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Interrogated with Intellectual Disabilities: The Risks of False Confession

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NOTE

Interrogated with Intellectual Disabilities: The Risks of False Confession

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Abstract. False confessions happen. At least 245 people have been exonerated from convictions in cases featuring confessions that were simply not true. Confessions offer a narrative that allows law enforcement, and society in general, to neatly resolve cases with apparent clarity and closure. And yet the pressures officers place on suspects to provide that closure weigh disproportionately on the vulnerable, including individuals with intellectual disabilities. These individuals are disadvantaged at every step of the custodial interrogation, and they face heightened risks of falsely confessing. Moreover, the principal judicial safeguards against false confessions—assessing a suspect's *Miranda* waiver and determining whether a confession was voluntarily given within the bounds of the Fourteenth Amendment's Due Process Clause—provide little protection for the innocent with intellectual disabilities.

Few pieces of scholarship focus specifically on the heightened risks faced by individuals with intellectual disabilities throughout the process of police interrogation. This Note describes the various ways these individuals are disadvantaged. And it offers an additional data point illustrating the vulnerability of people with intellectual disabilities. This Note analyzes the 245 individuals (as of June 2, 2017) on the National Registry of Exonerations who have falsely confessed. Over one-quarter of them display indicia of intellectual disability. This percentage dwarfs the prevalence of people with intellectual disabilities in the general population and even exceeds most estimates of the proportion of the prison population suffering from intellectual disabilities. This Note concludes with several policy and doctrinal suggestions to better protect individuals with intellectual disabilities from the risks of false confession.

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Introduction

People falsely confess. It is a fact of the criminal justice system proved time and again. As of June 2, 2017, the National Registry of Exonerations (NRE) had identified 245 individuals exonerated from convictions in cases featuring false confessions.[1] These individuals served an average of twelve years for crimes they did not commit.[2] To the average juror—who cannot fathom an innocent person ever confessing to a crime[3]—these individuals may not be sympathetic. But though scholars have struggled to extrapolate an estimate of the frequency of false confessions in the general criminal justice system, there is a consensus that these 245 proven false confessions are "only the tip of a much larger iceberg."[4]

For individuals with intellectual disabilities, the risks of false confession are likely even greater. Police interrogation tactics, which are known to elicit false confessions from typical suspects, pose heightened risks for individuals with these disabilities. There are few safeguards for these vulnerable suspects in the confines of custodial interrogation. And the principal means of judicial oversight are inadequate to protect these suspects from wrongful conviction.

This Note sets out to accomplish several related tasks. It brings together strands of scholarship from various fields. Few works have focused specifically on the heightened risks facing individuals with intellectual disabilities in the context of police interrogations. This Note reviews the exhaustive literature on confessions, false confessions, and wrongful convictions and passes these insights through the lens of psychological scholarship on intellectual

1. *See* Samson J. Schatz, Analysis of False Confessors in the National Registry of Exonerations (2018), https://perma.cc/XDV3-TEPH [hereinafter Data Supplement] (to access the data in Excel format, click "View the live page") (collecting all individuals listed on the NRE as of June 2, 2017 whose convictions were based, at least in part, on a false confession); *see also Contributing Factors and Type of Crime*, NAT'L REGISTRY EXONERATIONS, https://perma.cc/HEE7-MR2C (archived Jan. 16, 2018). For each exoneree, the NRE data included basic demographic and case details. I then researched each exoneree's individual files—including NRE notes, case files, and news reports—to search for various indicia of intellectual disability.

2. Data Supplement, *supra* note 1.

3. *See* Saul M. Kassin & Katherine Neumann, *On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis*, 21 LAW & HUM. BEHAV. 469, 482 (1997) ("[P]eople find it difficult to believe that anyone would confess to a crime he or she did not commit.").

4. Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 921 (2004); *accord* RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 247-48 (2008); Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 3 (2010). Indeed, while I performed my analysis as of June 2, 2017, as of the time this Note went to print the NRE showed 263 exonerations in cases featuring false confessions. *See Contributing Factors and Type of Crime*, *supra* note 1.

disabilities. In part, this Note follows the model set forth by Barry Feld in *Kids, Cops, and Confessions: Inside the Interrogation Room*, which brought similar strands of scholarship together to study the experiences of youths—another vulnerable group—in police interrogations.[5]

This Note identifies the heightened risks faced by individuals with intellectual disabilities at the various steps of a police interrogation. There are two critical stages: the custodial interrogation itself, where the false confession occurs and is developed; and the post-hoc judicial assessment of the interrogation and confession. These two stages can be further dissected into specific parts. The custodial interrogation consists of (1) the officer's first impression of a suspect; (2) the *Miranda* waiver; (3) the preadmission interrogation, in which the police employ various strategies to get a suspect to admit she "did it"; and (4) the postadmission development of a fluid narrative of guilt. The judicial assessment stage can also be divided between two separate constitutional doctrines: (1) the court determines whether the *Miranda* warning was properly given and the suspect's rights properly waived; and (2) the court analyzes whether the confession itself comports with the requirements of the Fourteenth Amendment's Due Process Clause.[6] At each step, both during and following the interrogation, individuals with intellectual disabilities are disadvantaged. They face heightened risks of falsely confessing and having those confessions used against them in court or during plea negotiations.

Having identified the particular stages throughout the interrogation process in which individuals with intellectual disabilities are especially vulnerable, this Note adds one further empirical measure of these risks. It works with one of the largest datasets of proven false confessors to date[7]—245 individuals from the NRE database.[8] With this compilation, this Note sets out to make two modest contributions. First, it looks at those who have falsely confessed in the NRE database and identifies individuals who demonstrate indicia of intellectual disability. This analysis reveals that individuals displaying characteristics linked to intellectual disabilities represent more than

5. *See generally* BARRY C. FELD, KIDS, COPS, AND CONFESSIONS: INSIDE THE INTERROGATION ROOM (2013).

6. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .").

7. *Cf., e.g.*, Drizin & Leo, *supra* note 4, at 951 (analyzing a dataset of 125 proven false confessors); Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1059 (2010) (studying 40 exonerees); Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 472 & tbl.B1 (1998) (compiling a dataset of 60 cases).

8. *See* Data Supplement, *supra* note 1.

one-quarter (25.7%) of those who have falsely confessed.[9] This figure is larger than estimates of intellectual disabilities in the general population (1-3%) and even the prison population (anywhere from 4% to 19.5%).[10] Furthermore, this Note seeks to provide a rough methodology for identifying indicia of intellectual disability within the larger NRE database. Hopefully future papers will continue the project of identifying these indicia and determining the prevalence of intellectual disabilities in the larger population of exonerees.

Part I discusses the general role that confessions play in the criminal justice system. I briefly describe the types of false confessions and why they occur. Part II defines the terminology of intellectual disabilities and reviews why individuals with intellectual disabilities are particularly vulnerable to police interrogations. Part III examines how these characteristics expose those individuals to risks at each stage of the interrogation process. Part IV presents new evidence supporting the assertion that individuals with intellectual disabilities face heightened risks of falsely confessing. Finally, I conclude by surveying possible policy and legal reforms to address these problems.

I. Confessions and False Confessions

A. Confessions in the Criminal Justice System

Confessions are unique and powerful evidence. In his dissent in *Colorado v. Connelly*, Justice Brennan recognized that factfinders place "such heavy weight" on confessions "in their determinations that 'the introduction of a confession makes the other aspects of a trial in court superfluous, and the real trial, for all practical purposes, occurs when the confession is obtained.'"[11] Research has proved Justice Brennan's concerns valid. Actors in the criminal justice system—law enforcement officers, prosecutors, judges, jurors, and even defense attorneys—struggle to overcome the presumption that confessions are true and confessors guilty.[12] Suspects who confess are treated more harshly at every

9. *See id.*; *infra* Part IV. False confessions are by no means a problem only for people with intellectual disabilities. The vast majority of suspects (nearly 75%) who falsely confess are not intellectually disabled, though some segment of this majority does include vulnerable individuals of other categories (e.g., youths and individuals with mental illnesses). While the exact percentage of individuals showing no obvious sign of vulnerability is beyond the scope of this Note, a rough calculation shows that 34.7% of the false confessor population in the NRE database is both twenty-one years old or older and shows no sign of mental disability or illness.

10. *See infra* notes 306-08 and accompanying text.

11. 479 U.S. 157, 182 (1986) (Brennan, J., dissenting) (quoting EDWARD W. CLEARY ET AL., MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE 316 (2d ed. 1972)).

12. *See, e.g.*, Richard A. Leo & Deborah Davis, *From False Confession to Wrongful Conviction: Seven Psychological Processes*, 38 J. PSYCHIATRY & L. 9, 19-24 (2010) (detailing how *footnote continued on next page*

stage of the investigative and trial process.[13] The vigor with which police pursue confessions and the persuasiveness of confessions as evidence render false confessions extremely fateful errors.

Admission of guilt can come in several flavors. When a suspect admits to all the elements of a crime, the admission constitutes a full confession.[14] When the suspect admits to some but not all elements of a crime (if, for example, he admits to being present during the crime but not participating in it), this is a partial admission.[15] Researchers estimate anywhere from 42% to 76% of suspects give some form of confession or admission.[16] And most admissions occur during custodial interrogations.[17]

Most people assume that confessions, "by [their] very nature," are true.[18] The existence of a confession in a case tends to strongly bias the perceptions and factfinding of judges and juries.[19] Researchers have demonstrated that mock jurors find confession evidence more incriminating than other types of evidence.[20] And even when the jurors viewed the confessions as coerced, they nevertheless believed them to be true.[21] These studies indicate that to some

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confessions "set[] in motion a seemingly irrefutable presumption of guilt" at all stages of the investigation and trial).

13. *See* Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 298-99, 299 tbl.16 (1996) (analyzing the effect of a suspect's providing incriminating statements on likelihood of charging, dismissal, plea bargaining, and conviction, as well as on severity of sentence).

14. *See, e.g.*, *id.* at 280 (coding suspects' responses to interrogation).

15. *See* GISLI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS: A HANDBOOK 154 (Graham Davies & Ray Bull eds., 2003) (discussing "partial and limited confession[s]"); *see also infra* Part III.A.4 (discussing the distinction between an admission and a full confession).

16. GUDJONSSON, *supra* note 15, at 137 tbl.6.1 (collecting studies). Richard Leo's observational study of 182 suspects showed that 42% of suspects fully confessed (24.2%) or partially admitted (17.6%) to a crime. Leo, *supra* note 13, at 280 tbl.7.

17. *See* GUDJONSSON, *supra* note 15, at 134.

18. Leo & Davis, *supra* note 12, at 19.

19. *See id.*

20. *See, e.g.*, Kassin & Neumann, *supra* note 3, at 476, 479, 481.

21. Saul M. Kassin & Holly Sukel, *Coerced Confessions and the Jury: An Experimental Test of the "Harmless Error" Rule*, 21 LAW & HUM. BEHAV. 27, 42 (1997) (finding that mock jurors "did not sufficiently discount a defendant's confession in reaching a verdict—even when they saw the confession as coerced, even when the judge ruled the confession inadmissible, and even when participants said that it did not influence their decision-making"). Both 1997 studies—Kassin and Neumann as well as Kassin and Sukel—were conducted in reaction to a portion of Chief Justice Rehnquist's opinion in *Arizona v. Fulminante*, 499 U.S. 279 (1991), holding for a majority of the Court that admission of an involuntary confession into evidence was governed by the harmless error standard, *id.* at 312. *See* Kassin & Sukel, *supra*, at 29-30; Kassin & Neumann, *supra* note 3, at 470.

extent, "[m]ost Americans simply accept confession evidence at face value."[22] Judges are no exception: They tend to presume that confessors are guilty, and they only rarely suppress confession evidence.[23]

Even defense attorneys are affected by the confessions of their clients. For example, studies show that defense attorneys put greater pressure on clients who have confessed to accept guilty pleas to lesser charges.[24] Defense attorneys, like everyone else, may reflexively presume that clients who confess are guilty. Or it may be that they realize what the Supreme Court of California recognized: that a "confession operates as a kind of evidentiary bombshell which shatters the defense."[25] In that case, defense attorneys know that pleading guilty may simply be the best strategy.

The case of Danial Williams provides an extreme example of the distortive effect a confession can have on an individual's counsel. Danial was arrested and convicted for rape and murder.[26] Though DNA evidence excluded him as the rapist, Williams falsely confessed after more than twelve hours of interrogation.[27] When Williams asserted his innocence after the interrogation, his lawyers called him "Denial" to his face—even once at a court hearing.[28] Williams's lawyers convinced him to plead guilty, and they never challenged the admissibility of the confession at the suppression hearing.[29]

Law enforcement officers also intuitively trust confessions.[30] Police officers tend to believe that their interrogations cannot yield anything but a true confession; more often, they worry that too many *guilty* people escape punishment.[31]

But beyond the intuitive belief that confessions are true, law enforcement officers are incentivized to pursue confessions from suspects. For example, confessions are persuasive evidence even in the absence of, or contrary to,

22. Leo & Davis, *supra* note 12, at 25.

23. *See id.* at 24-25.

24. *See id.* at 23-24 (citing PETER F. NARDULLI ET AL., THE TENOR OF JUSTICE: CRIMINAL COURTS AND THE GUILTY PLEA PROCESS (1988)).

25. People v. Cahill, 853 P.2d 1037, 1050 (Cal. 1993) (quoting People v. Schader, 401 P.2d 665, 674 (Cal. 1965), *overruled on other grounds by Cahill*, 853 P.2d 1037).

26. *See* Leo & Davis, *supra* note 12, at 10.

27. *Id.* at 14-15.

28. *See id.* at 24.

29. *Id.* at 18, 24. Rhea Williams, Danial's mother, also described the lawyers' efforts to persuade Danial to plead guilty. *See* Parties' Joint Stipulations of Fact ¶ 287, Dick v. Brown, No. 3:10-cv-00505-JAG (E.D. Va. Apr. 6, 2015).

30. FELD, *supra* note 5, at 235 ("Neither professionals nor laypeople can readily distinguish between true and false confessions.").

31. *See* LEO, *supra* note 4, at 21.

other evidence.[32] Confessions also allow police to "clear" crimes—close the file, classify it as solved by arrest, and cease chasing down other leads—which is the metric by which police departments often evaluate and reward their officers.[33] This yields efficiencies for the department: Once a suspect confesses, the evidence is considered so damning it will almost always lead to a conviction or, more often, a guilty plea.[34] Furthermore, confessions allow police to clear crimes with an authoritative and seemingly unimpeachable narrative of the crime. As discussed below, police generally do not just elicit an "I did it" statement; they work the suspect to develop a "full confession," a thorough and logical narrative.[35] This provides closure for the department, the community, the media, politicians, and the victims.[36]

These incentives reinforce the vicious loop created by introducing confessions into the criminal justice system. Because people intuitively believe confessions, police actively seek them, using psychologically coercive tactics to elicit admissions.[37] But also, because police use confessions to close cases neatly, efficiently, and often, the public might take these cues as suggestive of their validity. It is this dangerous cycle that the Supreme Court warned against when it wrote that it had "learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation."[38]

Counterintuitively, however, suspects receive no benefits from confessing. One might expect that suspects are induced to confess through promises of leniency or sentencing reductions, but these advantages do not seem to

32. *See id.* at 29-30; Kassin & Neumann, *supra* note 3, at 479; *see also* Sara C. Appleby et al., *Police-Induced Confessions: An Empirical Analysis of Their Content and Impact*, 19 PSYCHOL. CRIME & L. 111, 124 (2013) (showing that simple admissions of guilt, even when later retracted, yielded higher conviction rates as compared to a no-confession control group).

33. *See* LEO, *supra* note 4, at 30.

34. *See id.*

35. *See infra* Part III.A.4.

36. *See* LEO, *supra* note 4, at 30 (noting that confessions do what "virtually no other type of evidence can do as authoritatively: provide a narrative account of the crime . . . , thus providing social closure for victims and others").

37. *See infra* Part III.A.3.

38. Escobedo v. Illinois, 378 U.S. 478, 488-89, 492 (1964) (footnote omitted) (recognizing, before the Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), that if a suspect requests to consult with his lawyer during an interrogation, it is unconstitutional for the police to deny him counsel).

materialize.[39] Once a suspect has confessed, prosecutors tend to charge him with the most severe and greatest number of offenses, request high bail amounts, and negotiate plea bargains from a strong position of power.[40] Beyond the prosecutor, a defendant who has confessed will be treated more harshly at "every stage" of the investigative and trial process.[41] In general, "[c]onfession evidence . . . tends to define the case against a defendant, usually overriding any contradictory information or evidence of innocence."[42]

B. The Problem of False Confessions

As illustrated above, "[c]onfessions are the most incriminating and persuasive evidence of guilt that the state can bring against a defendant."[43] Therefore, Richard Leo—a preeminent scholar of police interrogations and an oft-consulted expert in false confession cases[44]—deduces that false confessions are the "most incriminating and persuasive *false* evidence of guilt that the state can bring against an *innocent* defendant."[45] False confessions are dangerous because—as noted above—people intuitively believe them.[46] Relatedly, the public does not believe that innocent people falsely confess.[47] This disbelief partially stems from a commonsense question: "Why do the innocent confess to crimes that carry lengthy prison sentences, life imprisonment or execution?"[48] Suspects do not generally premeditate their false confessions, however. False confessions occur, in part, because (1) police, prosecutors, judges, jurors, and defendants themselves are not sufficiently aware they *can* happen and therefore do not take steps to protect against them; and (2) police interrogation tactics are *designed* to elicit confessions.

39. *See* LEO, *supra* note 4, at 31 ("[T]he pre-plea bargaining practices of American interrogation offer the suspect no benefit (no charge or sentence reductions) in exchange for his admission of guilt.").

40. *See id.* at 250.

41. Leo, *supra* note 13, at 298.

42. Leo & Davis, *supra* note 12, at 19.

43. LEO, *supra* note 4, at 248.

44. *See Richard A. Leo*, U.S.F. SCH. L., https://perma.cc/3UZT-MVRM (archived Dec. 6, 2017).

45. LEO, *supra* note 4, at 248.

46. *See supra* text accompanying notes 22-23.

47. *See* LEO, *supra* note 4, at 196.

48. Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 981 (1997). In fact, there is reason to believe that false confessions, and in general wrongful convictions, are *more* likely in cases involving murder or rape because of the intense pressure to solve these crimes. *See* Samuel R. Gross et al., *Exonerations in the United States: 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 532 (2005) (discussing the "extraordinary pressure to secure convictions for heinous crimes").

Many subscribe to what Leo calls the "myth of psychological interrogation"—the idea that innocent people do not confess to crimes unless they are brutally tortured or mentally ill.[49] A survey of jury-eligible individuals revealed that even when they recognized certain police techniques as coercive, they did not believe that those techniques could lead to false confessions.[50] Police officers and prosecutors also do not believe that innocent people confess.[51]

The sibling of the myth of psychological interrogation is the myth that jurors, judges, or police officers can determine when someone is lying. The assumption that people can somewhat accurately judge whether a person is credible is foundational to the U.S. rules of evidence and essential to the constitutional preference for in-court testimony. The extensive rules of hearsay and the Sixth Amendment right to confront witnesses in a criminal proceeding are based at least in part on the notion that we can tell, in person, when people are lying or not.[52] Social scientists, however, have called this principle into question. Humans make poor lie detectors: Most people are not able to tell whether an individual is lying or telling the truth much better than if they were to flip a coin to decide.[53]

A suspect's innocence may, in fact, make her vulnerable to interrogations because an innocent suspect may be overconfident in the justice system.[54] She may not believe there is any risk of falsely confessing[55] and may think that regardless of what she says, "truth and justice will prevail."[56] In addition, an innocent person may be less strategic in her interactions with the police.[57] For

49. LEO, *supra* note 4, at 196 (emphasis omitted).

50. Richard A. Leo & Brittany Liu, *What Do Potential Jurors Know About Police Interrogation Techniques and False Confessions?*, 27 BEHAV. SCI. & L. 381, 384, 395 (2009).

51. *See* LEO, *supra* note 4, at 197.

52. *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."); FED. R. EVID. 802 (prohibiting hearsay subject to certain exceptions); Crawford v. Washington, 541 U.S. 36, 62 (2004) (articulating the modern Sixth Amendment Confrontation Clause doctrine and defining the purpose of the right to cross-examine witnesses as ferreting out the truth face-to-face); 5 WEINSTEIN'S FEDERAL EVIDENCE § 802.02[3] (LexisNexis 2017).

53. Charles F. Bond, Jr. & Bella M. DePaulo, *Accuracy of Deception Judgments*, 10 PERSONALITY & SOC. PSYCHOL. REV. 214, 219 (2006) (finding a mean percentage of "correct lie-truth classifications" of approximately 54% in 292 samples).

54. *See* Saul M. Kassin, *False Confessions: Causes, Consequences, and Implications for Reform*, 1 POL'Y INSIGHTS FROM BEHAV. & BRAIN SCI. 112, 116 (2014).

55. *See id.*; *cf.* LEO, *supra* note 4, at 197 ("[M]ost people cannot imagine that they themselves would falsely confess, especially to a serious crime.").

56. Kassin, *supra* note 54, at 116.

57. *Id.*

example, she is more likely to waive her *Miranda* rights given the belief that she has nothing to hide.[58]

Indeed, scholars have proved that innocent test subjects do confess. For example, in the oft-cited keystroke experiment, subjects were accused of crashing the test computer by hitting a forbidden "Alt" key.[59] None of the subjects had actually hit the button, yet 69% of them signed a confession admitting to hitting the key.[60]

False confessions certainly occur outside research settings too. Around 12% (245) of the 2040 exonerees identified by the NRE falsely confessed.[61] The Innocence Project reports that 101 of the 353 individuals exonerated by postconviction DNA testing falsely confessed (about 29%).[62] Other researchers have documented numerous false confessions that have either not led to convictions or not resulted in technical "exonerations"[63]—that is, the recognition of a convicted person's factual innocence or nonculpability through appellate, collateral, or habeas review, executive pardon, or some other official governmental process.[64]

58. Saul M. Kassin & Rebecca J. Norwick, *Why People Waive Their* Miranda *Rights: The Power of Innocence*, 28 LAW & HUM. BEHAV. 211, 217-18 (2004).

59. Kassin et al., *supra* note 4, at 17 (citing Saul M. Kassin & Katherine L. Kiechel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 PSYCHOL. SCI. 125, 125-28 (1996)).

60. Kassin & Kiechel, *supra* note 59, at 125-27; *see also* Julia Shaw & Stephen Porter, *Constructing Rich False Memories of Committing Crime*, 26 PSYCHOL. SCI. 291, 292, 296 (2015) (reporting the results of a study in which the researchers convinced 70% of participants that earlier in life, they had been involved in a criminal event that resulted in police contact, when that event never actually happened).

61. Data Supplement, *supra* note 1.

62. *Featured Cases*, INNOCENCE PROJECT, https://perma.cc/Y8UK-R7Q3 (archived Dec. 28, 2017) (filtering database by "False Confessions or Admissions" under "Contributing Causes of Conviction"). The Innocence Project and NRE lists are not mutually exclusive.

63. Leo and Ofshe identified sixty cases of alleged police-coerced false confessions, just over half of which did not result in conviction. Leo & Ofshe, *supra* note 7, at 435, 473. Drizin and Leo compiled a list of 125 false confessors, which includes individuals who were not convicted and some who were not technically exonerated. *See* Drizin & Leo, *supra* note 4, at 951-52. These lists, too, are not mutually exclusive.

64. *See Glossary*, NAT'L REGISTRY OF EXONERATIONS, https://perma.cc/T7D8-K85A (archived Dec. 7, 2017) (defining "exoneration"). This technical definition can be limiting. For example, though the Norfolk Four were widely recognized as wrongfully convicted, until recently only one of the four men was officially exonerated. The remaining three were granted "conditional pardons," which released them from prison but maintained their felony convictions and required them to register as sex offenders. *See* Wilson v. Flaherty, 689 F.3d 332, 334 (4th Cir. 2012). Thus, their lack of a full pardon barred them from official "exoneration" status.

There are reasons to believe that known and documented cases of false confessions are only the "tip of the iceberg."[65] But it is nearly impossible to determine the frequency of false confessions in the criminal justice system. In part, this stems from the lack of a universal database of police interrogations. Another challenge is the relative difficulty of conclusively verifying a confession as false. This Note focuses on individuals whose confessions were proved false through legal exoneration, but outside this population, determinations of falsity are less certain. For that reason, most false confessions go unreported by the media and are therefore unnoticed by researchers.[66] This of course feeds back into the general lack of awareness or disbelief, noted above, that false confessions actually occur.

Regardless of how often false confessions occur, when they are secured and introduced at trial, the defendant has a very high chance of being wrongfully convicted, even when the confession resulted from questionable interrogation tactics and is not supported by other evidence.[67] Leo and Ofshe showed that 73% of the thirty defendants they studied who had falsely confessed and whose cases went to trial were erroneously convicted.[68] Drizin and Leo calculated a rate of conviction of more than 80% (85% when incorporating guilty pleas).[69] These numbers alone highlight the tremendous danger a false confession poses for a defendant.

"There is no single cause of false confession."[70] In particular, police-induced false confessions result from any number of calculated and practiced steps, which "usually involve psychological coercion."[71] That said, false confessions do tend to result from longer interrogations.[72] Observational studies have shown that most police interrogations are relatively short (less than two hours).[73] In contrast, Drizin and Leo calculated that the average length of interrogation in their population of proven false confessions was 16.3 hours.[74]

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65. Richard J. Ofshe & Richard A. Leo, *The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions*, 16 STUD. L. POL'Y & SOC'Y 189, 191 (1997).

66. *See* GUDJONSSON, *supra* note 15, at 178; Drizin & Leo, *supra* note 4, at 921.

67. *See* Leo & Davis, *supra* note 12, at 19.

68. Leo & Ofshe, *supra* note 7, at 483-84, 483 tbl.B3.

69. Drizin & Leo, *supra* note 4, at 961.

70. *See* Richard A. Leo, *False Confessions: Causes, Consequences, and Implications*, 37 J. AM. ACAD. PSYCHIATRY & L. 332, 333 (2009).

71. *See id.*; *see also infra* Part III.A.3 (detailing these psychologically coercive tactics).

72. *See* GUDJONSSON, *supra* note 15, at 199.

73. *See, e.g.*, Leo, *supra* note 13, at 279 & tbl.6.

74. Drizin & Leo, *supra* note 4, at 948.

Some suspects are more vulnerable to the conditions of police interrogations and to the sequential errors that lead to false confessions. In particular, scholars have identified three vulnerable groups: youth, individuals with psychological disorders (for example, autism and attention-deficit/hyperactivity disorder), and individuals with intellectual disabilities.[75] I now turn to the third of these vulnerabilities to understand the particular risks faced by this population in the context of police interrogations.

II. Intellectual Disabilities

Well into the twentieth century, the English and American legal systems identified individuals with intellectual disabilities as "idiots," "imbeciles," and the "feebleminded."[76] Until even more recently—as recently as the second-to-latest edition of the *Diagnostic and Statistical Manual of Mental Disorders*—the medical and legal communities referred to intellectual disability as "[m]ental [r]etardation."[77] While the term "mentally retarded" refers to the same population as "intellectually disabled," the medical and legal communities have moved away from that stigmatizing label.[78] In this Note, I follow the convention of medical professionals, educators, and advocacy groups in using the term "intellectual disability."[79]

The *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* (DSM-5) defines the term *intellectual disability* or *intellectual developmental disorder* as "a disorder with onset during the developmental period that

75. *See* Kassin, *supra* note 54, at 114.

76. *See* Morgan Cloud et al., *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495, 507 & n.53 (2002).

77. *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed. text rev. 2000) [hereinafter DSM-IV-TR]. For the most recent edition, see AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013) [hereinafter DSM-5].

78. *See Frequently Asked Questions on Intellectual Disability*, AM. ASS'N ON INTELL. & DEVELOPMENTAL DISABILITIES, https://perma.cc/8AY8-MVDR (archived Dec. 6, 2017). In 2010, Congress followed suit by passing Rosa's Law, which changed references to "mental retardation" in federal statutes to "intellectual disability." *See* Pub. L. No. 111-256, § 2, 124 Stat. 2643, 2643-44 (2010) (codified as amended in scattered sections of the U.S. Code).

79. *See* DSM-5, *supra* note 77, at 33. Many sources continue to refer to the population as "mentally retarded," and this terminology may appear in quotations or references. The term, while disfavored, should be understood as interchangeable with "intellectually disabled." Furthermore, sometimes the term "developmental disability" is used to refer to this population. This term is less precise, as it encompasses all severe disabilities originating before age twenty-two, including intellectual disabilities. *See* John H. Noble, Jr. & Ronald W. Conley, *Toward an Epidemiology of Relevant Attributes*, *in* THE CRIMINAL JUSTICE SYSTEM AND MENTAL RETARDATION: DEFENDANTS AND VICTIMS 17, 22 (Ronald W. Conley et al. eds., 1992).

includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains."[80] Deficits in intellectual functioning generally include challenges in "reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience."[81] The deficits are confirmed by clinical assessment as well as individualized, standardized intelligence testing, like intelligence quotient (IQ) tests.[82] Adaptive functioning deficits result in "failure to meet developmental and sociocultural standards for personal independence and social responsibility."[83] Intellectual disability is further categorized into four levels of severity: mild, moderate, severe, and profound.[84]

The majority of people with intellectual disabilities—about 85%—fall within the category of "mild."[85] Mild intellectual disabilities may be difficult to perceive.[86] While individuals with mild intellectual disabilities may be able to work in jobs that do not emphasize conceptual skills, they generally require support in conducting complex daily living tasks and making decisions regarding health or law.[87] Individuals with mild intellectual disabilities tend to fall in the IQ range of anywhere from 50 to 70.[88]

Approximately 10% of the population with intellectual disabilities falls into the second classification, "moderate."[89] These individuals generally fall within the IQ range of 35 to 55.[90] Individuals with moderate intellectual disabilities can, after extended periods of learning, become independent in

80. DSM-5, *supra* note 77, at 33.

81. *Id.*

82. *See id.* at 33, 37. The American Psychiatric Association has moved away from defining intellectual disabilities by IQ scores because, in addition to issues of validity, IQ testing does not assess deficits in adaptive functioning. For example, though an IQ of 70 is generally viewed as the upper boundary for individuals with intellectual disabilities, a person with this IQ may have "severe adaptive behavior problems in social judgment, social understanding, and other areas of adaptive functioning [such] that the person's actual functioning is comparable to that of individuals with a lower IQ score." *Id.* at 37.

83. *Id.* at 33.

84. *Id.*

85. *See* DSM-IV-TR, *supra* note 77, at 43.

86. *See* Cloud et al., *supra* note 76, at 510.

87. *See* DSM-5, *supra* note 77, at 34 tbl.1.

88. DSM-IV-TR, *supra* note 77, at 42. Though DSM-5 no longer indicates an IQ range for the different severity levels of intellectual disabilities, I include them here to provide context for the data discussed in Part IV below, where IQ was sometimes the only indicator available of the exonerees' intellectual disabilities. *See* Data Supplement, *supra* note 1.

89. DSM-IV-TR, *supra* note 77, at 43.

90. *Id.* at 42.

personal care and household tasks.[91] They can also work in jobs that require "limited conceptual and communication skills," though these individuals may need "considerable support" from coworkers and supervisors to "manage social expectations" and navigate complex tasks like scheduling, commuting, arranging health benefits, or managing money.[92]

An individual with "severe" intellectual disabilities generally has little understanding of written language or of concepts involving numbers, quantity, time, and money.[93] These individuals generally have very limited spoken language skills in terms of vocabulary and grammar, and they require support for all activities of daily living, including eating, dressing, and bathing.[94] Approximately 3-4% of individuals with intellectual disabilities fall into this severity level, and they fall in the IQ range of 20 to 40.[95]

Lastly, individuals with "profound" disability constitute around 1-2% of the population with intellectual disabilities, falling generally within the IQ range of below 20 to 25.[96] These individuals are "dependent on others for all aspects of daily physical care, health, and safety."[97] Though they can participate in some activities, they have limited understanding of symbolic communication, and they express themselves largely through nonverbal communication.[98]

People with intellectual disabilities are, first and foremost, people, and "[a]ny attempt to describe them as a group risks false stereotyping."[99] But this overview of intellectual disability severity levels highlights the fundamental difficulties faced by law enforcement when interacting with individuals with intellectual disabilities. The intellectual and adaptive functioning deficits of most people with intellectual disabilities may be difficult to perceive in an

91. *See* DSM-5, *supra* note 77, at 35 tbl.1.

92. *See id.*

93. *Id.* at 36 tbl.1.

94. *Id.*

95. DSM-IV-TR, *supra* note 77, at 42-43.

96. *Id.* at 42, 44.

97. DSM-5, *supra* note 77, at 36 tbl.1.

98. *Id.*

99. James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 427 (1985). H. Carl Haywood wrote in his reaction to the 1976 report by the President's Committee on Mental Retardation:

> It is a typical observation in behavioral research that there is more variability within a group of mentally retarded persons than between retarded and nonretarded persons. . . . Mentally retarded persons are not alike, because mental retardation is not an entity. It is a collection of well over 200 syndromes that have only one element in common: relative inefficiency at learning by the methods and strategies devised for other people to learn.

H. Carl Haywood, *Reaction Comment*, *in* THE MENTALLY RETARDED CITIZEN AND THE LAW 677, 677 (Michael Kindred et al. eds., 1976).

initial interaction.[100] A full 95% of these individuals—those with mild and moderate disabilities—can be hard to identify as disabled.[101] For example, most of these individuals have the potential to be nearly or fully economically independent.[102] Therefore, even when officers are sympathetic to the challenges faced by people with intellectual disabilities, they may have difficulty determining toward whom to be sympathetic.

Intellectual disability is often confused with mental illness, but there are important differences between the two. To start, an intellectual disability "is not an illness."[103] Whereas people with mental illness suffer "disturbances in their thought processes and emotions," individuals with intellectual disabilities have "limited abilities to learn" and socialize with others.[104] In addition, "[m]any forms of mental illness are temporary, cyclical, or episodic."[105] But intellectual disability is permanent.[106] Furthermore, the treatment required for each can differ significantly.[107] Though many individuals suffer from both conditions,[108] it is important to recognize the conditions as separate, as they can pose different challenges in the criminal justice context.

III. Interrogating Individuals with Intellectual Disabilities

Individuals with intellectual disabilities face heightened risks of falsely confessing in the context of police interrogations.[109] The risks occur at every stage: before, during, and after the interrogation. I focus on four steps that lead to a full confession: the officer's first impression of the suspect, the *Miranda* warnings, the preadmission interrogation, and the postadmission interrogation. After the interrogation is complete and a full confession is secured, the defendant may already be at a terrific disadvantage: The prosecution now has

100. *See* Cloud et al., *supra* note 76, at 511.

101. *See id.*

102. *See id.*

103. Ellis & Luckasson, *supra* note 99, at 423.

104. *Id.* at 423-24.

105. *Id.* at 424.

106. *Id.*

107. *Id.*

108. *See id.* at 425.

109. *See* Kassin et al., *supra* note 4, at 30 ("There is a strong consensus among psychologists, legal scholars, and practitioners that juveniles and individuals with cognitive impairments or psychological disorders are particularly susceptible to false confession under pressure.").

strong leverage to force her to accept a plea deal.[110] If the case does proceed to trial, however, and the prosecution seeks to use that evidence against the defendant, the defendant at a suppression hearing can raise two constitutional doctrines designed to protect her against the use of an unlawful confession: review of the *Miranda* waiver and due process analysis of the confession.

A. Within Custodial Interrogation

1. Recognizing the suspect's disability

Perhaps the most consequential step of the interrogation process for an individual with intellectual disabilities—and the step that sets intellectual disabilities apart from other vulnerabilities, such as being a child—is the interrogator's failure to recognize the individual's disability at the outset. Scholars estimate that three-quarters of offenders later identified to have intellectual disabilities were not identified as such at the time of arrest.[111]

The vast majority of people with intellectual disabilities have a mild or moderate disability.[112] As noted above, it can be difficult to recognize that these individuals have intellectual disabilities.[113] Also, individuals with intellectual disabilities tend to deny or hide their disability or overrepresent their abilities.[114] Despite the potential advantages of identifying oneself to the interrogator as an individual with intellectual disabilities, many do not do so.[115] And many individuals are skilled in hiding their limitations.[116] In part, the impulse to hide or overrate one's abilities may stem from a rejection of labels, such as "mental retardation," and the stigmas attached to them.[117] Some individuals, however, may also genuinely misconceive their abilities.[118]

110. A full one-quarter of the 245 false confessors in the NRE database pleaded guilty following their confessions. *See* Data Supplement, *supra* note 1 (showing that 25.3% of the false confessor population pleaded guilty).

111. *See* JOAN PETERSILIA, DOING JUSTICE?: CRIMINAL OFFENDERS WITH DEVELOPMENTAL DISABILITIES 6 (2000).

112. Cloud et al., *supra* note 76, at 511; *see supra* text accompanying notes 85, 89.

113. Cloud et al., *supra* note 76, at 511.

114. *See id.* at 513 ("It is not uncommon for disabled people to overrate their skills."); Ellis & Luckasson, *supra* note 99, at 430-31 ("[M]any . . . individuals [with intellectual disabilities] will go to great lengths to hide their disability."). It also seems plausible that some of those with intellectual disabilities are ignorant of their disability, *see* Cloud et al., *supra* note 76, at 513, either because they do not have the resources to secure a diagnosis or because they are high functioning and thus avoid medical scrutiny.

115. *See* Cloud et al., *supra* note 76, at 512-13.

116. Ellis & Luckasson, *supra* note 99, at 431 & n.85.

117. *See id.* at 430.

118. Cloud et al., *supra* note 76, at 513.

The leading interrogation manual, *Criminal Interrogation and Confessions*—the latest edition of the handbook that sets out the until-recently preeminent interrogation technique, the Reid Method[119]—briefly acknowledges the need to adjust some of the normal procedures for individuals with intellectual disabilities.[120] But even if an officer were to follow this manual verbatim, adjusting the interrogation process for a suspect with intellectual disabilities requires knowing that the suspect *has* intellectual disabilities. Most interrogators probably have no interest in manipulating the weaknesses of an individual with intellectual disabilities. And yet if the officer is unaware of the suspect's disabilities, the officer may assume that the suspect is of typical abilities and simply lying.

2. Delivering the *Miranda* warnings

The now-famous 1966 decision *Miranda v. Arizona* held that police officers must alert suspects of certain constitutional rights.[121] This warning—now memorized by every American who has ever watched television—alerts the suspect to her right to remain silent, her right to appointed counsel, and that anything she says may be used against her in court.[122] If the law enforcement officer fails to properly deliver the *Miranda* warning or the suspect does not adequately waive her rights, the resulting interrogation is excluded from evidence.[123]

The rate at which suspects waive their *Miranda* rights, however, is staggering: Eighty percent of adult suspects waive their rights.[124] The high rate of waivers is not an accident; it is the product of concerted police tactics.[125]

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119. *See* Eli Hager, *The Seismic Change in Police Interrogations*, MARSHALL PROJECT (Mar. 7, 2017), https://perma.cc/R99B-85AW.

120. *See* FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 352 (5th ed. 2013) ("We offer these recommendations with respect to introducing fictitious evidence during an interrogation: . . . This technique should be avoided when interrogating a youthful suspect with low social maturity or a suspect with diminished mental capacity. These suspects may not have the fortitude or confidence to challenge such evidence and . . . may become confused as to their own possible involvement . . . .").

121. 384 U.S. 436, 479 (1966).

122. *Id.* at 478-79; *see* LEO, *supra* note 4, at 27.

123. *Miranda*, 384 U.S. at 479 ("[U]nless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him."). I discuss the legal standard for review of *Miranda* waivers below. *See infra* Part III.B.1.

124. FELD, *supra* note 5, at 249-50.

125. *See* LEO, *supra* note 4, at 27 ("American police have devised a number of strategies to obtain (or create the appearance of obtaining) the suspect's compliance at this stage in the interrogation process, thereby minimizing the impact of *Miranda*." (citation omitted)).

Officers often "de-adversarialize" the *Miranda* process by creating the illusion that the police and the suspect "share the same interest."[126] Officers are allowed to talk with suspects before issuing *Miranda* warnings, during which time they can lull suspects into a false sense of security by "build[ing] a relationship and creat[ing] a favorable climate to confess."[127] Detectives also emphasize the routine nature of the *Miranda* warning, for example, by referring to the suspect's familiarity with the rights from television.[128]

These tactics may be particularly successful when used on individuals with intellectual disabilities. A person with intellectual disabilities may be easily persuaded by the idea that waiving her *Miranda* rights is in her and the police officer's shared best interests. Many individuals with intellectual disabilities are exceptionally desirous of pleasing authority figures.[129] This tendency to please and seek approval may follow from the necessary reliance on authority figures for solutions to what an individual with typical abilities would consider everyday problems.[130] This, in turn, could also lead a suspect with intellectual disabilities to watch the interrogator closely for social cues on how to react and indications of what the officer wants to hear.[131] Operating in the background may be the individual's difficulty in discerning when she is "in an adversarial situation."[132] It may be impossible for an individual with intellectual disabilities to differentiate between a police officer assisting a person in need and one serving as an interrogator.[133] As the President's Panel on Mental Retardation observed in 1963, "A retarded person may be hard put to distinguish between the fact and the appearance of friendliness."[134] Therefore, a suspect with intellectual disabilities may not "understand that the police detective who appears to be friendly is really [an] adversary," and she may have trouble sensing the adversarial nature of the *Miranda* warnings.[135]

126. *See id.*

127. *See* FELD, *supra* note 5, at 77.

128. *See id.* at 81; *see also, e.g.*, Doody v. Ryan, 649 F.3d 986, 992 (9th Cir. 2011) ("I'm sure you've heard this thing and you've heard it said on t.v. . . . it's a little more, little less technical and a little less heavy if you want to put it ah that way." (emphasis omitted) (quoting the interrogation transcript)).

129. *See* Cloud et al., *supra* note 76, at 511-12; Ellis & Luckasson, *supra* note 99, at 431-32.

130. *See* Robert Perske, *Thoughts on the Police Interrogation of Individuals with Mental Retardation*, 32 MENTAL RETARDATION 377, 377 (1994).

131. *Id.* at 377-78.

132. Cloud et al., *supra* note 76, at 512. As noted above, this may be difficult for *any* innocent individual. *See supra* text accompanying notes 54-58.

133. *See* Cloud et al., *supra* note 76, at 512.

134. Ellis & Luckasson, *supra* note 99, at 451 (quoting PRESIDENT'S PANEL ON MENTAL RETARDATION, REPORT OF THE TASK FORCE ON LAW 33 (1963)).

135. *See* LEO, *supra* note 4, at 232.

Moreover, individuals with intellectual disabilities may also struggle to grasp abstract legal concepts like "rights" or "waiver."[136] As discussed in greater detail below,[137] individuals with intellectual disabilities, even those with mild or moderate disabilities, are almost categorically incapable of understanding their *Miranda* rights.[138] This perfect storm of common characteristics will result in a suspect struggling to understand the *Miranda* warning being given, but hiding that fact, and simply acquiescing to the waiver at the officer's behest.

3. Conducting preadmission interrogation

Until recently, the Reid Method was the most prevalent interrogation-training program in the United States.[139] John Reid and Fred Inbau, the pioneers of this method, were progressives by the political standards of the 1930s, and they are at least partially responsible for the decline in "third degree" interrogation techniques—tactics that included anything from severe psychological duress to extreme physical violence and torture—in the United States.[140] In teaching that physical violence and intense psychological duress were inappropriate, Reid and Inbau offered an effective alternative for police to secure confessions.[141]

As early as 1966, however, people began to understand that the Reid Method presented its own dangers of coercion. In *Miranda*, the Supreme Court observed, after describing the Reid Method in detail, that "the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals."[142] Following this assertion, the Court acknowledged the real possibility that these interrogation procedures could give rise to false confessions.[143] Though the risks of the Reid Method were recognized in 1966, more than 300,000 interrogators were trained in the method, and it remained the "most widely used [interrogation] method in North America"[144]—at least until recently.

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136. *See* Perske, *supra* note 130, at 377.

137. *See infra* Part III.B.1.

138. *See* Cloud et al., *supra* note 76, at 590.

139. FELD, *supra* note 5, at 26; *supra* text accompanying notes 119-20.

140. *See* Richard A. Leo, *The Third Degree and the Origins of Psychological Interrogation in the United States*, *in* INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT 37, 63 (G. Daniel Lassiter ed., 2004).

141. *Id.*; *see also id.* ("[B]oth physical and psychological coercion may produce false confessions.").

142. *See* Miranda v. Arizona, 384 U.S. 436, 455 (1966); *see also id.* at 448-55 (describing the Reid Method and noting that it "is psychologically rather than physically oriented").

143. *See id.* at 455 n.24.

144. *See* FELD, *supra* note 5, at 26.

In March 2017, Wicklander-Zulawski & Associates, one of the largest consulting groups providing interrogation and interview training for law enforcement officers, stopped instructing officers to use the Reid Method.[145] The company cited the growing awareness of false confessions and wrongful convictions in determining that "the inherent risks and pitfalls of using a confrontational emotional approach [to interrogation], combined with the improper use of that method, can lead to horrendous miscarriages of justice."[146] The implications of Wicklander-Zulawski's decision for the future of the Reid Method are unclear,[147] but the growing consensus that the method has contributed to the phenomenon of false confessions—long recognized by scholars,[148] briefly noted by the Court in *Miranda*,[149] and now embraced by one of the major players in law enforcement interrogations—demands a brief discussion of how it works. After all, the Reid Method was *the* pervasive interrogation technique used during the era in which each of the studied false confessions discussed below took place.

The Reid Method proceeds in two main phases. During the first, the Behavioral Symptom Analysis, the interrogator makes his initial assessment of the suspect's guilt; he relies on verbal and nonverbal cues to determine whether the suspect is guilty or innocent.[150] Under the Reid Method, practitioners learn to read certain behavioral cues to detect deception.[151] Despite the detailed instructions given by the Reid handbook,[152] psychologists question the theoretical underpinnings of the methodology. Police interrogators "cannot reliably distinguish between truthful and false denials of guilt at levels greater

145. *See* Press Release, Wicklander-Zulawski & Assocs., Inc., Wicklander-Zulawski Discontinues Reid Method Instruction After More Than 30 Years (Mar. 6, 2017), https://perma.cc/9YRG-KT3P; Hager, *supra* note 119. The company claims to have trained "a majority of U.S. police departments" as well as federal law enforcement agencies such as the U.S. Army, the Federal Bureau of Investigation, and the Department of Homeland Security (including Immigration and Customs Enforcement and Transportation Security Administration officers). Press Release, *supra*.

146. *See* Wicklander-Zulawski & Assocs., *WZ Focuses on Non-confrontational Interviewing* at 2:11, YOUTUBE (Mar. 6, 2017), https://perma.cc/5UHL-TFFT.

147. The company that licenses the method—John E. Reid & Associates—has decried Wicklander-Zulawski's announcement as "very misleading and disingenuous." *See* Hager, *supra* note 119 (quoting Joseph P. Buckley of John E. Reid & Associates).

148. *See, e.g.*, FELD, *supra* note 5, at 234 ("The psychological processes used in the Reid Method—isolation, confrontation, and minimization—increase the risks of false confessions.").

149. *See* Miranda v. Arizona, 384 U.S. 436, 455 n.24 (1966).

150. *See* FELD, *supra* note 5, at 26.

151. *See* INBAU ET AL., *supra* note 120, at 105.

152. *See id.* at 108-36.

than chance."[153] Like most people, they are not much better than flipping a coin at distinguishing truth from fiction; police can tell the difference only 45-60% of the time.[154] Anecdotally, Leo describes that in the thousands of interrogations he has studied, he rarely encounters interrogators who can point to the specific characteristics of a suspect that lead to an assumption of guilt.[155] These interrogators, however, tend to believe that they can reliably infer guilt based on their own intuitive analysis of body language and demeanor.[156] Unfortunately, these intuitions often lead to misclassification.

If the interrogator concludes that the suspect is guilty, he proceeds to a sequence of nine steps designed to psychologically pressure the guilty suspect to confess.[157] Generally, this series of steps operationalizes three interrelated psychological processes: "isolation, confrontation [or maximization], and minimization."[158] First, the suspect is isolated to increase stress, which incentivizes her to find ways to extricate herself.[159] The method seeks to influence suspects to "emphasize short-term relief over [the] long-term consequences" of their actions during the interrogation.[160] The stress from isolation is further exacerbated when the interrogation takes place over the course of many hours,[161] which is generally true in interrogations that lead to false confessions.[162]

Second, the interrogator constantly and consistently confronts the suspect, conveying his absolute certainty that the suspect is guilty.[163] The interrogator seeks to convey to the suspect that denials are futile and to push the suspect

153. *See* LEO, *supra* note 4, at 227; *see also* Saul M. Kassin & Christina T. Fong, *"I'm Innocent!": Effects of Training on Judgments of Truth and Deception in the Interrogation Room*, 23 LAW & HUM. BEHAV. 499, 500-01 (1999) ("[T]his unwavering faith and reliance in the interrogator's diagnostic skills is misplaced."); Aldert Vrij, *Why Professionals Fail to Catch Liars and How They Can Improve*, 9 LEGAL & CRIMINOLOGICAL PSYCHOL. 159, 159 (2004) ("[A]lthough professional lie catchers do not seem to be better lie detectors than laypersons, they often feel more confident in their ability to detect truths and lies.").

154. Saul M. Kassin & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 PSYCHOL. SCI. PUB. INT. 33, 37 (2004); *see also* Bond & DePaulo, *supra* note 53, at 219.

155. *See* LEO, *supra* note 4, at 229.

156. *See id.*

157. *See* FELD, *supra* note 5, at 26.

158. *Id.* at 234.

159. *See* Kassin & Gudjonsson, *supra* note 154, at 43, 53.

160. FELD, *supra* note 5, at 24.

161. *See id.* at 239.

162. *See supra* text accompanying notes 72-74.

163. *See* Kassin & Gudjonsson, *supra* note 154, at 43.

toward hopelessness.[164] In the course of confronting the suspect, the interrogator may use "trickery, deception, and false evidence."[165]

Third, the interrogator plays a sympathetic role, minimizing the moral weight of the crime.[166] This tactic "provide[s] the suspect with moral justification and face-saving excuses for having committed the crime,"[167] leading the suspect to infer that she will be treated leniently if she confesses.[168]

In the introduction to the nine steps, the Reid handbook reminds trainees: "It must be remembered that none of the steps is apt to make an innocent person confess and that all the steps are legally as well as morally justifiable."[169] In fact, the manual recognizes the risks of false confessions[170] but downplays the risk that its own technique will cause them.[171] The manual states: "When a false confession occurs, it is not the technique that is the genesis, but rather the introduction of an element, most frequently a threat of harm and/or promise of leniency, that violates the best practices described in this text."[172]

Despite these contentions, scholars believe that the psychologically coercive steps of the Reid Method can lead to false confessions.[173] In fact, other countries have wholesale rejected the Reid Method in favor of less accusatory and confrontational processes.[174] Police interrogators in the United Kingdom and elsewhere now practice the PEACE approach, a mnemonic for its five components: Planning and Preparation, Engage and Explain, Account, Closure, and Evaluate.[175] The method focuses on obtaining a free narrative from the suspect, encouraging interviewers to ask open-ended questions, and providing "meaningful closure" at the end of the interview by summarizing the

164. *See* FELD, *supra* note 5, at 25-26.

165. *Id.* at 236.

166. *See* Kassin & Gudjonsson, *supra* note 154, at 43.

167. *See* FELD, *supra* note 5, at 26 (quoting Kassin et al., *supra* note 4, at 12).

168. *See* Kassin & Gudjonsson, *supra* note 154, at 43.

169. INBAU ET AL., *supra* note 120, at 187.

170. *See id.* at 339 ("There is no question that interrogations have resulted in false confessions from innocent suspects.").

171. *See id.* at 362.

172. *Id.*

173. *See, e.g.*, Kassin et al., *supra* note 4, at 27 (stating that "guilt-presumptive and confrontational" interrogation techniques like the Reid Method "put innocent people at risk").

174. *See* FELD, *supra* note 5, at 28.

175. *Id.*

information and answering the suspect's questions.[176] This method is "widely assumed" by scholars to be "less likely to elicit false confessions."[177]

Individuals of typical capacity face serious risks in the stress-inducing environment of a Reid-facilitated interrogation, but individuals with intellectual disabilities are especially disadvantaged. The Reid handbook itself recognizes that a suspect with a "mental . . . condition may offer misleading behaviors."[178] Though this warning may be well intentioned, it offers little solace to the individual who successfully hides her disability. Her misleading behaviors may convey guilt in the mind of the interrogator, triggering the psychological pressures of the nine steps.

Once the interrogator reaches the nine steps, an individual with intellectual disabilities will be uniquely susceptible to the Reid tactics. For example, she will likely be less capable of handling the stressful environment and isolation. People with intellectual disabilities are often easily overwhelmed by stress, and they often lack the psychological resources to withstand the same levels of pressure and anxiety as people with typical abilities.[179] A suspect with intellectual disabilities may be easily manipulated by fake evidence and officers' trickery.[180] The interrogator's minimization tactics may also be extremely effective on an individual who is predisposed to pleasing authority figures.[181]

In addition, studies show that people with intellectual disabilities often "have incomplete or immature concepts of blameworthiness and causation."[182] This means that some people with intellectual disabilities are unable to differentiate between guilt and unforeseeable accident.[183] This inability to differentiate between the two can lead an individual to accept blame for events for which she is not culpable.[184] An individual with intellectual disabilities may admit "guilt[] to a crime which he did not commit because he believes that blame should be assigned to *someone* and he is unable to understand the concept of causation and his role in the incident."[185]

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176. *Id.*

177. Gisli H. Gudjonsson & John Pearse, *Suspect Interviews and False Confessions*, 20 CURRENT DIRECTIONS PSYCHOL. SCI. 33, 36 (2011); *see also* Kassin et al., *supra* note 4, at 28 (finding that inquisitorial methods "lower[ed] the rate of false confessions without producing a corresponding decrease in the rate of true confessions").

178. INBAU ET AL., *supra* note 120, at 32.

179. *See* LEO, *supra* note 4, at 233.

180. *See id.* at 232.

181. *See supra* text accompanying notes 129-31.

182. Ellis & Luckasson, *supra* note 99, at 429.

183. *Id.* at 429-30; *accord* Cloud et al., *supra* note 76, at 512-13.

184. Cloud et al., *supra* note 76, at 512-13; Ellis & Luckasson, *supra* note 99, at 429-30.

185. Ellis & Luckasson, *supra* note 99, at 430 (emphasis added).

For these reasons, individuals with intellectual disabilities face heightened risks in the confines of an interrogation run according to the Reid Method.

4. Administering postadmission interrogation

After the interrogator secures an "I did it" from the suspect, she pursues a full confession.[186] A jury may not find a mere admission convincing, whereas a rich narrative suggests to the jury that the defendant has intimate knowledge of the crime.[187] In addition, an admission does not itself prove guilt. Only through the postadmission narrative can an officer, prosecutor, or factfinder assess the reliability of the defendant.[188]

Interrogators are trained to avoid contamination of the confession by revealing facts already known to the police.[189] The Reid Method handbook considers it "highly important" to "let the confessor supply the details of the occurrence."[190] If and when the interrogator leaks crucial information to the suspect, it becomes impossible to check the confession for accuracy and reliability. "The truthfulness of a confession should be questioned . . . when the suspect is unable to provide any corroboration beyond the statement, 'I did it.'"[191] Therefore, officers are trained to ask open questions.[192]

To build a sufficient case against the suspect, the confession narrative must be believable.[193] The interrogator will seek to flesh out certain elements: a coherent, believable storyline; a motive and explanations for the suspect's actions; detailed knowledge about the crime, scene, and victim; and expressions of emotion in the crime's aftermath.[194] Guilty suspects may readily provide these details about their involvement in the crime following their admission of guilt.[195] They likely do not realize that there is a substantial difference between what they have already offered—the "I did it"—and what they have yet to reveal—details of their guilt.[196] Most interrogators—assuming their suspect is in fact guilty—"make no distinction between preadmission interrogation and

186. *See* Ofshe & Leo, *supra* note 48, at 990-91.

187. *See* Garrett, *supra* note 7, at 1067.

188. *See* Ofshe & Leo, *supra* note 48, at 990-91.

189. *See* Garrett, *supra* note 7, at 1066.

190. *See id.* at 1067 (quoting INBAU ET AL., *supra* note 120, at 381 (4th ed. 2001)).

191. INBAU ET AL., *supra* note 120, at 425 (4th ed. 2001).

192. *See* Garrett, *supra* note 7, at 1066-67; *see also* LEO, *supra* note 4, at 166.

193. *See* LEO, *supra* note 4, at 168.

194. *See id.*

195. *See id.* at 169.

196. *See id.*

postadmission interrogation."[197] The Reid Method interrogator employs the same isolation, confrontation, and minimization well into the postadmission construction.[198]

But the distinction between preadmission and postadmission for innocent suspects is incredibly meaningful. Whereas the guilty admitter may naturally launch into the details of his admitted guilt, false confessors, by definition, do not have the substance to back up their admissions. For an innocent defendant, saying "I did it" is a lot simpler than providing details that seem accurate and match the evidence the police have already collected. And yet the vast majority of false confessions contain an incredible amount of detail about the crime.[199] Brandon Garrett found that 95% of his sample of false confessions included "specific details concerning how the crime occurred."[200]

There are only three ways a false confession can contain accurate details about the crime: The suspect guesses correctly,[201] the suspect learns details through the media or some other public source,[202] or the police convey those details.[203] In most cases, falsely accused suspects are unlikely to draw rich detail from unlucky guesswork or media disclosure alone.[204] In those cases, the police must communicate substantial detail in the course of eliciting false confessions.[205]

Even if officers do not intentionally contaminate the confession, they communicate details about the crime to the defendant explicitly and implicitly.[206] Explicitly, interrogators sometimes express their theory of the

197. *Id.* at 166.

198. *See id.*

199. *See* Garrett, *supra* note 7, at 1054.

200. *See id.* To be sure, false confessions may also contain a plethora of untrue details that are contradicted by other evidence—demonstrating "the limitations of officers' abilities to construct a confession narrative"—but these contradictions are often either excused by police testimony or overshadowed by other facts that seem to be truthfully corroborated. *See id.* at 1083.

201. *See* Ofshe & Leo, *supra* note 48, at 993 ("Assuming that neither the investigator nor the media have contaminated the suspect by transferring information about the crime facts, . . . the likelihood that his answers will be correct should be no better than chance. The only time an innocent person will contribute correct information is when he makes an unlucky guess. The likelihood of an unlucky guess diminishes as the number of possible answers to an investigator's questions grows large." (footnote omitted)).

202. *See* LEO, *supra* note 4, at 171 ("Suspects may also learn crime facts and details from police or other third parties (e.g., community gossip, overheard conversations, the media, etc.).").

203. *See id.* at 169, 171.

204. *See* Garrett, *supra* note 7, at 1060, 1084-85 (finding that only four of forty subjects in the sample were *not* fed details by the police in some way).

205. *See id.* at 1084-85.

206. *See* LEO, *supra* note 4, at 171.

case, fill in missing details, or correct statements they think are wrong.[207] Implicitly, the police convey information through leading questions or by directing the suspect to particular conclusions.[208]

The interrogation of Brendan Dassey illustrates the error of officer contamination. Brendan (made famous by *Making a Murderer*, the true-crime documentary series on Netflix[209]) was a sixteen-year-old special education student at the time.[210] The police were so convinced of Brendan's involvement in a murder perpetrated by his uncle Steven Avery that they pressed Brendan over several interviews to confess.[211] The transcript of Brendan's interrogation[212] reads:

> [OFFICER]: What else did he do to her? We know something else was done. Tell us, and what else did you do? Come on. Something with the head. Brendan?
>
> BRENDAN: Huh? . . .
>
> [OFFICER]: What else did you guys do, come on. . . .
>
> [OFFICER]: We have the evidence Brendan, we just need you ta, ta be honest with us.
>
> BRENDAN: That he cut off her hair.
>
> [OFFICER]: He cut off her hair? In the house?
>
> BRENDAN: mm huh. . . .
>
> [OFFICER]: OK, what else?
>
> [OFFICER]: What else was done to her head?
>
> BRENDAN: That he punched her.
>
> [OFFICER]: What else? (pause) What else? . . .

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207. *Id.*

208. *See id.*

209. *See* Ralph Ellis, *Court Upholds Confession by Brendan Dassey of "Making a Murderer,"* CNN (updated Dec. 9, 2017, 1:02 AM ET), https://perma.cc/76FX-WPFB.

210. *See* Dassey v. Dittmann, 860 F.3d 933, 938-39 (7th Cir.) ("[Brendan's] IQ had been measured at various times between 74 and 81 . . . . A psychological expert at trial described Dassey as highly suggestible, docile, withdrawn, with extreme social anxiety and social avoidant characteristics, and more suggestible than 95% of the population."), *rev'd*, 877 F.3d 297 (7th Cir. 2017) (en banc).

211. *See id.* at 939-40.

212. *See* Interview of Brendan Dassey by the Manitowoc County Sheriff's Department, at STATE4597 (2006) [hereinafter Dassey Interrogation] (on file with author). Sections have been edited out for brevity, and the reporting officers' names have been bracketed for simplicity. Dassey has not been exonerated, and his confession has not been proved false. *But cf.* Affidavit of Dr. Richard A. Leo, ¶ 51(4), State v. Dassey, No. 2006CF88 (Wis. Cir. Ct. Manitowoc Cty. 2009) ("These highly suggestive post-admission interrogation techniques created the risk of eliciting a highly detailed, and thus factually persuasive, confession from Brendan that may nevertheless (or counterintuitively) be false and/or unreliable."). But this does not detract from the illustration of contamination in the transcript.

> [OFFICER]: What did he make you do Brendan? It's OK, what did he make you do?
>
> BRENDAN: Cut her.
>
> [OFFICER]: Cut her where?
>
> BRENDAN: On her throat. . . .
>
> [OFFICER]: . . . What else happens to her in her head? . . .
>
> [OFFICER]: Come on Brendan, what else?
>
> (pause)
>
> [OFFICER]: We know, we just need you to tell us.
>
> BRENDAN: That's all I can remember.
>
> [OFFICER]: All right, I'm just gonna come out and ask you. Who shot her in the head?
>
> BRENDAN: He did.
>
> [OFFICER]: Then why didn't you tell us that?
>
> BRENDAN: Cuz I couldn't think of it.
>
> [OFFICER]: Now you remember it? (Brendan nods "yes[.]") Tell us about that then.[213]

This transcript illustrates the officers contaminating Brendan's confession by inserting the detail about shooting the victim in the head: They had that piece of evidence and needed the statement to match it. This was not the only detail the police fed to Brendan that ultimately formed the basis of his "confession."[214]

A panel of the Seventh Circuit upheld the federal district court's grant of Brendan's petition for habeas corpus, in part acknowledging the constitutional errors in Brendan's interrogation.[215] But the court recently vacated the panel opinion and reheard the case en banc, ultimately reversing the district court and upholding as reasonable the state courts' finding that Dassey's confession was voluntary.[216]

As is the case in the preadmission phase,[217] individuals with intellectual disabilities are at particular risk of manipulation during the postadmission phase. People with intellectual disabilities tend to be more suggestible—catering their responses to the cues of others in a social interaction—and acquiescent—responding affirmatively to questions, regardless of their content

213. Dassey Interrogation, *supra* note 212, at STATE4655-58; *see also* Laura H. Nirider et al., *Combating Contamination in Confession Cases*, 79 U. CHI. L. REV. 837, 851-52 (2012) (book review).

214. *See Dassey*, 860 F.3d at 940 (describing the officers' suggesting body parts to Brendan that he may have seen in the fire that cremated the victim's corpse).

215. *See id.* at 982-83.

216. *See* Dassey v. Dittmann, 877 F.3d 297, 301, 315 (7th Cir. 2017) (en banc).

217. *See supra* text accompanying notes 178-85.

or truth.[218] A suggestible suspect may fall prey to an interrogator who signals, through leading questions or negative feedback to a previous answer, what he thinks is the truth or the correct answer to the questions being asked.[219] An acquiescent person may simply respond affirmatively to questions about behavior she perceives as desirable.[220]

Many individuals with intellectual disabilities also have memory lapses, especially with regard to facts or events they did not identify as important.[221] These individuals may not be able to recall the truth with sufficient detail to convince an interrogating officer of their innocence. Lapses or inconsistencies in memory may be mistaken for lying.

Interacting with weak memory retention and the desire to please authority figures, suggestibility and acquiescence may lead the individual to respond the way she thinks the officer wants her to respond. When that happens, it is "easy to get [people with intellectual disabilities] to agree with and repeat back false or misleading statements, even incriminating ones."[222]

B. Existing Judicial Safeguards Against False Confessions

Two doctrines of constitutional law police the custodial interrogation of suspects.[223] First, the court assesses the suspect's *Miranda* waiver.[224] Second, the court determines whether the confession itself was voluntarily given within the bounds of due process.[225] Many individuals who have delivered false

218. *See* I.C.H. Clare & G.H. Gudjonsson, *Interrogative Suggestibility, Confabulation, and Acquiescence in People with Mild Learning Disabilities (Mental Handicap): Implications for Reliability During Police Interrogations*, 32 BRIT. J. CLINICAL PSYCHOL. 295, 296-99, 298 tbl.1 (1993).

219. *See* GUDJONSSON, *supra* note 15, at 347, 350.

220. *See* Cloud et al., *supra* note 76, at 512.

221. Clare & Gudjonsson, *supra* note 218, at 296-99; Ellis & Luckasson, *supra* note 99, at 428-29; Perske, *supra* note 130, at 378. Some authors use the term "learning disability," *see, e.g.*, Clare & Gudjonsson, *supra* note 218, at 295; in the United Kingdom, "learning disability" is the equivalent of "intellectual disability" in the United States, *see* GUDJONSSON, *supra* note 15, at 320.

222. LEO, *supra* note 4, at 232.

223. *See* Dickerson v. United States, 530 U.S. 428, 433 (2000) ("[O]ur cases recognize[] two constitutional bases for the requirement that a confession be voluntary to be admitted into evidence: the Fifth Amendment right against self-incrimination and the Due Process Clause of the Fourteenth Amendment.").

224. *Miranda* warnings are only required in "custodial interrogation" settings—"questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way"—and therefore do not cover confessions made outside those settings. *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966).

225. *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 225-26 (1973) (holding that a suspect's confession was involuntarily given and therefore violates due process if his "will [was]

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confessions never directly benefit from these constitutional protections because the threatened weight of the confession as evidence may counsel in favor of pleading guilty before a judge has a chance to review the evidence.[226] Even those who plead guilty, however, are affected indirectly by how strong or weak a defense attorney perceives these constitutional protections to be.

Historically, only the latter inquiry—the voluntariness of a confession—existed as a bulwark against abusive and physically coercive interrogations.[227] In *Brown v. Mississippi*, the Court ruled for the first time that a confession was unconstitutionally coercive.[228] There, the police elicited confessions from the defendants through torture.[229] The Court held that the trial court violated the defendants' Fourteenth Amendment due process rights by admitting these confessions into evidence.[230] Over time the Court developed the due process test into a totality-of-the-circumstances analysis to determine whether a suspect's confession was voluntary and thus constitutional.[231] In this analysis, the Court questioned "whether a defendant's will was overborne at the time he confessed."[232] Though the standard was a "fact-sensitive, case-by-case method of adjudication," it seemed to have the effect of disincentivizing the use of "third degree" tactics in the interrogation room.[233] But by the 1960s, the Court came to realize that the due process test was insufficient to monitor the new forms of psychologically coercive interrogation used by police.[234] *Miranda*—a case primarily aimed at erecting safeguards for a defendant's privilege against

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overborne and his capacity for self-determination critically impaired" (quoting Culombe v. Connecticut, 367 U.S. 568, 602 (1961) (opinion of Frankfurter, J.))).

226. I calculated from the NRE sample that 25.3% of the false confessors had pleaded guilty. *See* Data Supplement, *supra* note 1.

227. *See* J.D.B. v. North Carolina, 564 U.S. 261, 269-70 (2011).

228. 297 U.S. 278, 287 (1936); *see* Cloud et al., *supra* note 76, at 518.

229. *See Brown*, 297 U.S. at 284-85.

230. *Id.* at 287.

231. The due process test for voluntariness was well articulated in *Schneckloth*:

> In determining whether a defendant's will was overborne in a particular case, the Court has assessed the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation. Some of the factors taken into account have included the youth of the accused; his lack of education; or his low intelligence; the lack of any advice to the accused of his constitutional rights; the length of detention; the repeated and prolonged nature of the questioning; and the use of physical punishment such as the deprivation of food or sleep.

Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973) (citations omitted).

232. Reck v. Pate, 367 U.S. 433, 440 (1961).

233. *See* Cloud et al., *supra* note 76, at 519. On third degree tactics, see text accompanying note 140 above.

234. *See* Cloud et al., *supra* note 76, at 519-21.

self-incrimination[235]—was, in part, the Court's response to the insufficiency of the due process test in these new interrogations.[236] But the voluntariness inquiry continued to exist in parallel.[237]

1. Review of the *Miranda* waiver

In *Miranda*, the Supreme Court heard four cases; in each, the defendant was questioned while in custody, was not alerted to his rights, and gave an admission that was used against him at trial.[238] As the Court later described: "In *Miranda*, we noted that the advent of modern custodial police interrogation brought with it an increased concern about confessions obtained by coercion."[239] In fact, in *Miranda*, the Court acknowledged that "[i]nterrogation procedures may even give rise to a false confession."[240] The due process voluntariness test was insufficient to protect suspects in the context of custodial interrogations, which the Court recognized "exact[] a heavy toll on individual liberty and trade[] on the weakness of individuals."[241] In particular, the Court described in detail facets of the Reid Method and how they are psychologically coercive and manipulative.[242]

The Court acknowledged the inadequacy of the due process analysis: "In these cases, we might not find the defendants' statements to have been involuntary in traditional terms."[243] Therefore, the Court took the progressive step of establishing "concrete constitutional guidelines for law enforcement agencies and courts to follow."[244] The Court held that prior to a custodial interrogation, the police must affirmatively advise the suspect

> that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that

235. *See* U.S. CONST. amend. V ("No person shall . . . be compelled in any criminal case to be a witness against himself . . . .").

236. *See* Cloud et al., *supra* note 76, at 520-21.

237. *See infra* note 269 and accompanying text.

238. *See* Miranda v. Arizona, 384 U.S. 436, 445 (1966).

239. Dickerson v. United States, 530 U.S. 428, 434-35 (2000).

240. *Miranda*, 384 U.S. at 455 n.24.

241. *Id.* at 455; *see also* Cloud et al., *supra* note 76, at 519 n.115 (noting that in custodial interrogations, "the confession problem had outgrown the voluntariness rule" (quoting George E. Dix, *Federal Constitutional Confession Law: The 1986 and 1987 Supreme Court Terms*, 67 TEX. L. REV. 231, 235 (1988))).

242. *See Miranda*, 384 U.S. at 449-55; *see also id.* at 450 ("To highlight the isolation and unfamiliar surroundings, the manuals instruct the police to display an air of confidence in the suspect's guilt and from outward appearance to maintain only an interest in confirming certain details.").

243. *See id.* at 457.

244. *Id.* at 441-42.

> if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.[245]

These warnings were necessary in order to "insure that the statements were truly the product of free choice."[246] In other words, without these affirmative warnings of the defendant's rights, the Court acknowledged that a confession may slip through the due process voluntariness test without being truly voluntary.

A suspect can of course waive these rights—as most do[247]—but she must do so "voluntarily, knowingly and intelligently."[248] Courts have understood these words to represent "two distinct dimensions."[249] First, the waiver must be "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception."[250] Second, the rights can only be relinquished if the suspect has "full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."[251] Courts look to the totality of the circumstances surrounding the interrogation to determine whether the decision to waive one's *Miranda* rights was both an "uncoerced choice" and made with "the requisite level of comprehension."[252]

Over time, the protections established by the *Miranda* Court have been diminished—doctrinally and in practice. After affirming in 2000 that *Miranda* was in fact a constitutional holding not subject to congressional overruling,[253] the Court subsequently narrowed the protection's scope. The Court had long held that a defendant's right to exclude statements given under custodial interrogation without proper *Miranda* warnings extends only to direct evidence; such statements may be used to impeach the defendant if she chooses to testify.[254] But in 2004, the Court limited the right further: Where a statement given in violation of *Miranda* leads to the discovery of physical evidence—for instance, a firearm—that physical evidence will not be excluded, even if the statement is inadmissible in court.[255] And in 2010, the Court weakened the protection further by deeming the waiver of *Miranda* rights

245. *Id.* at 479.

246. *Id.* at 457.

247. *See supra* text accompanying note 124.

248. *Miranda*, 384 U.S. at 444.

249. Moran v. Burbine, 475 U.S. 412, 421 (1986).

250. Berghuis v. Thompkins, 560 U.S. 370, 382 (2010) (quoting *Moran*, 475 U.S. at 421).

251. *Id.* at 382-83 (quoting *Moran*, 475 U.S. at 421).

252. *See, e.g.*, *Moran*, 475 U.S. at 421.

253. *See* Dickerson v. United States, 530 U.S. 428, 432 (2000).

254. *See* Harris v. New York, 401 U.S. 222, 225-26 (1971).

255. *See* United States v. Patane, 542 U.S. 630, 637-42 (2004) (opinion of Thomas, J.); *id.* at 644-45 (Kennedy, J., concurring in the judgment).

easier than invoking them. In *Berghuis v. Thompkins*, the Court held that a defendant's remaining silent for hours did not amount to an invocation of his right to remain silent,[256] but when he started answering questions—without a "basis . . . to conclude that he did not understand his rights"—*that* amounted to a proper waiver of his rights.[257] In light of these doctrinal developments, and due to the fact that nearly 80% of adult suspects waive their *Miranda* rights,[258] *Miranda*'s protections now amount to little more than empty formalism.

As originally conceived, *Miranda* was a strong step toward safeguarding suspects' Fifth Amendment rights against self-incrimination. But the Court's holding—that the warnings are required to ensure the confession's voluntariness—rests on the assumption that these warnings will be an effective safeguard for suspects' rights during custodial interrogations.[259] Unfortunately, despite the Court's best intentions, this assumption has been seriously challenged, and it is especially dubious in the context of individuals with intellectual disabilities.[260]

Courts sometimes recognize that waivers executed by people with intellectual disabilities require extra scrutiny, but often mental disability is only one of several factors considered.[261] Judges often assume that *Miranda* waivers by people with intellectual disabilities can be knowing if offset by other factors such as the suspect's older age, previous experience with the justice system, or the way the warnings themselves are delivered.[262]

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256. *See* 560 U.S. at 381.

257. *See id.* at 385.

258. *See supra* text accompanying note 124.

259. *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966) ("As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the [warnings] are required.").

260. *See* Cloud et al., *supra* note 76, at 522. It is clear the Court intended *Miranda* to be effective for everyone, including those who are intellectually disabled. The Court specifically mentioned the example of a person "of *limited intelligence* [who] confessed to two brutal murders and a rape which he had not committed." *Miranda*, 384 U.S. at 455 n.24 (emphasis added). It would be hard to argue that the Court included this example as evidence of the dangers of modern police interrogation techniques but omitted individuals with "limited intelligence" from consideration in its holding.

261. Cloud et al., *supra* note 76, at 527; *see, e.g.*, Byrd v. State, 78 So. 3d 445, 453 (Ala. Crim. App. 2009) ("A defendant's low IQ is only one factor that must be considered when reviewing the totality of the circumstances.").

262. *See* Cloud et al., *supra* note 76, at 531; *see also, e.g.*, Bevel v. State, 983 So. 2d 505, 516 (Fla. 2008) ("Despite his low IQ, the totality of the circumstances, based upon the testimony presented at the hearing as well as a review of the videotaped confessions, indicates that [the defendant] knowingly and voluntarily waived his *Miranda* rights."); State v. Carpenter, 633 A.2d 1005, 1008 (N.J. Super. Ct. App. Div. 1993) ("Although defendant is illiterate, has an I.Q. of 71 and left school at age 18 while attending special education classes, those factors are not dispositive of whether he understood the meaning of the

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But scholars have demonstrated that the only factor that seems to matter is the fact of these individuals' intellectual disability.[263] Cloud et al. conducted a study of individuals with varying severities of intellectual disability and found that no individual at any level was able to understand the legal concepts enshrined in the *Miranda* warnings.[264] They also determined that most of the common totality-of-the-circumstances factors judges use to assess the validity of a waiver—"age, education, prior experience with the criminal justice system, and prior reception of the *Miranda* warnings"—do not correlate with greater comprehension in the intellectually disabled population.[265] In other words, even if a person with intellectual disabilities has, for example, been arrested before—a factor that typically increases an individual's understanding of and ability to validly waive her *Miranda* rights[266]—there will be no appreciable increase in her capacity to understand the nature and implications of the waived rights. People with intellectual disabilities simply do not understand their *Miranda* rights.[267]

With these findings, the judicial inquiry into the *Miranda* waiver of a suspect with intellectual disabilities is called into serious question. *Miranda* may even harm this vulnerable population, if not the greater body of suspects. *Miranda* provides formalistic legal cover for coerced confessions that might otherwise garner more significant due process scrutiny. That said, the *Miranda* warnings were created to provide further constitutional protection on top of the due process voluntariness analysis, which proved insufficient to protect individuals from psychologically manipulative interrogation tactics.[268] Therefore, the ideal solution for people with intellectual disabilities would be to legally recognize their per se inability to knowingly waive their *Miranda* rights. Under such a rule, if a suspect is diagnosed with intellectual disabilities, her confession would not be admitted into evidence unless her attorney—or perhaps a legal guardian—was present for the interrogation. And if it were

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Miranda warnings . . . . A defendant's I.Q. is merely a factor in the totality of the circumstances to be considered.").

263. *See, e.g.*, Cloud et al., *supra* note 76, at 538 ("Regardless of the presence or absence of these factors, whether taken singly or in combination, if the person was [intellectually disabled], he did not understand the *Miranda* warnings.").

264. *See id.*

265. *See id.* at 538, 563-68.

266. *See, e.g.*, State v. Fisher, 556 A.2d 596, 599 (Conn. 1989) (identifying "the defendant's extensive experience with the criminal justice system" as tending to prove "that the waiver and the subsequent statement were voluntarily, knowingly and intelligently given").

267. Cloud et al., *supra* note 76, at 590. For a more comprehensive review of literature supporting the conclusion that people with intellectual disabilities cannot understand the legal rights associated with *Miranda*, see Kassin et al., *supra* note 4, at 21.

268. *See supra* notes 239-46 and accompanying text.

somehow determined before the interrogation that the suspect had such disabilities, the interrogation would halt until such a lawyer or guardian was present.

2. Review of the confession's voluntariness

Even if a suspect's *Miranda* waiver was made voluntarily, knowingly, and intelligently, a court may find that the confession itself does not pass the due process voluntariness standard.[269] In the aftermath of *Colorado v. Connelly*,[270] however, it is unclear whether this doctrine provides any more protection for a suspect with intellectual disabilities who has falsely confessed.

In *Connelly*, the Supreme Court held that finding a confession involuntary under the Fourteenth Amendment's Due Process Clause requires proving coercive conduct by the police.[271] In that case, the defendant approached a uniformed police officer to say that he was told by God to move from Boston to Denver to take responsibility for the murder of a young girl.[272] The defendant suffered from chronic schizophrenia, and he made it clear to the officer that he had spent time in mental hospitals.[273] Though the Supreme Court had seemed to consider the mental state of suspects in prior cases,[274] in *Connelly* the Court determined that the defendant's mental condition was "a matter to which the United States Constitution does not speak."[275] The Court also made clear that the statement's reliability is not germane to its constitutionality.[276] The due process voluntariness test thus concerns itself

269. *See* Dickerson v. United States, 530 U.S. 428, 434 (2000) ("We have never abandoned this due process jurisprudence, and thus continue to exclude confessions that were obtained involuntarily."); Miller v. Fenton, 474 U.S. 104, 110 (1985) ("Indeed, even after holding that the Fifth Amendment privilege against compulsory self-incrimination applies in the context of custodial interrogations, and is binding on the States, the Court has continued to measure confessions against the requirements of due process." (citations omitted)).

270. 479 U.S. 157 (1986).

271. *See id.* at 167.

272. *Id.* at 160-61.

273. *Id.*

274. *See, e.g.*, Townsend v. Sain, 372 U.S. 293, 308 n.4 (1963), *overruled in other part by* Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992); Blackburn v. Alabama, 361 U.S. 199, 209 (1960).

275. 479 U.S. at 170-71. It appears that the suspect in *Connelly* suffered from mental illness, not mental disability. *See id.* at 160-62. Though there are important differences between illness and disability, *see supra* text accompanying notes 103-08, it is unlikely *Connelly*'s holding would apply differently in the context of mental disability.

276. *Connelly*, 479 U.S. at 167 ("A statement rendered by one in the condition of [the defendant] might be proved to be quite unreliable, but this is a matter to be governed by

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almost exclusively with the police's conduct.[277]

The *Connelly* Court made clear that a suspect's mental condition does not *directly* affect the due process voluntariness of her confession.[278] The Court seemed to suggest, however, that the suspect's mental condition may be *indirectly* relevant to the coercive power a police officer can exert over her.[279] The opinion left open exactly *how* mental disability would be considered, and federal courts of appeals "have not answered this question uniformly."[280] Most courts conduct a two-step voluntariness inquiry, asking first whether the police activity was objectively coercive and second whether that coercive behavior overbore the will of the accused.[281] This test only considers a suspect's mental disability relevant to the extent that the police were aware of the condition and exploited it.[282]

A minority of the federal courts of appeals, however, takes a more subjective approach. Those courts consider the suspect's mental state as lowering the

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the evidentiary laws of the forum, and not by the Due Process Clause of the Fourteenth Amendment." (citation omitted)).

277. *See id.*

278. *See id.* at 170-71.

279. *See id.* at 164 (acknowledging that "courts have found the mental condition of the defendant a more significant factor" in the due process analysis "as interrogators have turned to more subtle forms of psychological persuasion").

280. Paul T. Hourihan, Note, *Earl Washington's Confession: Mental Retardation and the Law of Confessions*, 81 VA. L. REV. 1471, 1481 (1995).

281. *See, e.g.*, United States v. Taylor, 752 F.3d 254, 261 (2d Cir. 2014) (Raggi, J., dissenting from the denial of rehearing en banc) ("[A] defendant's 'mental state does not become part of the calculus for the suppression of evidence *unless* there is an allegation that agents . . . engaged in some type of coercion.'" (second alteration in original) (quoting United States v. Salameh, 152 F.3d 88, 117 (2d Cir. 1998) (per curiam))); Sweet v. Tennis, 386 F. App'x 342, 347 (3d Cir. 2010) ("[T]here is no evidence to suggest that the detectives who interrogated the petitioners resorted to coercive tactics or exploited the petitioners' medical condition in any way."); Murphy v. Ohio, 551 F.3d 485, 514 (6th Cir. 2009) ("Murphy's low intelligence alone does not make the officers' actions in questioning him coercive. . . . [T]he facts do not suggest that the officers engaged in improper tactics when questioning Murphy . . . ."); Smith v. Mullin, 379 F.3d 919, 935 (10th Cir. 2004) ("Mr. Smith's mental impairments are nonetheless relevant to our scrutiny of his interrogation . . . . Police may not 'exploit[] this weakness with coercive tactics.'" (second alteration in original) (quoting *Connelly*, 479 U.S. at 165)); United States v. Hall, 969 F.2d 1102, 1107-08, 1108 n.6 (D.C. Cir. 1992) ("[T]he subject's particular 'vulnerable subjective state,' [including low IQ and psychological problems,] would be relevant only insofar as the police knowingly took advantage of that vulnerability in eliciting a consent to search." (citation omitted) (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 229 (1973))); Atkins v. Singletary, 965 F.2d 952, 959 (11th Cir. 1992) (recognizing that "the mental condition of a defendant . . . can be a significant factor when discussing involuntariness" but holding that the defendant's confession was voluntary because the record demonstrated "no improper or coercive state tactics").

282. *Cf.* United States v. Walker, 607 F. App'x 247, 256 (4th Cir. 2015) ("[T]here is no evidence in the record that the officers sought to exploit Walker's intoxication in order to unlawfully obtain incriminating statements from him.").

threshold of police coercion required to find the confession involuntary.[283] Police conduct that would be noncoercive for a suspect with typical intellectual abilities may be deemed coercive, and thus a violation of due process voluntariness, when used on individuals with lower cognitive abilities or other mental disorders.[284] For example, in *United States v. Preston*, the defendant—an eighteen-year-old with intellectual disabilities and an IQ of 65—was questioned by two FBI officers right in front of his house.[285] The officers "quickly became aware of Preston's mental disability," but they persisted.[286] About twenty minutes into the interview, the officers were able to convince the defendant to acquiesce in the suggestion that he was home on Friday—which he was not, as both parties agreed by the time of the appeal—and by the end of forty minutes, he was signing a confession to allegations of child molestation.[287] In an en banc decision, the Ninth Circuit overruled circuit precedent and rejected the two-step voluntariness inquiry that requires first finding that the police acted coercively.[288] Instead, the court held that the defendant's reduced mental capacity was directly relevant to due process voluntariness because it rendered him more vulnerable to forms of psychological coercion.[289]

The minority approach is more favorable to suspects with intellectual disabilities. The standard interrogation tactics police use may be unduly effective at eliciting confessions from individuals with intellectual disabilities, even if they are not deemed coercive under the standard due process voluntariness test. The minority approach to due process voluntariness allows courts to recognize the subjective risks that individuals with mental disorders face in these interrogations, forcing police to submit alternative evidence (other than the suspect's confession) to prove the defendant's guilt. Furthermore, the majority rule—which only incorporates mental disability to the extent the interrogating officer is aware of the suspect's handicap—fails to account for the difficulty in identifying individuals with mild to moderate intellectual disabilities.[290]

283. *See, e.g.*, United States v. Preston, 751 F.3d 1008, 1019-23 (9th Cir. 2014) (en banc).

284. *See, e.g.*, Smith v. Duckworth, 910 F.2d 1492, 1497 (7th Cir. 1990) ("[W]hile a finding of involuntariness cannot be predicated solely upon Smith's mental instability, his mental state is relevant 'to the extent it made him more susceptible to mentally coercive police tactics.'" (quoting Andersen v. Thieret, 903 F.2d 526, 530 n.1 (7th Cir. 1990))).

285. *See* 751 F.3d at 1010, 1012.

286. *Id.* at 1012.

287. *See id.* at 1012-15.

288. *See id.* at 1019.

289. *See id.* at 1019-20 (overruling Derrick v. Peterson, 924 F.2d 813 (9th Cir. 1991)).

290. *See supra* text accompanying notes 101-02.

Connelly also made clear that a confession's reliability is irrelevant to the due process inquiry.[291] Even where an admission by a person with mental disabilities or illness "might be proved to be quite unreliable, . . . this is a matter to be governed by the evidentiary laws of the forum."[292]

The issue of reliability, however, was of particular concern to Justice Brennan in his dissent.[293] Because confessions "so strongly tip[] the balance against the defendant in the adversarial process," Justice Brennan believed that courts "must be especially careful about a confession's reliability."[294] Where reliability no longer bears upon the due process inquiry, the postadmission phase of the interrogation essentially goes unchecked. Once the individual admits guilt "voluntarily," the validity and accuracy of the postadmission narrative is not constitutionally relevant. This is especially unfortunate for individuals who have given false confessions that could be easily determined by a neutral judge to be unreliable and therefore in violation of the defendant's due process rights. Where an individual with intellectual disabilities is especially likely to be coaxed into giving a false confession, the absence of a constitutional reliability inquiry removes a potentially powerful check on that defendant's path to wrongful conviction.

IV. Indicia of Intellectual Disability Among Exonerated False Confessors

The NRE maintains a comprehensive database of individuals who have been officially exonerated.[295] The NRE reports over 2000 exonerations since 1989.[296] The registry tracks numerous characteristics pertaining to each exoneration, including demographic information (for example, race and age), conviction information (crime and sentence), and factors contributing to the conviction (for example, mistaken witness identification, misleading forensic evidence, jailhouse informants, or false confessions).[297] Of the 2040 officially

291. *See* Colorado v. Connelly, 479 U.S. 157, 167 (1986).

292. *Id.* at 167.

293. *See id.* at 181 (Brennan, J., dissenting) ("Since the Court redefines voluntary confessions to include confessions by mentally ill individuals, the reliability of these confessions becomes a central concern.").

294. *Id.* at 182.

295. *See Our Mission*, NAT'L REGISTRY EXONERATIONS, https://perma.cc/R5X4-58ER (archived Dec. 7, 2017).

296. *See* NAT'L REGISTRY EXONERATIONS, https://perma.cc/A4QG-HGFF (archived Dec. 30, 2017).

297. *See National Registry of Exonerations: Detailed List*, NAT'L REGISTRY EXONERATIONS, https://perma.cc/2NYZ-FXSR (archived Dec. 6, 2017).

recognized wrongful convictions analyzed in this Note,[298] 245 (12%) involved a false confession.[299] But the database contained no detailed tagging of intellectual disabilities.[300]

The goal of this Note's analysis is twofold. First, using the most comprehensive database of proven false confessions, I estimate the occurrence of intellectual disabilities among those who falsely confess. Second, I lay out a methodology by which the NRE could begin tracking indicia of intellectual disability for the greater population of exonerees. This would allow researchers to study the correlation of intellectual disabilities with other factors contributing to wrongful convictions.

For each of the 245 exonerees in my study who falsely confessed, I searched for indicia of intellectual disability through various source documents including, but not limited to, court orders, petitions for habeas corpus or other postconviction relief, complaints in postexoneration civil lawsuits, expert affidavits and testimony, news articles, scholarly articles, and NRE notes. These indicia included the following list of terms (and reasonable variations thereof): intellectual disability, cognitive disability, mental handicap, mental retardation, mental impairment, learning disability, and IQ. This Note's data supplement indicates which indicia were present for each identified individual.[301]

It is important to note that this classification is *not* a diagnosis. I estimated the exonerees' intellectual disabilities based on the presence of certain terms and characteristics in these individuals' files, case histories, and media reports. In some cases, the indicia do come from a psychologist's or psychiatrist's analysis, as captured in an affidavit or expert testimony. But in most cases, such clarity was not available.

This in-depth search revealed that 58 of the 245 people (23.7%) whose convictions relied, in whole or in part, on false confessions have indicia of

298. *See supra* note 1.

299. *See* Data Supplement, *supra* note 1. The NRE defines a confession as follows:

> A confession is a statement made to law enforcement at any point during the proceedings which was interpreted or presented by law enforcement as an admission of participation in or presence at the crime, even if the statement was not presented at trial. A statement is not a confession if it was made to someone other than law enforcement. A statement that is not at odds with the defense is not a confession. A guilty plea is not a confession.

See Glossary, *supra* note 64.

300. The NRE tracked a general category of "mental disability" that contained information pertaining to mental illness, intellectual disabilities, and cognitive disabilities resulting from trauma. This information is not reported on the NRE website. Telephone Interview with Samuel R. Gross, Editor, Nat'l Registry of Exonerations (Mar. 9, 2016).

301. *See* Data Supplement, *supra* note 1. I considered an IQ of 70 or lower to be an indicator of intellectual disability. If the IQ was between 70 and 80, I looked for other indicia of intellectual disability besides just the number.

intellectual disability.[302] A further five individuals display cognitive disabilities that may be linked to prior episodes of trauma.[303] Though these individuals may not technically suffer from "developmental disabilities" (because their disabilities did not arise "during the[ir] developmental period"),[304] they likely suffer similar risks in the context of police interrogations due to their mental impairments. In total, then, 63 of 245 individuals (25.7%) display indicia of intellectual disability.[305]

This figure—25.7%—is larger than estimates of the percentage of the general population and the prison population in the United States that have intellectual disabilities. Studies estimate that between 1% and 3% of the general population have intellectual disabilities.[306] Even estimates of the prison population with intellectual disabilities—which vary widely—are less than 25.7%. Joan Petersilia reported in 2000 that somewhere between 4% and 10% of

302. *See id.*

303. *See id.* Bobby Ray Dixon suffered mental impairment and seizures because he was kicked in the head by a horse as a child. *See id.* Ronald Jones fell from a fourth-story porch and consequently began struggling in school and was described as "mentally retarded." *See id.* Damon Thibodeaux was placed in special education classes; his psychologists said that he suffered from physical and sexual abuse as a child. *See id.* Antonio West also suffers from cognitive disabilities due to a head injury as a child. *See id.* And Frank Lee Smith was described as "mentally slow" and "special needs" as a result of a traumatic brain injury as a toddler and again as a teenager; as a toddler, Smith accompanied his mother to a bar where a fight broke out, and somebody threw a bottle that split open Smith's head such "that his brain tissue was exposed." *See* Jeff Walsh, *Frank Lee Smith's Long Hard Life*, PBS: FRONTLINE, https://perma.cc/MW3G-QFRT (archived Dec. 6, 2017). A sixth individual—Joseph Dick, Jr.—demonstrates disabilities that *may* be the result of a head injury as a child, but the circumstances are less certain, and I have included him as one of the 58 individuals showing general indicia of intellectual disability. *See* Data Supplement, *supra* note 1.

304. *See* DSM-5, *supra* note 77, at 33.

305. In addition, two individuals suffer from Fetal Alcohol Syndrome Disorder, which can cause, among other symptoms, various cognitive disabilities. *See* Data Supplement, *supra* note 1 (Gabriel Baddeley and Danya Christoph); *see also* Nat'l Org. on Fetal Alcohol Syndrome, FASD: What Everyone Should Know (n.d.), https://perma.cc/9EN8-KRN7. Without further information about their cognitive abilities, however, these individuals are not included in these results.

306. *See Intellectual Disability*, ARC, https://perma.cc/QF9D-TFWP (archived Dec. 6, 2017); *see also* JENNIFER BRONSON ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 249151, DISABILITIES AMONG PRISON AND JAIL INMATES, 2011-12, at 3 tbl.1 (2015), https://perma.cc/ML37-EYR4 (estimating that when general population data are standardized to match the "sex, age, race, and Hispanic origin" characteristics of state and federal prison populations, 4.8% of that standardized population has cognitive disabilities); NAT'L ACADS. OF SCIS, ENG'G & MED., MENTAL DISORDERS AND DISABILITIES AMONG LOW-INCOME CHILDREN 268 tbl.15-1 (Thomas F. Boat & Joel T. Wu eds., 2015) (chronicling historical estimates of the prevalence of intellectual disabilities among children since the 1960s); *What Is Intellectual Disability?*, SPECIAL OLYMPICS, https://perma.cc/J3Y7-TFUV (archived Dec. 6, 2017) (estimating that approximately 6.5 million people in the United States live with intellectual disabilities).

those in prison or jail suffer from developmental disabilities.[307] The Bureau of Justice Statistics (BJS) conducted a study of inmates' *self-reported* disabilities in 2011-2012, finding that 19.5% of state and federal prisoners report having a cognitive disability.[308] Neither of these studies presents an apples to apples comparison with my dataset—developmental and cognitive disabilities are broader categories, both of which can encompass intellectual disabilities[309]—but they provide approximate comparison points.

These findings are consistent with previous estimates of false confessors with intellectual disabilities.[310] Drizin and Leo compiled a dataset of 125 proven false confessions and determined that approximately 22% of the defendants were "mentally retarded."[311] Though the dataset analyzed in this Note and the one compiled by Drizin and Leo overlap somewhat, 65% of Drizin and Leo's set were *not* convicted.[312] For those defendants, the pretrial process may have failed to weed out their false confessions, but in one way or another, they were able to avoid conviction.

Turning to the dataset analyzed in this Note, there are several notable points of comparison between the general population of false confessors and the subset displaying indicia of intellectual disability. For example, there are few demographic differences. The group displaying indicia of intellectual disability skews slightly more male than the 182 false confessors who do not show such indicia (94% versus 88%).[313] But the racial distribution is not meaningfully different. In the population of 63 individuals demonstrating some indicia of intellectual disability, 43% are Caucasian, 49% are black, and 8% are Hispanic.[314] Clearly, people of color are overrepresented, but not much

307. *See* PETERSILIA, *supra* note 111, at 5 (collecting prevalence estimates by state, ranging from 3% in New York to 27% in South Carolina).

308. BRONSON ET AL., *supra* note 306, at 3 tbl.1. The study also finds that 30.9% of jail inmates (as opposed to state or federal prisoners) report having a cognitive disability. *Id.* at 3 tbl.2. There are myriad reasons to set this outlier aside given the broader definition of "cognitive" disabilities used by the study, its self-reported nature, and the unique dynamic at jails—institutions increasingly tasked with compensating for the nation's failure to provide adequate services for people with cognitive disabilities or mental disorders. *Cf.* Matt Ford, *America's Largest Mental Hospital Is a Jail*, ATLANTIC (June 8, 2015), https://perma.cc/M3MY-9ZT4.

309. *See supra* note 79 (explaining that intellectual disability is one specific type of developmental disability). The BJS defines "cognitive disability" as "a broad term used to describe a variety of medical conditions affecting different types of mental tasks, such as problem solving, reading comprehension, attention, and remembering." BRONSON ET AL., *supra* note 306, at 3.

310. *See, e.g.*, Drizin & Leo, *supra* note 4, at 920 n.155, 971.

311. *Id.* at 920 n.155.

312. *See id.* at 951.

313. *See* Data Supplement, *supra* note 1.

314. *See id.*

more so than in the false confessor population without indicia of intellectual disabilities (38% Caucasian, 52% black, 8% Hispanic, and 2% other).[315] In terms of age, the subset displaying indicia of intellectual disability is representative of the whole: The approximate average for both is twenty-four years of age.[316]

The subset of individuals who display indicia of intellectual disability differ from the general false confessor population, however, in terms of crime and sentence. Fifty-one of the 63 individuals in the subset (81%) were convicted of some form of homicide.[317] This is slightly higher than in the population of false confessors without indicia of intellectual disabilities, where only 74% of convictions included homicide.[318] In addition, 36 of the subset's convictions (57%) involved sex-related crimes.[319] This is noticeably higher than that of the group of false confessors without indicia of intellectual disability (31%).[320] The percentage of exonerees who were convicted of crimes that consisted of both homicide and sex crimes is also higher in the subset of individuals displaying indicia of intellectual disability.[321] While 41% of the subset were convicted of both homicide and sex crimes, only 14% of the larger population of false confessors included both.[322] Only 2 of the 63 cases including indicia of

315. *See id.* This demographic also generally tracks estimates of the distribution in the general exoneree population (39% Caucasian, 47% black, 12% Hispanic, 2% other). *See* Samuel R. Gross, *What We Think, What We Know and What We Think We Know About False Convictions*, 14 OHIO ST. J. CRIM. L. 753, 756 (2017) (estimating based on 1900 individuals exonerated from January 1989 through October 2016).

316. *See* Data Supplement, *supra* note 1 (24.2 years for the general false confessor population and 23.8 years for the subset of false confessors with indicia of intellectual disability).

317. *See id.* Homicide includes murder and manslaughter. *See id.*

318. *See id.* These figures are much higher than the homicide rate among the general population of exonerees; one study estimated that 42% were convicted of homicide. *See* Gross, *supra* note 315, at 757 & tbl.t. Even *that* number is extraordinarily different from the rate of homicides in the larger criminal justice system; fewer than 1% of felony convictions are homicides. *See id.* at 758. Scholars observe that police-induced false confessions, in general, tend to correlate with more serious crimes like homicide and rape, *see* Garrett, *supra* note 7, at 1065, likely because these cases tend to be high profile and law enforcement officials are thus under increased pressure to solve them, s*ee* Gross et al., *supra* note 48, at 532.

319. Data Supplement, *supra* note 1. Note that cases involving homicide and cases involving sex-related crimes are not mutually exclusive. Thus, these percentages do not add to 100%. *See id.*

320. *Id.* Again, both figures are higher than the prevalence of sexual assault convictions in the larger exoneree population (26%). Gross, *supra* note 315, at 757.

321. *See* Data Supplement, *supra* note 1.

322. *See id.* The small size of the samples in my dataset produced a predictable result: Few of the comparisons between exonerees with indicia of intellectual disabilities and those without such indicia are statistically significant. However, the overrepresentation of individuals with indicia of intellectual disabilities convicted of sex-related crimes, *see supra* notes 319-20 and accompanying text, is statistically significant. *See* Data

footnote continued on next page

intellectual disability did *not* involve homicide or sex-related crimes.[323]

There are differences in terms of sentencing as well. The population displaying indicia of intellectual disability has a higher prevalence of the most severe sentences: death, life in prison without the possibility of parole (LWOP), and life in prison.[324] Eight of the 63 individuals (13%) were sentenced to death; ten (16%) were sentenced to LWOP; and thirteen (21%) were sentenced to life in prison.[325] In comparison, only 7% of the population without indicia of intellectual disabilities was sentenced to death, 9% to LWOP, and 17% to life in prison.[326]

To be sure, it is difficult to attribute meaning to these differences without a greater sample size.[327] If further work is done to identify indicia of intellectual disability among the remaining exonerees (not just those who falsely confessed), it would be notable if the trend of severe criminal charges and sentencing continues to correlate with individuals with intellectual disabilities.

It is perhaps noteworthy that none of the eight death penalty sentences were imposed after 2002, the year the U.S. Supreme Court held in *Atkins v. Virginia* that the Constitution prohibits sentencing to death individuals with intellectual disabilities.[328] The Court, in holding the practice unconstitutional under the Eighth Amendment, underscored the "special risk of wrongful execution."[329] In particular, the Court highlighted the narrative of Earl Washington Jr., who in the 1980s had "unwittingly confessed to a crime that he did not commit."[330]

Supplement, *supra* note 1. So too is the overrepresentation of individuals with those indicia convicted of both sex- and homicide-related crimes. *See id.* And the difference in the percentage of individuals who pleaded guilty in both groups, *see infra* note 331 and accompanying text, is also statistically significant. *See* Data Supplement, *supra* note 1.

323. *See* Data Supplement, *supra* note 1. Ricky Cullipher was wrongfully convicted of assault, and Antonio West was wrongfully convicted of gun possession or sale. *See id.*

324. *See id.*

325. *Id.*

326. *Id.* Only 6% of the larger exoneree population was sentenced to death. *See* Gross, *supra* note 315, at 757 tbl.1. This, again, is much lower than that of the 245 false confessors (9%) and the 63 false confessors with indicia of intellectual disability (13%). *See* Data Supplement, *supra* note 1.

327. *See supra* note 322.

328. 536 U.S. 304, 321 (2002) (concluding that executing individuals with intellectually disabilities violates the Eighth Amendment); *see* U.S. CONST. amend. VIII (prohibiting "cruel and unusual punishments"). The exonerees displaying indicia of intellectual disability most recently sentenced to death were Hubert Geralds, Jr. and Damon Thibodeaux, both in 1997. *See* Data Supplement, *supra* note 1.

329. *See Atkins*, 536 U.S. at 321.

330. *Id.* at 320 n.25 (citing Peter Baker, *Death-Row Inmate Gets Clemency*, WASH. POST (Jan. 15, 1994), https://perma.cc/4FH4-Q3M7).

Lastly, the subset displaying indicia of intellectual disability also has a higher rate of pleading guilty than population without those indicia. Whereas 22% of the larger group were convicted on a guilty plea, 35% of the subset with such indicia pleaded guilty.[331] Both figures are higher than the rate of the broader exoneree population (17%),[332] lending support to the hypothesis noted above that a defendant's confession may yield undue pressure to plead guilty, even when she is innocent.[333]

The number of individuals with intellectual disabilities in the studied population may very well be higher than the 63 identified here. Individuals with clear intellectual disabilities are likely to raise the issue at trial, on appeal, or in postconviction proceedings. Indicia in those cases were more readily identified. For most of the 245 false confessors, however, detailed information regarding the person's acumen was unavailable.[334] There are several plausible scenarios under which an individual suffering from intellectual disabilities would not be discoverable as such in this study. First, the individual may never have been diagnosed or identified as having intellectual disabilities. Second, the individual may have known of her disability but may have elected not to share the information with defense counsel. Third, the attorneys representing the defendant may not have raised the issue of intellectual disability (perhaps because their legal strategy did not call for such disclosure). Under any of these scenarios, an intellectual disability would have gone unnoted in the individual's record and undiscovered in my review, and thus would not be represented in the data here.

This study only looks at individuals who have been officially exonerated. The NRE database is unrepresentative of the greater criminal justice system in several obvious ways. For example, the vast majority (82%) of documented exonerations involve violent crimes (including homicides or sexual crimes), while fewer than 20% of felony convictions nationwide are for violent crimes.[335] This may be because violent crimes carry longer and harsher sentences, in turn increasing the incentives and time for innocent defendants to seek exoneration through postconviction processes.[336] It is also partially because these violent crimes—especially sex-related crimes, but also homicide—are more likely to involve the transfer of DNA evidence,[337] which presents the

331. *See* Data Supplement, *supra* note 1.

332. *See* Gross, *supra* note 315, at 756.

333. *See supra* text accompanying notes 24-25.

334. *Cf.* Drizin & Leo, *supra* note 4, at 971 n.452 (noting a similar likelihood of underestimation of intellectual disabilities in their dataset).

335. *See* Gross, *supra* note 315, at 758.

336. *See id.* at 766-67; *see also* Gross et al., *supra* note 48, at 531-32.

337. *See* Gross et al., *supra* note 48, at 529 tbl.1.

opportunity to conclusively exonerate the wrongfully convicted.[338] Due to these and other peculiarities of the overall exoneration sample, these results cannot be extrapolated to estimate a frequency of false confessions or the tendency of false confessions to occur in cases where defendants have intellectual disabilities.

The inability to estimate the frequency of false confessions based on these results does not strip the study of meaning, however. The fact that a full quarter of the proven false confessions in the NRE database show indicia of intellectual disability provides further evidence for the hypothesis that individuals with intellectual disabilities have faced and continue to face heightened risks of falsely confessing.

Conclusion

That intellectually disabled individuals are "more likely to confess falsely"[339] seems intuitive and logical. The hypothesis has been often stated but rarely examined in detail. Here, I have traced the common characteristics of individuals with intellectual disabilities through the rich false confession literature, highlighting the points in the process of custodial interrogations where individuals with intellectual disabilities may be at greater risk. Furthermore, I have explored this hypothesis empirically, finding that in fact around one-quarter of those who have been proved to have falsely confessed in the NRE dataset display indicia of intellectual disability, a greater percentage than estimates for those in the general population and even most estimates for those in prison.

There are numerous ways to better protect individuals with intellectual disabilities from conviction based on their false confessions. Some of these proposals are generally applicable to all false confessors; others are geared toward the specific vulnerabilities of people with intellectual disabilities.

First, police interrogations should be videotaped.[340] Many states have already passed statutes requiring custodial interrogations to be videotaped, and many police departments have implemented the policy;[341] scholars almost unanimously call for national adoption of this policy.[342] The reasons for the policy are fairly simple: Videotaping interrogations allows for greater

338. *See* Gross, *supra* note 315, at 766.

339. LEO, *supra* note 4, at 232; *accord* Kassin et al., *supra* note 4, at 30.

340. *See* Kassin et al., *supra* note 4, at 25.

341. *See id.* at 26; *Custodial Interrogation Recording Compendium by State*, NAT'L ASS'N CRIM. DEF. LAWS., https://perma.cc/RP3Z-Y2GZ (archived Dec. 6, 2017).

342. *See, e.g.*, Kassin et al., *supra* note 4, at 26.

accountability and more accurate post-interrogation review.[343] A video of the interrogation allows the judge, in determining voluntariness, and the jury, in determining guilt, to observe the confession with their own eyes.[344] It also may deter more egregious interrogator misconduct.[345] Even the latest edition of the Reid Method handbook acknowledges benefits to taping.[346] Videotaping is a relatively low-cost improvement with a high potential reward.[347]

Second, police should receive special training that addresses the limits of human lie detection, the risks of false confession, and the added risks faced by people with intellectual disabilities.[348] For example, police departments could implement the International Association of Chiefs of Police's model policy on "Interactions with People with Intellectual and Developmental Disabilities."[349] This model policy provides guidelines on common characteristics of individuals with intellectual disabilities, as well as tips for identifying these individuals.[350] The model policy specifically directs officers *not* to employ common interrogation techniques on individuals officers believe to have intellectual disabilities because these individuals "are easily manipulated and may be highly suggestible."[351] The implementation of model policies instructing officers on how to identify intellectual disabilities and how to adjust their normal procedures in these cases could prevent some police-induced false confessions among this vulnerable population.

Third, individuals with intellectual disabilities should be tutored to invoke their *Miranda* rights. The literature gives little attention to the possibility of teaching individuals with intellectual disabilities—perhaps in special education curricula or just in the home—how to protect themselves in the confines of a custodial interrogation. Though these individuals may not comprehend the full consequences of the legal rights they are invoking, they may only need to memorize the words to ask for a lawyer or invoke silence for the interrogation to halt, thus minimizing the chances of a false confession. There may be a

343. *Id.*

344. *Id.*

345. *See id.*

346. *See* INBAU ET AL., *supra* note 120, at 50 (noting that the majority of 112 Reid Method-trained investigators surveyed "reported positive experiences with electronic recording" of interrogations).

347. *See* Christopher Slobogin, *Toward Taping*, 1 OHIO ST. J. CRIM. L. 309, 315 (2003).

348. *See* Kassin et al., *supra* note 4, at 30.

349. *See* Int'l Ass'n of Chiefs of Police, Law Enf't Pol'y Ctr., Model Policy: Interactions with Individuals with Intellectual and Developmental Disabilities (2016). It is unclear to what extent police departments across the country already implement this or similar training programs.

350. *See id.* at 1-2.

351. *Id.* at 4.

concern that this lesson would conflict with the desire to teach individuals with intellectual disabilities to seek help from the police in times of need. Additional research is necessary to determine the best method to teach individuals with intellectual disabilities not only to seek help when necessary but also to protect themselves in adversarial interactions with an officer.

Alternatively, a more drastic remedy would be to require the presence of an attorney in the interrogation of any individual with intellectual disabilities.[352] This would amount to a per se invocation of one's *Miranda* rights when the individual is determined to be intellectually disabled. To make this per se invocation meaningful would require an adjustment to the legal review of *Miranda* waivers—or legislation imposing such a requirement as a matter of statutory if not constitutional law. This proposal is similar to the requirement in the United Kingdom that an interested adult be present in the interrogation of a juvenile or person with intellectual disabilities.[353]

Fourth, in terms of legal review of the confession's voluntariness, as noted above, individuals with intellectual disabilities who have falsely confessed would be better protected were the minority due process rule widely adopted.[354] Under this rule, courts consider an individual's mental disability as relevant to determining the type of police conduct that amounts to coercion and therefore renders the confession involuntary.

Short of this shift in the majority due process voluntariness rule,[355] trial court judges could make greater use of their evidentiary discretion to exclude confessions by individuals with intellectual disabilities or more generally in cases where there is reason to believe that the confession is unreliable.[356] Though not every state may give judges the discretion to make such determinations, the Federal Rules of Evidence do so. Under Rule 403, a federal district judge has discretion to determine whether the possibility of unfair prejudice posed by the confession of an individual with intellectual disabilities outweighs the probative value of such evidence—especially when the confession shows indications of unreliability.[357] These evidentiary rulings

352. *See* Kassin et al., *supra* note 4, at 30.

353. *See id.*

354. *See supra* notes 283-90 and accompanying text.

355. On the majority rule, see notes 281-82 and accompanying text above.

356. *See* Colorado v. Connelly, 479 U.S. 157, 167 (1986) ("A statement rendered by [an individual with intellectual disabilities] might be proved to be quite unreliable, but this is a matter to be governed by the evidentiary laws of the forum . . . ."). *But see* Eugene R. Milhizer, *Confessions After* Connelly*: An Evidentiary Solution for Excluding Unreliable Confessions*, 81 TEMP. L. REV. 1, 34-37 (2008) (doubting that Rule 403 of the Federal Rules of Evidence would be an effective tool for curbing the distorting effects confessionary evidence imposes on a trial).

357. *See* FED. R. EVID. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice,
footnote continued on next page

would force the prosecution to proffer alternative evidence of the defendant's guilt and base its case on more than the words the suspect uttered in the confines of a custodial interrogation. In summary, where the constitutional doctrine of due process voluntariness does not allow a judge to exclude a confession due to its unreliability or because it was elicited from an individual with intellectual disabilities, she may be able to do so under the rules of evidence.

While further exploring these reforms is necessary, the most important goal is renewed awareness of the risks faced by individuals with intellectual disabilities. The integrity of the criminal justice system is called into question when we fail to protect the most vulnerable citizens from wrongful conviction based on their own self-incrimination.

confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."); *see also, e.g.*, United States v. Condon, 720 F.3d 748, 750, 755-57 (8th Cir. 2013) (upholding the district court's decision to exclude a recording of the defendant's admission of guilt over a phone call on Rule 403 grounds); Johnson v. Trigg, 28 F.3d 639, 641 (7th Cir. 1994) ("Of course if the pressure exerted by the police is so great that it might induce a person to confess to a crime he had not committed[,] . . . the resulting confession will be highly unreliable and should, like other highly unreliable evidence, be excluded from the defendant's trial." (citing FED. R. EVID. 403)).