection and evaluation of later evidence.

C. Legal safeguards

The process of pretrial corroboration by police and other investigators is one safeguard to prevent false confessions from leading to wrongful convictions, and it remains rife with difficulties. A series of other safeguards exist, including

¹³⁰ Jeff Kukucka & Saul M. Kassin, *Confession Errors as “Structural Defects,”* AM. PSYCHOL.-L. SOCIETY CONVENTION (March 2012) (paper presented at the convention).

¹³¹ *Id.*

¹³² Kassin, *supra* note 44, at 439.

¹³³ Another substantial concern is that cultural biases may affect views of confessions; Pickel and colleagues used a single interrogation video but described the suspect to mock jurors as White or Arab-American; participants who viewed him as Arab-American viewed his confession as more voluntary and more authentic, were more likely to render guilty verdicts, and rated him as more guilty. Kerri L. Pickel et al., *Conceptualizing Defendants as Minorities Leads Mocks Jurors to Make Biased Evaluations in Retracted Confession Cases*, 19 PSYCH. PUB. POL’Y & L. 56 (2013). Additionally, as noted previously, suspects who are African-American may appear more guilty to police than other suspects and may behave in ways that are consistent with police officers’ beliefs about guilt. Najdowski, *supra* note 71.

¹³⁴ Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2 WISCONSIN L. REV. 291, 291 (2006).

¹³⁵ Kassin, *supra* note 39 at 433.

¹³⁶ For example, the actual perpetrator of the crime to which Deskovic confessed and for which he was wrongfully convicted committed another murder three years later. See *Jeff Deskovic, supra* note 49.

voluntariness hearings, juries, and judicial review.¹³⁷ This paper briefly examines these safeguards to emphasize the challenges raised by the difficulties of corroboration and the risks faced by defendants who confess falsely.

1. *Voluntariness hearings*

Voluntariness hearings evaluate the voluntariness of a confession, but not the reliability or truth value of the confession, and if the court finds the confession voluntary it is admitted to trial. There are several important criticisms of these processes. First, *Miranda* warnings provide only very limited protection, as discussed previously. For example, in a sample of 40 exonerated false confessors, all had waived their *Miranda* rights and almost all attempted to suppress the confessions from court.¹³⁸ For these defendants, the courts' reviews of disputed confessions emphasized voluntariness and relied heavily on valid *Miranda* warnings and waivers,¹³⁹ even if these warnings provide only limited protection. Second, suppression hearings focus almost exclusively on voluntariness. All of the false confessors in Garrett's sample who attempted to suppress their confessions failed because courts found their confessions, though false, to be voluntary.¹⁴⁰ Third, the preponderance of evidence standard, the standard of proof used in suppression hearings, creates "a practical reality: a low standard of proof leads to the erroneous admission of coerced confessions, which, in turn, often leads to unreliable verdicts."¹⁴¹ Fourth, jurors and juries generally recognize but do not reject coercion, and they readily believe confession evidence.¹⁴² Fifth, judges

¹³⁷ Jurors, juries, and judges form relevant safeguards for cases that go to trial, however, and false confessions affect defendant's trial options. Those who plead guilty cannot benefit from jurors' or juries' actions. In a study of documented false confessions, Redlich found that defendants who had confessed falsely were approximately four times more likely to have falsely pleaded guilty than were defendants who had not confessed. ALLISON D. REDLICH, FALSE CONFESSIONS AND FALSE GUILTY PLEAS: SIMILARITIES AND DIFFERENCES, IN POLICE INTERROGATION AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY (G. Daniel Lassiter & Christian A. Meissner eds., 2010).

¹³⁸ Garrett, *supra* note 45, at 1058.

¹³⁹ Missouri v. Seibert, 542 U.S. 600, 609 (2004).

¹⁴⁰ Garrett, *supra* note 45, at 1058.

¹⁴¹ Michael D. Pepson & John N. Sharifi, *Lego v. Twomey: The Improbable Relationship Between an Obscure Supreme Court Decision and Wrongful Convictions*, 47 AM. CRIM. L. REV. 1185, 1218 (2010).

¹⁴² Woody & Forrest, *supra* note 104; Saul M. Kassin & Holly Sukel, *Coerced Confessions and the Jury: An Experimental Test of the "Harmless Error" Rule*, 21 L. AND HUM. BEHAV. 27, 42 (1997); William Douglas Woody et al., *Comparing the Effects of Explicit and Implicit False-Evidence Ploys on Mock Jurors' Verdicts, Sentencing Recommendations, and Perceptions of Police Interrogation*, 20 PSYCHOL., CRIME, & L. 603, 612 (2013); William Douglas Woody et al., *The Effects of Jury Deliberations on Verdicts and Perceptions of Guilt in Trials Involving False-Evidence Ploys During Police Interrogation*, presented at the AM. PSYCHOL.-L. SOC'Y CONVENTION, (March, 2012) (presented at the convention).

struggle to evaluate confession evidence.¹⁴³ Nothing about *Miranda* warnings, *Miranda* waivers, or suppression hearings protected any defendant in Garrett's sample from the consequences of false confession.¹⁴⁴

These difficulties combine with the ubiquity of contamination, formatting, and the influence of confession evidence on other evidence and evaluations. The resulting circumstances make independent and accurate corroboration of a confession extremely difficult at best, particularly using the range of corroboration options available under the trustworthiness standard. As one scholar noted, "It should not be surprising that [all of the documented false confessions identified by DNA exoneration prior to 2010] were admitted [to trial], because the voluntariness standard is forgiving and vague."¹⁴⁵

2. *Jurors and juries*

Courts have remained optimistic about jurors' abilities to recognize and reject coerced confessions, and a series of judicial decisions reflects this optimism. First, in *Lego v. Twomey*, the U.S. Supreme Court established the preponderance of evidence standard for the admission of confessions to trial and noted that this placed responsibility for recognizing and rejecting coerced confessions on the jury.¹⁴⁶ Despite this substantial responsibility for jurors, the court emphatically expressed confidence that jurors could accurately evaluate confessions and determine guilt.¹⁴⁷

Second, prior to *Arizona v. Fulminante* (1991),¹⁴⁸ improper admission of a coerced confession was overwhelmingly likely to lead to a new trial.¹⁴⁹ Since 1991, however, jurors carry additional responsibilities. In *Arizona v. Fulminante*, the U.S. Supreme Court held that improper admission of a coerced confession could be subject to harmless error analysis by appellate courts.¹⁵⁰ The notion that improper admission of a confession to trial could be a harmless error rests on the assumptions that jurors can recognize and reject coerced confessions and then

¹⁴³ D. Brian Wallace & Saul Kassin, *Harmless Error Analysis: How Do Judges Respond to Confession Errors?*, 36 L. AND HUM. BEHAV. 151, 156 (2012); William Douglas Woody et al., *supra* note 142, at 612.

¹⁴⁴ Garrett, *supra* note 45, at 1058.

¹⁴⁵ Garrett, *supra* note 45, at 1094.

¹⁴⁶ *Lego v. Twomey*, 404 U.S. 477 (1972), Woody et al., *supra* note 47, at 19.

¹⁴⁷ *Lego*, 404 U.S. at 484 (citing *Jackson v. Denno* case, which established the constitutional process of suppression hearings to evaluate voluntariness of confession, and stating that their decision in *Jackson* was "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").

¹⁴⁸ *Arizona v. Fulminante*, 499 U.S. 279 (1991).

¹⁴⁹ *Chapman v. California*, 386 U.S. 18, 23 n. 8 (1967).

¹⁵⁰ *Fulminante*, 499 U.S. at 295.

decide the case only in light of other evidence.¹⁵¹ The opinion “places great faith in the ability of a jury to properly evaluate a confession and the evidence about how it is obtained.”¹⁵²

A growing body of scholarship demonstrates that jurors do not meet these legal expectations. Across settings, jurors perceive confessions as powerful evidence.¹⁵³ In one study, when presented with evidence of an obviously coercive and illegal interrogation (in which a detective threatens a suspect, displays a weapon in the interrogation room, and engages in other clearly coercive behavior), jurors reported that they recognized the coercion and that they rejected the confession.¹⁵⁴ However, jurors were more likely to convict the defendant when presented with the confession induced by coercive interrogation than when there was no confession presented. Thus, the confession affected jurors’ verdicts even when they claimed to have rejected it.¹⁵⁵ A recent study extended these findings: jurors who evaluated a high-pressure interrogation rated the tactics as coercive unless the confession led to corroborating evidence.¹⁵⁶ When the confession led to corroboration, not only were jurors more confident in the suspect’s guilt, those in the high-pressure condition rated the interrogation as less coercive.¹⁵⁷ These findings have further revealed the complex cognitive difficulties in evaluating confession evidence. Additionally, studies have demonstrated that jurors do not reject confessions from a suspect with a mental illness¹⁵⁸ or confessions by a co-conspirator (i.e., after the defendant has refused to confess), even when the co-conspirator is offered an incentive for his or her secondary confession.¹⁵⁹

¹⁵¹ *Id.* at 295–96. For a review, see Woody et al., *supra* note 47.

¹⁵² Hollida Wakefield & Ralph Underwager, *Coerced or Nonvoluntary Confessions*, 16 BEHAV. SCI. & THE L. 423, 437 (1998).

¹⁵³ Saul M. Kassir & Katherine Neumann, *On the Power of Confession Evidence: An Experiment Test of the “Fundamental Difference” Hypothesis*, 21 L. AND HUM. BEHAV. 269, 475–76 (1997); Linda A. Henkel et al., *A Survey of People’s Attitudes and Beliefs about False Confessions*, 26 BEHAV. SCI. AND THE L. 555, 576 (2008).

¹⁵⁴ Kassir & Sukel, *supra* note 142, at 42.

¹⁵⁵ *Id.* at 42; see also Saul M. Kassir & Lawrence S. Wrightsman, *Coerced Confessions, Judicial Instructions, and Mock Juror Verdicts*, 11 J. OF APPLIED PSYCHOL. 489 (1981).

¹⁵⁶ Netta Shaked-Schroer et al., *Overlooking Coerciveness: The Impact of Interrogation Techniques and Guilt Corroboration on Jurors’ Judgments of Coerciveness*, 20 LEGAL AND CRIMINOLOGICAL PSYCHOL. 68 (2015).

¹⁵⁷ *Id.* at 74.

¹⁵⁸ Linda A. Henkel, *Jurors’ Reactions to Recanted Confessions: Do the Defendant’s Personal and Dispositional Characteristics Play a Role?* 14 PSYCHOL., CRIME & L. 565, 573–574 (2008).

¹⁵⁹ Jeffrey S. Neuschatz et al., *The Effects of Accomplice Witnesses on Jury Decision Making*, 32 L. AND HUM. BEHAV. 137, 146 (2008); Jeffrey S. Neuschatz et al., *Secondary Confessions, Expert Testimony, and Unreliable Testimony*, 27 J. POLICE CRIM. PSYCHOL. 179, 188 (2012).

The risks demonstrated by these studies are compounded by several other findings that further interfere with jurors' perceptions and trial decisions related to confession evidence. First, jury-eligible adults do not know much about police interrogation.¹⁶⁰ Second, jurors are likely to accept the myth of psychological interrogation.¹⁶¹ Third, evaluation of a confession without other corroborating evidence is extremely difficult, and both police and lay observers struggle to distinguish between true and false confessions.¹⁶² Fourth, even with limited knowledge of police interrogation, jury-eligible individuals perceive interrogation tactics as coercive¹⁶³ but as likely to lead to true rather than false confessions.¹⁶⁴ Fifth, jurors may use erroneous assumptions to evaluate confessions. For example, scholars found that jurors were more likely to convict a defendant in a case involving a retracted confession if the confession was rich in detail.¹⁶⁵ The same researchers examined twenty documented false confessions and found that "most are richly detailed statements complete with descriptions of the what, how, and why the crime was committed,"¹⁶⁶ that 85% of false confessions included reflections on feelings and thoughts during commission of the (non-existent) crime; and that 65% of false confessions incorporated a minimization theme (i.e., a face-saving explanation for the crime they did not commit).¹⁶⁷ Both true and false confessions are rich with sensory, emotional, and motivational details, but mock jurors in this study falsely believed that these details indicate truthful-

¹⁶⁰ Iris Blandón-Gitlin et al., "Jurors Believe Interrogation Tactics Are Not Likely to Elicit False Confessions: Will Expert Witness Testimony Inform Them Otherwise?" 17 *PSYCHOL., CRIME, AND L.*, 239 (2011); Leo & Liu, *supra* note 51; SAUL KASSIN, *EXPERT TESTIMONY ON THE PSYCHOLOGY OF CONFESSIONS: A PYRAMIDAL FRAMEWORK OF THE RELEVANT SCIENCE*, IN *BEYOND COMMON SENSE; PSYCHOL SCI IN THE COURTROOM* 195–218 (Eugene Borgida & Susan T. Fiske eds., 2008). Despite these findings, some courts assume that jurors *do* possess this knowledge, see SOLOMON M. FULLERO, *TALES FROM THE FRONT: EXPERT TESTIMONY ON THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS REVISITED, POLICE INTERROGATION AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY* 211–223 (G. Daniel Lassiter & Christian A. Meissner eds., 2010).

¹⁶¹ Leo, *supra* note 44; Woody & Forrest, *supra* note 104, at 349; Woody et al., *supra* note 47; Woody et al., *supra* note 54. See also Blandón-Gitlin, Sperry, & Leo, *supra* note 160.

¹⁶² Kassin, Goldstein & Savitsky, Behavioral confirmation in the interrogation room: On the dangers of presuming guilt," 27 *L. AND HUM. BEHAV.* 187, at 199; Kassin, Meissner, & Norwick, 'I'd know a false confession if I saw one': A comparative study of college students and police investigators, 29 *L. AND HUM. BEHAV.* 211, 221–222.

¹⁶³ Leo & Liu, *supra* note 51; Forrest, et al., *supra* note 51; Woody & Forrest, *supra* note 104.

¹⁶⁴ Leo & Liu, *supra* note 49; Blandón-Gitlin, Sperry, & Leo, *supra* note 160.

¹⁶⁵ Appleby et al., found that any admission of guilt generally led to guilty verdicts and that more detailed confessions led to higher confidence in guilty verdicts. Appleby et al., *supra* note 109, at 124.

¹⁶⁶ Appleby et al., *supra* note 113, at 116.

¹⁶⁷ *Id.* at 117; confronting suspects with such face-saving themes to justify the criminal behavior is recommended by those who train interrogators as a central aspect of interrogation methods (see Inbau et al. *supra* note 68; Jayne & Buckley, *supra* note 68), and therefore it is not surprising to see these themes emerge in false confessions.

ness. Jurors use these and other erroneous biases to evaluate confession evidence and struggle to recognize, much less reject, false or coerced confessions.¹⁶⁸

In addition to these biases, although jurors appear able to recognize police deception, they fail to discern the effects that deception has on suspects.¹⁶⁹ Across a wide range of measures, jurors do not appear able to meet legal expectations and do not appear to provide a safety net for suspects who may have faced coercion and/or confessed falsely.

3. Judges

As expert legal decision makers, judges carry particular responsibilities in evaluations of confession evidence but may face the same difficulties as jurors. Studies have found that, similar to jurors, judges recognize the deception inherent in FEPs, but judges underestimate the coerciveness of these tactics.¹⁷⁰ These findings reflect existing case law regarding police deception about evidence.¹⁷¹ Generally, courts have accepted confessions generated by FEPs and other forms of deception; even though many of these precedents predate DNA exonerations of false confessors and systematic study of interrogation and confession, judges generally apply these earlier precedents.¹⁷² In an experimental study, a majority of sitting judges recognized the coercion in a confession that resulted from a high-pressure interrogation.¹⁷³ Much like jurors, however, when other evidence was weak, judges were more likely to uphold a conviction when a coerced confession was present, even when they argued that the confession should not have been admitted to trial.¹⁷⁴ Judges view confessions as “such powerful evidence that they do not discount it when it is legally and logically appropriate to do so.”¹⁷⁵ These cognitive biases remain difficult for human decision makers to avoid, even legal experts.

¹⁶⁸ *Id.* at 124.

¹⁶⁹ Woody & Forrest, *supra* note 104, at 347; Woody et al., *supra* note 142, at 612; Woody et al., *supra* note 142; for a review see Woody et al., *supra* note 47.

¹⁷⁰ William Douglas Woody et al., Effects of False-Evidence Ploys and Expert Testimony on Judges' Perceptions and Trial Decisions, presented at the AM. PSYCHOL.-L. SOC'Y CONVENTION, (March, 2013) (presented at the convention).

¹⁷¹ *Id.*

¹⁷² *Id.* For relevant court cases, see e.g., *Frazier v. Cupp*, 394 U.S. 731 (1969); *State v. Cobb*, 566 P.2d 285 (AZ 1977); *People v. Lira*, 119 Cal. App. 3d 837 (1981). As discussed subsequently, there is ongoing judicial review of police interrogation tactics in several jurisdictions.

¹⁷³ The high pressure condition described a 15-hour coercive interrogation in which the police interrogator waved a gun and threatened the suspect with the death penalty. Wallace & Kassin, *supra* note 143, at 152.

¹⁷⁴ Wallace & Kassin, *supra* note 143, at 156.

¹⁷⁵ Kassin *supra* note 44, at 434.

III. THE SANCHEZ CASE AND CHANGING EXPECTATIONS FOR POLICE

The *Sanchez* case epitomizes the difficulties faced by police in any attempt to corroborate a confession and, in particular, the difficulties faced by police in their attempts to identify a false confession.¹⁷⁶ In 2009, during a 17-hour interrogation, Sanchez confessed falsely to a burglary but not to a related sexual assault; the district attorney then charged Sanchez with both crimes.¹⁷⁷ First, Sanchez had some characteristics associated with personal and situational vulnerability to interrogation and increased potential for false confession. As noted by the court, Sanchez has a cognitive disability, he struggled to understand and respond to questions, and, as a situational factor that increased his vulnerability, he had been awake for more than thirty hours by the end of the interrogation.¹⁷⁸ Investigators observed and noted Sanchez's atypical behavior related to his cognitive disability, yet these observations did not reduce their confidence in his guilt.¹⁷⁹ Second, police believed—incorrectly—that they had the right suspect. Their strong confidence was supported by Sanchez's confessions to burglary in ways that appeared to fit the existing evidence and to meet the corroboration requirements of the trustworthiness standard.¹⁸⁰ Police maintained their confidence in his guilt even though Sanchez “was unable to give any details regarding his involvement in the crime[s]” and even though he incorporated into his confession a detail that the officers knew was false.¹⁸¹ In particular, the court found that Sanchez's confession to this known falsehood should have informed police that his confession was false.¹⁸² Typical police biases likely shaped their views of Sanchez's atypical behavior and their mistaken evaluation of the extensive exculpatory evidence.

An additional example of corroboration failure in *Sanchez* involves the testimony from the survivor of the sexual assault. The survivor described her assailant as someone who “was roughly forty years old, weighed about 190 pound, had no tattoos, and had brown hair,” but the prosecution charged a nineteen-year-old who weighed 130 pounds, had prominent tattoos on both arms, and had short red hair.¹⁸³ The officers and others knew that the suspect did not fit the

¹⁷⁶ *Sanchez v. Hartley*, 810 F.3d 750 (10th Cir. 2016).

¹⁷⁷ *Mitchell*, *supra* note 2, ¶ 1, 7.

¹⁷⁸ *Sanchez*, 810 F.3d at 756; Steven J. Frenda et al., *Sleep Deprivation and False Confessions*, 113 PROCEEDINGS OF THE NAT'L ACAD. OF SCI. 2047, 2048 (2016).

¹⁷⁹ *Sanchez*, 810 F.3d at 756.

¹⁸⁰ *Id.* at 753; *Mitchell*, *supra* note 2 ¶ 7.

¹⁸¹ *Sanchez*, 810 F.3d at 757.

¹⁸² *Id.*

¹⁸³ *Sanchez*, 810 F.3d at 756.

survivor's description of the perpetrator, but this did not stop prosecutors from charging Sanchez with this crime.¹⁸⁴

Sanchez is not unique. The indicators of guilt (e.g., the suspect's confession to multiple crimes, corroboration of at least some details of his confession, and strong police expectations that the suspect is guilty) are similar to the cases reviewed in this paper as well as many others cases in which false confessions led to mistaken convictions. Despite the indicators of guilt in *Sanchez*, the exculpatory evidence was extensive. Similarly, police who charged Bloodsworth, the juvenile in Oakland, the teens in the Central Park Jogger case, Juan Rivera, and the Norfolk Four, among many others, continued to seek charges despite extensive exculpatory evidence, including in some cases DNA evidence that exonerated the defendant.¹⁸⁵ Simply stated, the potentially reckless errors made by the investigators in *Sanchez* are not atypical for cases involving false confessions and may even be less shocking than errors in other cases that did not lead to charges against police.¹⁸⁶ The 10th Circuit, however, found that the substantial evidence of Sanchez's innocence should have been evident to investigators, and the court concluded that investigators "either knew that the confession was untrue or recklessly disregarded that possibility," and therefore removed the investigators' qualified immunity.¹⁸⁷

In this case as in others, police officers faced substantial challenges in their examination of the *Sanchez* case and their attempts to corroborate his confession. They appeared to start with a strong belief in the suspect's guilt, and he confessed in ways corroborated by their existing evidence.¹⁸⁸ They contaminated and potentially formatted his confessions, and both processes substantially increased the already considerable difficulties of evaluating Sanchez's confession accurately. In particular, the investigators' apparent confirmation bias appears to have limited their abilities to evaluate the confession accurately, even in light of the exculpatory evidence.¹⁸⁹ In the thick of the investigation and without the benefit of hindsight, officers failed to reject Sanchez's confession and drop charges until almost three years after his false confession.¹⁹⁰

¹⁸⁴ Additionally, based on Garrett's review, the legal protections of a voluntariness hearing and a jury trial appear unlikely to have protected Sanchez from the consequences of this false confession. Garrett, *supra* note 45.

¹⁸⁵ See Garrett, *supra* note 45 for a thorough review of cases and failures to reject false confessions despite extensive exculpatory evidence; see also Innocence Project, *Kirk Bloodsworth*, *supra* note 101; Shipler, *supra* note 73; *Juan Rivera*, INNOCENCE PROJECT, (last visited Apr. 20, 2016), <http://www.innocenceproject.org/cases/juan-rivera/>; Wells & Leo, *supra* note 49.

¹⁸⁶ E.g., see Martin, *supra* note 88, ¶ 13, 16; *Juan Rivera*, *supra* note 185.

¹⁸⁷ *Sanchez*, 810 F.3d at 755.

¹⁸⁸ *Sanchez*, 810 F.3d at 753; Mitchell *supra* note 2, ¶ 7, 11.

¹⁸⁹ *Sanchez*, 810 F.3d at 756–57

¹⁹⁰ *Sanchez*, 810 F.3d at 753.

The court had an additional cognitive advantage not available to the investigators—the power of hindsight. The hindsight bias, a powerful bias in human cognition, predicts that for those who know a particular outcome, the series of events leading to that outcome appears predictable, and the applications and consequences of this bias have consistently been observed in many contexts.¹⁹¹ Could hindsight bias apply in this case? From a hindsight perspective, the court could view all of the evidence related to Sanchez's confession, charges, and eventual release as one coherent story¹⁹² and could readily connect, for example, Sanchez's confession to a false detail to the eventual decision to drop charges. From the court's later perspective, knowing the outcome increases observers' confidence that the outcome appears highly likely or even inevitable. From the police perspective, however, in the midst of the investigation, the evidence surrounding Sanchez may have appeared, incorrectly and potentially recklessly, strong enough to support charges. These issues relate not only to the processes of investigation but also to human cognitive biases. This decision brings powerful consequences for police investigators.

This decision is one of a small but growing body of cases in which police investigators have faced sanctions for actions related to interrogation. For example, Jeff Deskovic was 16 years old when he confessed to a brutal murder he did not commit; he confessed after an hours-long polygraph examination, while sobbing on the floor in the fetal position.¹⁹³ The police polygrapher who induced the false confession by Deskovic subjected Deskovic to a coercive and excessively long polygraph examination, and he fabricated evidence; the court denied his request for summary judgment based on qualified immunity,¹⁹⁴ and he was found liable by a jury.¹⁹⁵ Similarly, a civil jury found an individual fraud and loss prevention

¹⁹¹ Baruch Fischhoff, *Hindsight ≠ Foresight: the Effects of Outcome Knowledge on Judgment Under Uncertainty*, 1 J. OF EXPERIMENTAL PSYCHOL.: HUM. PERCEPTION AND PERFORMANCE 288 (1975); Scott A. Hawkins & Reid A. Hastie, *Hindsight: Biased Judgments of Past Events After The Outcomes Are Known*, 107 PSYCHOL. BULL. 311 (1990); Jay J.J. Christensen-Szalanski & Cynthia Fobian Willham, *The Hindsight Bias: a Meta-Analysis*, 48 ORGANIZATIONAL BEHAV. AND HUM. DECISION PROCESSES 147 (1991); Rebecca L. Guilbault et al., *A Meta-Analysis of Research on Hindsight Bias*, 26 BASIC AND APPLIED SOC. PSYCHOL. 103 (2004).

¹⁹² NANCY PENNINGTON & REID HASTIE, *THE STORY MODEL FOR JUROR DECISION-MAKING, INSIDE THE JUROR* 84–115 (Reid Hastie ed., 1993).

¹⁹³ Deskovic et al. v. City of Peekskill, 894 F. Supp. 2d 443, 449 (SDNY, 2012); *Jeff Deskovic*, *supra* note 49.

¹⁹⁴ *Deskovic*, 894 F. Supp. 2d at 455.

¹⁹⁵ Jonathan Bandler, *Deskovic Deskovic's Lie Detector Test Was "An Interrogation," Expert Testifies*, IOHUD, Oct. 24, 2014, <http://www.lohud.com/story/news/local/2014/10/15/deskovic-federal-civil-trial-wrongful-conviction-putnam-daniel-stephens/17323927/>; Jonathan Bandler, *Deskovic Awarded \$40M in Wrongful Conviction Case*, IOHUD, Oct. 24, 2014, <http://www.lohud.com/story/news/local/2014/10/23/jeffrey-deskovic-wrongful-conviction-forty-million-verdict/17798527/>.

officer liable for using excessive and coercive deception, including deception that would have been illegal for police interrogators and that induced a demonstrably false confession.¹⁹⁶ Courts have also rejected immunity for officers who coerced statements from juveniles and then used those statements in court and for officers who disregarded suspects' invocation of *Miranda* rights.¹⁹⁷

Courts are also reconsidering previously accepted police interrogation tactics, such as some FEPs. Police in New York City falsely told Adrian Thomas that his infant son would die unless Thomas confessed to causing his son's injuries; his son had already died.¹⁹⁸ Although the trial court admitted his confession, the appellate court ruled that this deception was coercive, ordered a new trial for Thomas, and suppressed his confession from the new trial.¹⁹⁹ Similarly, police falsely informed Paul Aveni that his detailed confession was needed to save the life of a friend who had already died; an appeals court reversed Aveni's conviction and rejected his self-incriminating statements.²⁰⁰ Although officers have not faced charges or the loss of qualified immunity in these New York appellate cases, these cases may shift the legal landscape surrounding deception during police interrogation. Across the United States, other officers beyond those in *Sanchez* may soon face limits to qualified immunity, additional exposure to civil lawsuits, or even criminal charges related to their errors, negligence, or recklessness in corroboration of confessions.

IV. THE PARADOX OF RISING EXPECTATIONS FOR POLICE

Since *Sanchez*, police in states in the 10th Circuit now face both higher expectations and higher stakes for corroboration of confessions. Although the trustworthiness standard allows admission of confessions to trial even when the confession differs substantially from the evidence, police may now lose qualified immunity if they accept confessions that do not clearly fit existing evidence.²⁰¹ To

¹⁹⁶ *Robles v. Autozone, Inc.*, 2008 WL 2811762 (Cal Ct. App. 2008); William Douglas Woody et al., *Deception In Corporate Interviews: Jurors' Perceptions, Decisions, and Damage Awards*, AM. PSYCHOL.-L. SOC'Y CONVENTION (March, 2016) (presented at the convention).

¹⁹⁷ *E.g.*, *Crowe v. County of San Diego*, 608 F.3d 406 (9th Cir. 2010); *California Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039 (9th Cir. 1999).

¹⁹⁸ *People v. Thomas*, 22 N.Y.3d 629, 8 N.E.3d 308, 311–12 (N.Y. 2014) (describing how police falsely claimed that only Thomas's confession could provide the critical information physicians needed to save Thomas's son).

¹⁹⁹ *Thomas*, 22 N.Y.3d 629, 8 N.E.3d 308 at 310.

²⁰⁰ *People v. Aveni*, 100 A.D.3d 228, 232 (N.Y. App. Div., 2012); James C. McKinley Jr., *Court Weighs Police Role in Coercing Confessions*, NEW YORK TIMES, January 24, 2014, <http://www.nytimes.com/2014/01/15/nyregion/court-weighs-police-role-in-coercing-confessions.html?mc=eta1&r=2>.

²⁰¹ *Fontenot v. State*, 742 P.2d 31 (Okla. Crim. App. 1987); *Fontenot v. State*, 881 P.2d 69 (Okla. Crim. App. 1994); *Evig supra* note 1, at 62–63. As noted previously, *supra* note 82, the conviction of Karl Fontenot may come under judicial review.

review the cognitive challenges that cloud these processes, police must manage their general pro-guilt biases, and they must remain aware of and continue to question their beliefs in the suspect's guilt, particularly if police choose to engage in behavioral deception detection or in confrontational or deceptive interrogation methods. Human thinking biases, including motivated reasoning and the tendency to seek confirmation rather than disconfirmation, impede observers' abilities to evaluate confession evidence. Contamination and formatting, which are likely unintentional, may occur despite the best efforts of investigators, and in most cases can only be detected with a complete video-recording, which is required only in some states.²⁰² Cognitive biases combine with the difficulties in detecting contamination and formatting, which in turn affect the accuracy of forensic analyses and evaluations of unrelated evidence. All of these issues affect prosecution and defense attorneys as well as police investigators, jurors, judges, and other observers. Additionally, police risks of taking a false confession and seeking an erroneous conviction are compounded because voluntariness hearings, jurors and juries, and judges remain unlikely to provide sufficient safeguards to defendants who confess falsely.

These risks also come with contradictory expectations that police will use the greater flexibility of the trustworthiness standard to corroborate confessions, even as *Sanchez* holds officers to more exacting standards of corroboration. As the examples in this paper reveal, false confession cases often contain exculpatory evidence that remains overlooked by police, both prosecution and defense attorneys, and other investigators. The *Sanchez* case is tragically typical. How many police officers in these cases across the United States could face legal consequences in ongoing or historical false confession cases?

Although some scholars refuse to take a position on the role of police intent in cases with false confessions,²⁰³ this article argues strongly that these errors generally reflect human thinking biases and related factors rather than intentional police misconduct.²⁰⁴ Of course, human thinking biases can predispose

²⁰² Colorado House Bill 16-1117 would mandate video-recording for severe felonies and felonies involving sexual assault; it includes a series of exceptions that allow interrogation without video-recording, including unavailability or failure of recording equipment, leaving both suspects and police officers without the protections of a video record. H.B. 16-1117, 2016 70th Gen. Assemb., Reg. Sess. (Colo. 2016); see also Joey Bunch, *Democrats, Republicans Working Together on Colorado Police Reforms*, THE DENVER POST, February 11, 2016, http://www.denverpost.com/news/ci_29506490/democrats-republicans-working-together-colorado-police-reforms.

²⁰³ See e.g., Garret, *supra* note 43, at 1074.

²⁰⁴ Although cases exist of police misconduct (see e.g., the crime scene investigator who planted fabricated evidence that appeared to corroborate a false confession, *Nebraska v. Kofoed*, 283 Neb 767, 817 N.W.2d, 225 [NE 2012], see also Jean Ortiz, *CSI Chief Kofoed Convicted of Evidence Tampering*, LINCOLN JOURNAL STAR, March 23, 2010, http://journalstar.com/news/state-and-regional/nebraska/csi-chief-kofoed-convicted-of-evidence-tampering/article_8cd5cb4c-368c-11df-8531-001cc4c03286.html), the body of scientific literature as reviewed previously suggests that intentional misconduct is not necessary for errors involving confession evidence to lead to miscarriages of justice; see also claims *supra* note 98.

officers to recklessness as well as negligence, and future juries and courts appear likely to face the challenge of unraveling these distinctions. The 10th Circuit in *Sanchez* moved responsibility for these errors to individual police officers, who are now required to recognize the lack of fit between confessions and the evidence, despite the cognitive barriers to this recognition.²⁰⁵ Are we requiring police to meet standards that remain elusive for any human decision maker, particularly decision makers without the benefit of hindsight? Individual officers must navigate this storm. What changes can support police in these complex, high-stakes situations with these conflicting requirements that simultaneously lower the bar for corroboration while increasing risk for individual officers?

V. RECOMMENDATIONS

A. Continuing education

The growing scientific literature suggests several practical recommendations related to continuing education regarding corroboration of confession evidence. First and foremost, education and training for police, forensic investigators, judges, district attorneys, and defense attorneys can improve knowledge about the existence, causes, and consequences of false confessions, the dangers of deception and coercion during interrogations, and the substantial likelihood of contamination, formatting, confirmation biases, and other errors of corroboration. Acknowledging that false confessions exist is a critical first step; even some organizations that have disputed the scientific evidence about false confessions now admit that false confessions exist and that police investigators should be aware of and take steps to reduce these risks.²⁰⁶ Specifically, the growing scientific literature suggests that particular care should be taken with children, suspects with mental illnesses, and suspects with cognitive disabilities (e.g., *Sanchez*), particularly now that police may risk their qualified immunity in part for failure to recognize these issues.²⁰⁷

In particular, additional education for police, investigators, prosecution and defense attorneys, and judges should incorporate the growing scientific findings about the risks and consequences of police deception. As discussed previously, in

²⁰⁵ *Sanchez v. Hartley*, 810 F.3d 750, 757 (10th Cir. 2016).

²⁰⁶ John E. Reid, *False Confessions*, INVESTIGATOR TIP, January-February, 2015, <http://campaign.r20.constantcontact.com/render?ca=0004d1a7-c508-4bbb-90ca-4308d7f90d63&c=1ca3c4e0-4cf9-11e4-9cfc-d4ae528eb27b&ch=1ca831b0-4cf9-11e4-9cfc-d4ae528eb27b>.

²⁰⁷ *Sanchez v. Hartley*, 810 F.3d 750 (10th Cir. 2016); Mitchell, *supra* note 2. Those who train interrogators also recommend caution when interrogating children because “It is well accepted that juvenile suspects are more susceptible to falsely confess than adult suspects,” John E. Reid, *Research Reveals Insight on Juvenile Interrogations and Confessions*, INVESTIGATOR TIP, March-April, 2014, http://www.reid.com/educational_info/r_tips.html?serial=20140301.

archival investigations as well as experimental research, deception is associated with false confession.²⁰⁸ The largest disputes surround deception about evidence.²⁰⁹ There is growing awareness of these concerns from those who train interrogators, who now recommend additional caution with FEPs.²¹⁰ Additionally, as discussed previously, at least some courts are reconsidering the limits of acceptable interrogations tactics, including deception.²¹¹

A larger goal is for police, prosecutors, and judges to remain aware of the effects of human cognitive biases on evaluations of confession evidence, particularly human tendencies to seek confirmation rather than disconfirmation. The findings from the scientific literature suggest that adherence to the trustworthiness standard sets a low bar for corroboration of confession evidence. The risks and potential costs of errors can be tremendous; confession evidence carries too much power to be taken lightly.²¹²

B. Courts and the *corpus delicti* rule

Many of the long term consequences of *LaRosa* remain unknown in Colorado. As discussed previously, any estimate of the number of cases affected by changes in these standards is likely to be fraught with difficulties; prosecutors may decline to prosecute if they perceive difficulties in meeting the requirements of the *corpus delicti* rule or, presumably, the trustworthiness standard.²¹³ Additionally, observers do not know the degree to which this ruling has affected decisions of defense and prosecution attorneys regarding plea bargains, which often rest at least in part on each side's expectations about court outcomes. If district attorneys now feel increased confidence in their ability to meet the Colorado corroboration standard for extra-judicial confessions, we may see an increase in disputed confession cases at trial and in appellate courts. In particular, prosecutors may express increased confidence that they will succeed at trial and at securing effective plea bargains, not simply due to the increased flexibility of the trustworthiness standard but also due to misplaced confidence in corroboration that could be distorted by confession evidence in ways discussed

²⁰⁸ Kassin et al., *supra* note 8.

²⁰⁹ Kassin et al., *supra* note 8; Woody et al., 2011 *supra* note 47; Kassin & Perillo, *supra* note 62.

²¹⁰ John E. Reid, *To Lie or Not to Lie: The Use of Deception During an Interrogation*, INVESTIGATOR TIP, May-June, 2012, [http://reid.com/educational_info/r_tips.html?serial=20120501&print=\[print\]](http://reid.com/educational_info/r_tips.html?serial=20120501&print=[print]).

²¹¹ *People v. Thomas*, 22 N.Y.3d 629, 8 N.E.3d 308, 310 (N.Y. 2014); McKinley, Jr., *supra* note 200.

²¹² Primary costs include consequences to the wrongly convicted individual; secondary costs include dangers to the community, financial costs of the trial and incarceration of a wrongfully convicted defendant, and the loss of credibility for the system as a whole. For a review of primary and secondary costs, see Woody et al., *supra* note 47, at 5–7.

²¹³ Evig, *supra* note 1, at 60.

previously. These decisions would also bring a commensurate increase in risk for police officers.

How have other states handled these questions? State courts have provided a diverse range of opinions regarding arguments in *LaRosa* and corroboration of confessions. With the decision in *LaRosa*, Colorado has joined at least 11 other states across the nation in moving from *corpus delicti* rule to the trustworthiness standard.²¹⁴ Some states, however, have considered the strengths and weaknesses of the *corpus delicti* rule and refused to move to the trustworthiness standard. For example, the Supreme Court of Virginia reviewed *LaRosa* as well as related cases and decided to retain the *corpus delicti* rule.²¹⁵ In Texas, an appellate court noted the Colorado Supreme Court's reasoning in *LaRosa*, but decided to retain the *corpus delicti* rule.²¹⁶ As a third option, some states, including Tennessee, New Jersey, and New Mexico, have moved to a modified trustworthiness standard that preserves some elements of the *corpus delicti* rule.²¹⁷ The Supreme Court of Tennessee reviewed arguments in *LaRosa* and promoted the modified trustworthiness standard that includes, in cases with "tangible injury," a requirement that the state present independent evidence to support the trustworthiness of the defendant's statements and "independent prima facie evidence that the injury actually occurred."²¹⁸ Across jurisdictions, courts have provided several distinct legal analyses of corroboration requirements.²¹⁹ Although the concerns raised by the Colorado Supreme Court in *LaRosa* have inspired some courts, others have remained unmoved or reaffirmed their commitment to the *corpus delicti* rule.²²⁰ Should the Colorado Supreme Court or other courts in the 10th Circuit jurisdiction revisit this issue, many options exist for revision.

C. Forensic analyses

States should adopt revised forensic testing protocols to ensure that forensic examiners are blind to the identities of the suspects and/or confessors.

²¹⁴ State of Tennessee v. Bishop, 431 S.W. 3d 22 (Tenn. 2014); see also Utah, *State v. Mauchley*, 67 P.3d 477 (Utah 2003); Fontenot v. State, 881 P.2d 69 (Okla. Crim. App. 1994); Evig, *supra* note 1, at 63 n. 57.

²¹⁵ Allen v. Commonwealth of Virginia, 752 S.E. 2d 856 (Va. 2014).

²¹⁶ Carrizales v. Texas, 414 S.W. 3d 737 (Tex. Ct. Crim. App. 2013).

²¹⁷ State of Tennessee v. Bishop, 431 S.W. 3d 22; State v. Reddish, 181 N.J. 553, 859 A.2d 1173 (N.J. 2004); State of New Mexico v. Wilson, 149 NM 273, 2011-NMSC-001, 248 P.3d 315 (NM 2010).

²¹⁸ State of Tennessee v. Bishop, 431 S.W. 3d 22 at 59.

²¹⁹ Allen v. Commonwealth of Virginia, 752 S.E. 2d 856 at 859; State v. Reddish, 181 N.J. 553, 859 A.2d 1173 (N.J. 2004); State of New Mexico v. Wilson, 149 NM 273, 2011-NMSC-001, 248 P.3d 315 (NM 2010); Carrizales v. Texas, 414 S.W. 3d 737 (Tex. Ct. Crim. App. 2013).

²²⁰ State of Tennessee v. Bishop, 431 S.W. 3d 22; State v. Dern, 362 P.3d 566 (Kan. 2015); Allen v. Commonwealth of Virginia, 752 S.E. 2d 856; Carrizales v. Texas, 414 S.W. 3d 737 (Tex. Ct. Crim. App. 2013).

As the recent report about FBI biases has demonstrated, forensic analysts often bring biased evaluations of evidence to trial.²²¹ Perhaps more importantly, rather than random error or evenly distributed biases (i.e., in favor of both the prosecution and the defense), forensic analysts, likely unintentionally, have systematically distorted their hair analyses overwhelmingly in favor of the prosecution.²²² These biases are preventable. Blind testing protocols, in which the evaluator does not know the origin or identities of the samples, are standard across scientific disciplines.²²³ They emerged because scientists, as motivated reasoners who want to be right, struggle to separate their own motives from their analyses.²²⁴ Many have proposed these reforms for forensic evaluations.²²⁵ In several jurisdictions these reforms are already in place for eyewitness identification procedures, and blind eyewitness lineup administrators are specified in legislation signed into Colorado law in April 2015.²²⁶ In addition to these scientific and legal reasons to utilize blind testing procedures, these procedures would allow prosecutors, police investigators, and forensic analysts to refute at trial any allegations of biased forensic procedures.²²⁷ These ongoing biases, however, persist and confound the difficulties involved in corroboration of confession evidence.

²²¹ Cates et al., *supra* note 125.

²²² *Id.* ¶ 3.

²²³ BARRY H. KANTOWITZ ET AL., EXPERIMENTAL PSYCHOLOGY (10th ed.).

²²⁴ Examples of motivated reasoning abound across scientific disciplines. The present author is most familiar with these errors across the history of psychology. Some of the most egregious examples of historical motivated reasoning in science came from the early days of intelligence testing; simply stated, White researchers saw evidence of White superiority, even when such evidence did not exist or was contradicted by researchers' own findings. See GOULD, MISMEASURE OF MAN; DEFINING DIFFERENCE: RACE AND RACISM IN THE HISTORY OF PSYCHOLOGY (Andrew S. Winston ed., 1981); WILLIAM DOUGLAS WOODY ET AL., A BRIEF HISTORY OF THE PSYCHOLOGY OF PREJUDICE, IN PSYCHOL. SPECIALTIES IN HIST. CONTEXT: ENRICHING THE CLASSROOM EXPERIENCE FOR TEACHERS AND STUDENTS, 302–323 (William Douglas Woody et al. eds. 2016).

²²⁵ For example, see the American Statistical Association, *ASA Board Policy Statement on Forensic Science Reform* (April 17, 2010).

²²⁶ S.B. 15-058 69th Gen. Assemb., Reg. Sess. (Colo. 2015); see also BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 267 (2011). Requiring blind investigators has long been recognized as a critical reform of eyewitness identification procedures. See e.g., Gary Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photo Spreads*, 22 L. & HUM. BEH. 603, 627 (1998).

²²⁷ For example, a forensic analyst under cross examination by a defense attorney could acknowledge typical practice of nonblind testing and the high prevalence of bias in forensic examinations but then present the modified, blind testing protocols that eliminate the potential of bias. The use of blind testing protocols to identify a defendant may increase jurors' confidence in the defendant's guilt and may improve the public's perceptions of the fairness of the criminal justice system, although no known experimental research has yet evaluated these questions.

D. Mandatory video-recording

Legislative mandates to video-record all interrogations in their entirety can provide several important protections to suspects, police officers, attorneys, and courts.²²⁸ A complete video-recording can verify an officer's testimony and increase his or her credibility, and it can also demonstrate that the officer used accurate and thorough methods for collecting evidence in the interrogation room and that the officer is committed to preservation of the evidence in "its most unbiased and unadulterated form."²²⁹ Importantly, a video-recording can protect police investigators from spurious claims of coercion during interrogation and allow police supervisors to evaluate performance of officers and to improve training procedures.²³⁰

Video-recordings also benefit trial attorneys. Even if the video-recordings do not show materials that facilitate a victory for the prosecution, the recordings can help prosecutors prepare for potential suppression hearings, trials, or plea bargains.²³¹ Additionally, a video-recording, unlike an officer's handwritten notes, can allow a complete review of interrogation tactics, including potential deception in general as well as potential FEPs,²³² can enable defense attorneys to prepare for suppression hearings, trial, or plea bargains, and may reveal suspect vulnerabilities or interrogation tactics that provide justification for introducing an expert witness.²³³ A lesser-known benefit for defense attorneys is what the FBI authors called "'client control,' cutting through [potential] inconsistencies told to the representing attorneys about what actually occurred" during the interrogation.²³⁴

Video-recordings also benefit individual suspects and defendants, the public at large, and the criminal justice system as a whole. The most obvious benefits to individual suspects and defendants include potential evidence of coercion or involuntary confession, evidence of contamination and formatting that would

²²⁸ Boetig et al, *Revealing Incommunicado Electronic Recording of Police Interrogations*, 75 FBI L. ENFORCEMENT BULL. (2006).

²²⁹ *Id* at 6.

²³⁰ *Id* at 8.

²³¹ Boetig et al., *supra* note 228, at 6–7.

²³² Krista D. Forrest & William Douglas Woody, *Police Deception During Interrogation and Its Surprising Influence on Jurors' Perceptions of Confession Evidence*, 22 THE JURY EXPERT 9, 14 (2010); Krista D. Forrest & William Douglas Woody, *Research and Practice Surrounding Jurors' Perceptions of Police Deception and Confession Evidence: A Reply to Wallace and Kellerman* 22 THE JURY EXPERT 26 (2010).

²³³ Clarence Watson et al., *False Confessions, Expert Testimony, and Admissibility*, 38 J. OF THE AM. ACAD. OF PSYCHIATRY & THE L. 174 (2010); SOLOMON M. FULERO, TALES FROM THE FRONT: EXPERT TESTIMONY ON THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS REVISITED, POLICE INTERROGATION & FALSE CONFESSIONS: CURRENT RESEARCH, PRAC., AND POL'Y 211–223 (G. Daniel Lassiter & Christian A. Meissner eds., 2010).

²³⁴ Boetig et al., *supra* note 228, at 7.

otherwise be unavailable, and evidence of deception.²³⁵ Additionally, experts who testify about the psychology of interrogation and confession often rely on video-recordings to evaluate the interrogation and confession, and the testimony of experts affects jurors' perceptions, jurors' individual decisions, the decisions of deliberating juries, and the decisions of trial judges.²³⁶ The larger public also benefits from video-recordings of interrogations in their entirety. Not only does transparency in general benefit law enforcement, but complete video-recordings demonstrate to the public that police are taking transparent steps to engage in responsible investigations.²³⁷ These general benefits for the public and the criminal justice system may be particularly important in the current climate of police and community relations.

Despite the enthusiasm of many advocates of interrogations for video-recording,²³⁸ this method is not sufficient to protect suspects and police officers. As a recent review demonstrated, twenty-two of thirty-eight documented false confessions were video-recorded, and the recordings did not prevent miscarriages of justice.²³⁹ For video-recordings to prevent miscarriages of justice, recordings need to be used in combination with other procedures. Alongside video-recording mandates must come additional training for police about the recognition of vulnerable suspects and the interrogation of these suspects. Other reforms are also necessary, including careful consideration of interrogation tactics and, to the degree possible through blind forensic testing and other reforms, reduction of investigatory biases in general and confirmation biases in particular. Additionally, video-recordings are required for evaluation of voluntariness and for any proposed hearing related to reliability of confession evidence, as discussed subsequently.

E. Legal changes

Several legal factors make inclusion of coerced or false confession evidence more likely at trial, and legislation can address many of these factors. First, higher standards of proof in voluntariness hearings could reduce the likelihood of admission of false confessions to trial along with resultant mistaken convictions.²⁴⁰ Second, reliability hearings rather than voluntariness hearings could reshape evaluations of confession evidence in Colorado and across the 10th Circuit. As

²³⁵ Garrett, *supra* note 45; Kassir et al., *supra* note 8.

²³⁶ Woody & Forrest, *supra* note 104, at 348–349; Woody et al., *supra* note 142; Woody et al., *supra* note 170.

²³⁷ Boetig et al., *supra* note 228, at 7.

²³⁸ Kassir et al., *supra* note 8; G. Daniel Lassiter et al., Videotaping Custodial Interrogations: Toward a Scientifically Based Policy, in *Police Interrogation and False Confessions: Current Research, Practice, and Policy* 143–160 (G. Daniel Lassiter & Christian A. Meissner eds., 2010); Gudjonsson, *supra* note 47; Kassir & Gudjonsson, *supra* note 47.

²³⁹ Garrett, *supra* note 45, at 1079.

²⁴⁰ Pepson & Sharifi, *supra* note 141.

noted previously, *Miranda* provides only limited protection, and suppression hearings focus almost exclusively on voluntariness. Additionally, the low standard of proof leads to the high likelihood of confessions being admitted to trial, where jurors and judges provide only limited protections for defendants. Some have called for reliability hearings in addition to a separate voluntariness hearing to evaluate disputed confession evidence²⁴¹ and for the use of the Ofshe-Leo Test described previously to evaluate the reliability of disputed confessions.²⁴² More recently, scholars have proposed a series of specific procedures, including model statutory language.²⁴³ From their model language, they argue that it would be “the rare case—perhaps a case built exclusively on a confession, with little or no corroboration, and evidence of errors and contamination—that will lead a trial court to exclude a confession.”²⁴⁴ Any evaluation of reliability rests on the existence of a complete video-recording;²⁴⁵ therefore, reliability hearings, as well as any review of corroboration and potential contamination, must function concurrently with a requirement for video-recording complete interrogations.

VI. CONCLUSIONS

Recent changes in Colorado law, in particular the move from the *corpus delicti* rule to the trustworthiness standard and the removal of qualified immunity from police officers who accepted a confession that did not fit the evidence, have raised the stakes for the ways that officers evaluate confession evidence. These changes interact with other difficulties related to confession evidence, particularly the issues of contamination and formatting as well as the ways that confession evidence impacts forensic investigations and legal decisions. The scientific evidence consistently demonstrates that the biggest challenge to the accurate corroboration of a confession is the existence of confession itself. A confession affects observers, their perceptions of the suspect, and their perceptions of the other evidence. As one prominent scholar argued, “false confessions, once taken, arouse a strong inference of guilt, thereby unleashing a chain of confirmation biases that make the consequences difficult to overcome despite innocence.”²⁴⁶ These concerns justify consideration of important changes in Colorado law as well as states across the 10th Circuit, including continuing education, mandatory videotaping, a more rigorous standard of proof for voluntariness hearings, and optional reliability hearings in cases with disputed confessions. Our quest for corroboration should go beyond the legal minimum, and we must move to protect both suspects and law enforcement personnel.

²⁴¹ Leo et al., *supra* note 8, at 520.

²⁴² *Id.* at 520–535.

²⁴³ Leo et al., *supra* note 45, at 792–837.

²⁴⁴ *Id.* at 807.

²⁴⁵ *Id.* at 770.

²⁴⁶ Kassin, *supra* note 44, at 411.