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The Truth About False Confessions and Advocacy Scholarship¹

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Research References

West Key No. Digests

Criminal Law ☞ 516 to 538

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¹ We thank James Acker, Steve Drizin, Stanley Fisher, George C. Thomas III, Charles Weisselberg, and Welsh White for helpful comments on earlier drafts of this article.

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I. Introduction

Few topics shed more light on the administration of criminal justice than the study of its errors: wrongful arrests, prosecutions, convictions, incarcerations and executions. Beginning with Edwin Borchard's study *Convicting The Innocent* in 1932,⁴ social scientists, legal scholars, and journalists have documented hundreds of wrongful arrests and miscarriages of justice in America,⁵ including cases in which innocent individuals were executed by the state.⁶ Researchers have sought to deepen our understanding of the decision-making biases of criminal justice officials and juries that have led to erroneous judgments; the multiple sources and causes of wrongful arrest and conviction; the conditions under which the wrongful use of state power is likely to occur; the harms and deprivations of liberty that the criminal justice system inflicts on the lives of the wrongfully arrested, prosecuted, convicted

⁴ Edwin Borchard, *CONVICTING THE INNOCENT* (1932).

⁵ See, for example, Borchard, *supra* note 4; Erle Stanley Gardner, *THE COURT OF LAST RESORT* (1952); Jerome Frank & Barbara Frank, *NOT GUILTY* (1957); Edward Radin, *THE INNOCENTS* (1964); Hugo Adam Bedau and Michael L Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 *STAN. L. REV.* 21 (1987) [Hereinafter, *Miscarriages of Justice*]; Samuel R. Gross, *Loss of Innocence: Eyewitness Identification and Proof of Guilt*, 16 *J. Legal Stud.* 395 (1987); Martin Yant, *PRESUMED GUILTY: WHEN INNOCENT PEOPLE ARE WRONGFULLY CONVICTED* (1991); Edward Connors et al., *CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL*; C. Ronald Huff et al., *CONVICTED BUT INNOCENT: WRONGFUL CONVICTION AND PUBLIC POLICY* (1996); Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do we Reliably Acquit the Innocent*, 49 *RUTG. L. REV.* 1317 (1997); Michael L. Radelet et al., *Prisoners Released From Death Rows Since 1970 Because of Doubts About Their Guilt*, 13 *T.M. COOLEY L. REV.* 907 (1998); Edward Humes, *MEAN JUSTICE*; and Barry Scheck et. al., *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED* (2000).

⁶ See Bedau and Radelet, *supra* note 5. See also Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions are Common in Capital Cases*, 44 *BUFF. L. REV.* 469 (1996).

and/or incarcerated; and the types of policy reforms that, if implemented, could minimize the incidence of wrongful conviction in America.⁷

To contribute to this investigation, in 1998 we published *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation* (hereinafter, *Consequences*) — a study of 60 confession-driven cases, all of which involved a false confession by an innocent person, arrest and often wrongful conviction.⁸ As with the seminal research of Bedau and Radelet on miscarriages of justice in capital and potentially capital cases,⁹ our article drew a one-sided response from Paul Cassell, *The Guilty and the ‘Innocent’’: An Examination of Alleged Cases of Wrongful Conviction from False Confessions* (hereinafter *Examination*).¹⁰ Numerous social scientists and legal scholars have strongly criticized Cassell for his bias;¹¹ reliance on flawed methods, studies, and data;¹² inaccurate and incomplete summaries;¹³ sources and quotes out of context;¹⁴ arbitrary, speculative and exaggerated statistical estimates;¹⁵

⁷ See generally supra note 5.

⁸ 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 (1998) [Hereinafter Leo & Ofshe, *Consequences*].

⁹ See Bedau and Radelet, *Miscarriages of Justice*, supra note 5; Stephen L. Markman & Paul G. Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121 (1988); Hugo Adam Bedau and Michael Radelet, *The Myth of Infallibility: A Reply to Markman and Cassell*, 41 STAN. L. REV. 161 (1988) [Hereinafter, *The Myth of Infallibility*].

¹⁰ Paul Cassell, *The Guilty and the ‘Innocent’’: An Examination of Alleged Cases of Wrongful Conviction from False Confessions*, 22 HARV. J.L. & PUB. POL’Y 523 (1999) [Hereinafter Cassell, *EXAMINATION*].

¹¹ See, for example, Hugo Adam Bedau & Michael Radelet, *The Myth of Infallibility*, supra note 9 at 169 (observing that Markman and Cassell’s “efforts appear to spring largely from unacknowledged political roots; as a result, they either obfuscate the issues or merely trumpet the limits of our research as if we failed to state them in the first place.”); and Charles Weisselberg, *Saving Miranda*, 84 CORN. L. REV. 109, 176, ft 332 (Suggesting that “one may question Cassell’s motives” and pointing out that “Cassell has presented his views as an advocate in litigation” and does not acknowledge “critiques of his work or otherwise acknowledge that his empirical analyses are much disputed.”).

¹² See, for example, Weisselberg, supra note 14 at 176 (noting Cassell’s “flawed methodologies”) and at 177 (“Cassell’s work, with its dubious methods, sets a poor benchmark from which to base a revision of *Miranda*’s settled rules.”). See also George C. Thomas, *Telling Half-Truths*, LEGAL TIMES, Aug. 12, 1996 at 21 (“Cassell relies on flawed studies, while rejecting other studies that show little or no effect from *Miranda*. His empirical theories and underlying methodologies have been strongly criticized”). See also Stephen J. Schulhofer, *Miranda’s Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U.L. REV. 500, 502 (“[A]t critical points in [Cassell’s] analysis, data are cited selectively, sources are quoted out of context, weak studies showing negative impacts are uncritically accepted, and small methodological problems are invoked to discredit a

and indefensibly selective reporting of data.¹⁶ We too have criticized Cassell

no-harm conclusion when the same difficulties are present — to an even greater extent — in the negative-impact studies that Cassell chooses to feature”).

¹³ See, for example, Bedau and Radelet, *The Myth of Infallibility*, supra note 14 at 162 (“Markman and Cassell contend that . . . we alone have judged the convicted defendants to be innocent. Their charge is false and misleading”). See also Schulhofer, supra note 15 at 543 Ft 175 (“It is also disappointing in this connection to see Cassell repeat, as an example of *Miranda*’s cost, the Office of Legal Policy’s emotionally inflammatory but misleading example of Ronnie Gaspard, a Texan accused of a brutal murder, who was set free because of what Cassell calls “a *Miranda* technicality.” In fact, *Miranda* was irrelevant to Gaspard’s release . . . Equally misleading is Cassell’s use of *Edwards v. Arizona* as an example of a defendant who received a favorable plea bargain because of *Miranda*.”). [citations omitted]. See also Stephen J. Schulhofer, *Miranda and Clearance Rates*, 91 NW. U.L. REV. (1996) at 280 (“Like the statistics and quotations Cassell featured in his original article, his national clearance rate data have been isolated from their context in order to support a dramatic but misleading claim”).

¹⁴ See also Stephen J. Schulhofer, *Miranda’s Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U.L. REV. 500, 502 (“[A]t critical points in [Cassell’s] analysis, data are cited selectively, sources are quoted out of context, weak studies showing negative impacts are uncritically accepted, and small methodological problems are invoked to discredit a no-harm conclusion when the same difficulties are present — to an even greater extent — in the negative-impact studies that Cassell chooses to feature”). Elsewhere, Schulhofer has written, “like the statistics and quotations Cassell featured in his original article, his national clearance rate data have been isolated from their context in order to support a dramatic but misleading claim.” Stephen J. Schulhofer, *Miranda and Clearance Rates*, 91 N.W. U.L. REV. 278, 280.

¹⁵ See, for example, Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. (1997) at 132, FT. 190 (“Cassell’s estimate of 35 miscarriages per year seems particularly speculative . . . His figure of 35 wrongful convictions per year was essentially plucked from this air”). See also Welsh S. White, *What Is An Involuntary Confession Now?*, 50 RUTG. L.REV (1998) at 2030-2031, FT. 189 (noting “Cassell’s use of bizarre assumptions” and stating that “Thus, even if Cassell’s calculations deserved to be taken seriously, his conclusions would be subject to the criticism: garbage in, garbage out”). See also Peter Arenella, *Miranda Stories*, HARV. J.L. & PUB. POL., 375, 380 (“Cassell has clearly exaggerated the extent to which the *Miranda* regime has hampered law enforcement.”). See also Stephen J. Schulhofer, *Pointing in the Wrong Direction*, LEGAL TIMES, Aug. 12, 1996 at 21:

“Just a few months ago, in his Northwestern University Law Review article, Professor Cassell claimed that each year, because of *Miranda*, an additional 28,000 violent criminals are walking the streets. By the time he wrote for Legal Times, the number had grown to 100,000. Readers should understand that these are simply advocacy numbers, derived from indefensibly selective accounts of the available data.”

¹⁶ See, for example, Stephen J. Schulhofer, *Miranda and Clearance Rates*, 91 NW. U.L. REV. 278, 278-279 (1996) (“Yet once again, [Cassell’s] arguments rest on selective descriptions of the data—and I am sorry to say—indefensibly partisan characterizations of the underlying material.”). See also George C. Thomas III,

for each of these flaws.¹⁷ In our view, Cassell's commentary on *Consequences* exemplifies and repeats all of these problems: Cassell's Examination is largely based on factual errors, misleading assertions, critical omissions, unwarranted inferences and arguments, statements presented out of context, and/or partisan presentations of case materials.

In this article, we demonstrate that Cassell's commentary contains three types of serious flaws. First, Cassell mischaracterizes the subject of the research reported in *Consequences*.¹⁸ Second, Cassell's commentary is logically irrelevant to our research.¹⁹ Third, Cassell's attempt to challenge our classifications of nine out of sixty confessions as false fails because he excludes or presents an incomplete picture of important facts in his case summaries, selectively ignores enormous inconsistencies, implausibilities and/or contradictions in the state's cases, and fails to acknowledge the existence of substantial exculpatory, if not dispositive, evidence.²⁰ To illustrate the problems and biases in Cassell's commentary, we discuss at length one of his challenges (the Barry Lee Fairchild case) in the main text of this article.²¹ In the Appendix, we address the remaining eight cases (Joseph Gia-

supra note 15 at 20 (“While *Miranda* is not immune from questioning, advocacy cannot replace careful scholarship”); Id. at 24 (“[S]cholars have a duty to describe all the evidence and to acknowledge contrary interpretations if they are widely held. Professor Cassell draws a one-sided picture of the evidence against *Miranda*”).

¹⁷ See, for example, Richard A. Leo and Richard J. Ofshe, *Using the Innocent to Scapegoat Miranda: Another Reply to Paul Cassell*, 88 J. CRIM L. & CRIMINOL-OGY at 557 (“Paul Cassell advances several logically flawed and empirically erroneous propositions. These propositions appear to stem from Cassell’s ideological commitments.”) [Hereinafter Leo & Ofshe, *Using the Innocent to Scapegoat Miranda*]. Id. at 558 (“Cassell’s method for quantifying the frequency of wrongful convictions following from false confessions amounts to no more than grand speculation masquerading as a reasoned estimate of fact. Hence, it has no credible empirical foundation, and it should not be used as the basis for any factually-informed analysis”). Id. at 560 (“To the extent that Cassell suggests he is providing an “alternative” methodology to our procedures for quantifying the frequency of false confessions his analysis is misleading”). Id. at 563 (“The problem with Cassell’s impulse to quantification . . . is that it oversimplifies complicated issues and inevitably presents speculation as fact”).

¹⁸ See infra text at [6-15] Sec. II.

¹⁹ See infra text at [15-24] Sec. III(D)-III(E).

²⁰ See infra text at [24ff] Sec. IV.

²¹ We chose to illustrate the case of Barry Lee Fairchild in the main text of this article not because it offers the strongest case for innocence of the 9 cases Cassell challenges — we classified it as a probable false confession, our weakest of three categories — but because it is the most consequential: In 1995 Fairchild was executed by the state of Arkansas. See Leo and Ofshe, supra note 8, at _____.

rratano, Paul Ingram, Richard Lapointe, Jessie Misskelley, Bradley Page, James Harry Reyos, Linda Stangel and Martin Tankleff).²²

II. *The Consequences of False Confessions: The Findings*

We undertook the research reported in *Consequences* to estimate how much influence a true or false confession exerts on key decision makers — investigators, prosecutors, jurors and judges — who control arrests, prosecutions and convictions in the American criminal justice system.²³ While it is well-recognized that confession evidence is powerful, prior to the publication of *Consequences* no empirical study had ever examined a group of false confession cases in order to assess the strength of such evidence on the decision-making of criminal justice officials and triers of fact. *Consequences* had two specific goals: (1) To examine the fate in the criminal justice system of a group of persons who had in common only that police interrogators coerced from them false confessions to major felonies (typically murder); and (2) To extend one component of Bedau and Radelet's study of miscarriages of justice²⁴ forward into the era of psychological interrogation by documenting 60 cases of police-induced false confession in the last third of the twentieth century.²⁵

The common assumption about the strength of confession evidence probably arises from cases in which the defendants who confess are guilty and in which there are multiple sources of evidence pointing to the defendant's guilt. For example, a true confession case will likely include some circumstantial, eyewitness and/or forensic evidence which, along with the confession, implicates the defendant. Therefore, estimating the effect that any one

²² Because the editors of this journal have imposed a tight page limit on this article, we lack the space necessary to undertake a full point-by-point refutation of all of Cassell's erroneous and/or misleading assertions.

²³ Any reader of Cassell's essay who had not first read *Consequences* would have no way of knowing the study's purpose since Cassell fails to provide a comprehensive and accurate description of the research and arbitrarily focuses on one minor element of the research design to express his idiosyncratic objections to the research findings. Elsewhere, Cassell has done the same thing. See Richard A. Leo and Richard J. Ofshe, *Missing the Forest for The Trees: A Response to Paul Cassell's "Balanced Approach" to the False Confession Problem*, 74 DENV. L. REV. (1997) at 1135 ("In his Comment, Paul Cassell ignores what our article is about: the development and illustration of a decision model that analyzes and explains how modern methods of psychologically-based interrogation lead both to true confessions from the guilty and false confessions from the innocent."). [Hereinafter, Leo & Ofshe, *Missing the Forest*]. Remarkably, the editor of *The Harvard Journal of Law and Public Policy* told us that he had not bothered to first read our article, *The Consequences of False Confessions*, before accepting Cassell's commentary on it for publication!

²⁴ See Bedau & Radelet, *Miscarriages of Justice*, supra note 5.

²⁵ Hence, we limited our case choices to only false confessions occurring in the post-*Miranda* era (i.e., after June 13, 1966). See Leo & Ofshe, *Consequences*, supra note 8 at 433.

of these co-varying factors exerts on the decision-making of criminal justice officials and triers of fact is impossible without a substantial amount of comparable data and a mathematical solution to determine how much variance is explained by each contributing factor. Even the careful review of a large collection of non-systematic case observations will not offer up this information.

The assumption that confession evidence is the pivotal fact in a case might, for example, be masking a true causal structure in which the confession made it easier for the trier of fact to conclude that the defendant is guilty but, because of the strength of the other case evidence, the confession did not materially change the result. Or perhaps a confession sometimes makes a pivotal contribution to a trier of fact's determination of guilt, but only when coupled with case evidence that alone would have been viewed as too weak to support a guilty verdict. Or perhaps the power of the confession is so great that, when coupled with even the weakest of circumstantial evidence, the confession nearly always leads to the conclusion that the defendant must have done it.

The problem of assessing the power of false confession evidence is at least as complicated, but for different reasons. If a person is factually innocent, there will likely be no valid forensic evidence tying him or her to the crime and any circumstantial evidence is likely to be weak (since it is, in fact, merely coincidental). Social scientists have demonstrated that false confessions are highly prejudicial because people find it difficult to accept that an innocent person would ever confess.²⁶ The facts available to the evaluator of a false confession case will likely include the defendant's admission, the specifics of the confession, perhaps some erroneous circumstantial evidence, perhaps some prejudicial background information and/or some evidence tending to support the suspect's innocence. Since the false confession is only one piece of evidence in the case against the defendant, it is not possible to directly assess the strength of its prejudicial effect.

To estimate the impact of confession evidence one must devise a way to isolate and measure the influence of the confession separate and apart from the other circumstantial and/or confirming and disconfirming evidence. The usual methodological solution to the problem of estimating the variance attributable to one factor out of many is to collect a large number of observations, measure the strength of all the factors involved and derive an estimate of each variable's contribution by carrying out a multiple regression analysis. Another, less elegant and less precise, approach is to make observations of situations in which the factor of interest has been isolated by naturally occurring circumstances. This is what we did in *Consequences*.

The sources of information about the cases we studied ranged from extensive investigative files (including police reports, pre-trial and trial transcripts, medical records, and interviews with defendants) to academic

²⁶ See Saul Kassin, *The Psychology of Confession Evidence*, AM. PSYCHOLOGIST, 231 (1997); and Gisli Gudjonsson, *THE PSYCHOLOGY OF INTERROGATIONS, CONFESSIONS AND TESTIMONY* (1992).

journal articles, book length studies, and press reports.²⁷ The investigations and prosecutions we studied had in common the following conditions: no physical or other significant and credible evidence indicated the suspect's guilt; the state's evidence consisted of little or nothing more than the suspect's statement "I did it"; and the suspect's factual innocence was supported by a variable amount of evidence — often substantial and compelling — including exculpatory evidence from the suspect's post-admission narrative of the crime.²⁸

Based on the strength of the evidence that supported the defendant's factual innocence, all 60 defendants were classified into three categories: proven, highly probable, or probable false confessors.²⁹ For the 34 (57%) defendants we classified as proven false confessors, the confessor's innocence was established by at least one dispositive piece of independent evidence that came to light prior to trial or after conviction (e.g., the murder victim turned up alive, the true perpetrator was apprehended, a DNA analysis excluded the defendant). For the 18 (30%) defendants we classified as highly probable false confessors, the evidence overwhelmingly or very strongly indicated that the defendant's confession was false, but the defendant's innocence could not be proven. Instead, the evidence led us to conclude that the defendant's innocence was established beyond a reasonable doubt. For the 8 (13%) defendants we classified as probable false confessors, there was evidence supporting the conclusion that the confession was false, and the confession lacked any internal indicia that it was true. The evidence led us to conclude that the defendant's innocence was established by a preponderance of the evidence.

The research design sought to identify essentially pure false confession cases so that we could assess whether the knowledge that a suspect had given an utterly uncorroborated confession could overcome even strong affirmative evidence of innocence and lead to the conclusion that the defendant was guilty. In the cases we studied, the defendant was made to say "I did it," but the interrogation failed to yield any credible evidence of the defendant's guilt. Not only did the defendant's actual confession (the full statement describing participation in the crime) fail to demonstrate his or her guilt absent information made known to the defendant by the police, or the media and/or community gossip (i.e., the problem of contamination), but the specifics of the confession statement demonstrated the defendant's ignorance of the crime facts. Fairly analyzed, the defendant's confession constituted evidence of innocence rather than guilt.

In two different ways, the confessions we studied invariably failed to demonstrate that the suspect knew objectively demonstrable facts that could

²⁷ Cassell misinforms the reader when he reports that *Consequences* was based largely on secondary sources and media accounts and that his research is based on "an examination of original trial court records and similar sources." Cassell, *Examination*, supra note 10 at 525. The reported sources for *Consequences* were varied. See Leo & Ofshe, *Consequences*, supra note 8 at 435.

²⁸ Leo & Ofshe, *Consequences*, supra note 8 at 436.

²⁹ See Leo & Ofshe, *Consequences*, supra note 8 at 435-438.

be known only by the perpetrator or an accomplice. First, the confession did not yield information that led police to something otherwise unknown to them (e.g., the whereabouts of physical evidence such as the location of a missing murder weapon or of missing loot). Second, the confession failed to demonstrate that the defendant had independent knowledge of the crime that the perpetrator could reasonably be expected to know (e.g., the method of killing, the specific location where the crime was committed, specific details about the crime scene such as the method of entry into a residence, or knowledge of an unusual aspect of the crime that had been deliberately withheld from the public, etc.).³⁰

Consequences empirically demonstrated that false confessions have a substantial prejudicial effect on a defendant at every stage in the process from arrest to imprisonment or execution. All the false confessors that we studied spent an unjustified, and sometimes lengthy, period of time in pre-trial detention.³¹ They expended substantial sums to defend themselves or substantial public funds were expended on their behalf.³² Because the existence of a confession was perceived as so damaging, some agreed to plea bargains to avoid a death penalty or the harshest possible prison sentence.³³ Others were convicted at trial and sentenced to long prison terms.³⁴ One was executed.³⁵

Consequences empirically established that for all the confessors studied, the average likelihood of conviction at trial was 73%.³⁶ For those who were classified as proven false confessors, the probability of being convicted at trial was .91.³⁷ For the highly probable and probable false confessors, the likelihood of being convicted at trial was .63.

Based on the study's findings, we offered some obvious general sugges-

³⁰ In his nine case challenges, Cassell frequently and mistakenly imputes independent knowledge to a confessor who likely learned crucial facts from the police, the media, or community gossip. See Cassell, *Examination*, supra note 10. If contamination cannot be ruled out and is reasonably likely, then demonstrating that a defendant knows a certain fact has no significance or evidentiary value.

³¹ See Leo & Ofshe, *Consequences*, supra note 8 at 472-491.

³² *Id.*

³³ *Id.* at 478-481.

³⁴ *Id.* at 481-491.

³⁵ *Id.* at 466-468. See text infra at _____.

³⁶ *Id.* at 483.

³⁷ Our earlier article misprinted the risk of a guilty verdict at trial for those false confessors whose innocence was subsequently proven beyond any doubt as .90. See Leo & Ofshe, *Consequences*, supra note 8 at 483. The correct figure (10/11) is .91.

The higher likelihood that a proven false confession should be convicted at trial at first seems anomalous. It is explained by the fact that often the dispositive evidence proving innocence did not come to light until after conviction. For example, an innocent false confessor who was convicted before DNA analysis was available might not have been proven innocent (by our standards) until years later. Absent the piece of dispositive evidence, the fact pattern at trial would probably have led us to classify the person as a false confessor, but at a lower level of certainty.

tions for improving the quality of contemporary interrogation practices and better separating the innocent from the guilty prior to trial: Police should be better trained about the power of psychological interrogation to elicit false confessions; police should be trained how to improve the quality of any confession they obtain and thereby learn how to better discriminate between a true and false confession; and due to the substantial prejudicial effect of admitting into evidence a false confession, some minimum standard of reliability should be required of a confession before a judge deems it to have probative value that exceeds its prejudicial effect.³⁸

III. Cassell's Commentary is Inaccurate, Unpersuasive and Flawed

(A) Introduction

Cassell's commentary in *Examination* is inaccurate because, as elsewhere, Cassell presents his numbers in a way that offers illusory support for his one-sided, predetermined conclusions.³⁹ Cassell's commentary is irrelevant to our study because he ignores the questions our research addressed, disregards how they were investigated, and, instead, goes off on tangents reflecting his idiosyncratic biases. Cassell offers no alternative understanding either of the causes of the false confession problem or its consequences on decision-makers in the criminal justice process. Instead, he makes the claim that a different methodological approach should have been used.⁴⁰ Based on this claim, Cassell then floats the non-sequitur that if 15% (9/60) of the cases that we studied were misclassified, the problem of interrogation-induced false confession from innocents somehow vanishes and, instead, becomes limited to "the mentally infirm."⁴¹ However, as we demonstrate below, even if we remove from our analysis Cassell's small number of case challenges, our conclusions remain virtually unchanged. Finally, Cassell mischaracterizes our policy recommendations.

(B) Cassell's Flawed Presentation of Numbers and Arguments

Cassell's analysis of the lessons of our study is fundamentally flawed. He reaches erroneous conclusions by allowing advocacy to displace straightforward analysis of numbers in order to advance the idiosyncratic purposes of his argument. For example, consider Cassell's assertion that the

³⁸ Leo & Ofshe, *Consequences*, supra note 8 at 491-496.

³⁹ See Schulhofer supra Note 17 at 21 ("Readers should understand that these are simply advocacy numbers, derived from indefensibly selective accounts of the available data.").

⁴⁰ Cassell, supra note 10 at 525.

⁴¹ Cassell, *Examination*, supra note 10 at 584.

error rate in our study is 45%.⁴² Readers may wonder how Cassell, who excluded from consideration 85% of our sample (51 of our 60 cases), could purport to generalize his proposed error rate to the entire sample. The answer is that Cassell uses a series of strained assumptions, tenuous extrapolations and questionable exceptions to invent an error rate that he imputes to the study. To arrive at the remarkable 45% error rate, Cassell arbitrarily removes from consideration 31 of the 60 cases we studied because he says they did not result in a wrongful conviction. It should be obvious, however, that our ability to properly identify these 31 confessions as false is not negated by the fact that none of them resulted in a wrongful conviction. Of the remaining 29 cases, Cassell arbitrarily removes another 9 cases from consideration because, he claims, everyone agreed these were false confessions. Again, our ability to properly identify these 9 confession as false is not negated by the fact that others agree. Having thus removed 40 of the 60 cases in which we correctly identified a false confession, Cassell declares that we are correct in only 11 of the remaining 20 cases, thus producing the inflated error figure of 45%. Yet even if Cassell were correct in all 9 of his case challenges — and, as we will demonstrate below and in the Appendix, he is not — the error rate would be (9/60) 15%, not 45%. Cassell’s “slight of mind trick” leads him to invent a grossly inflated error rate, which he claims discredits the empirical foundation of our research.⁴³

Similarly, consider Cassell’s claim that “for the most part, false confessions are caused not by police questioning techniques in general but rather by the application of those techniques to certain narrow, mentally limited populations.”⁴⁴ Cassell arrives at this inaccurate and misleading conclusion by assuming that only a small percentage of our cases are relevant to understanding the “causes” of false confession. He, once again, arbitrarily excludes both the 31 false confession cases that did not result in wrongful conviction and, in addition, excludes 20 of the 29 cases resulting in wrongful conviction about which he claims there was a dispute. When one disregards Cassell’s unjustified dumping of 51 of the 60 cases in *Consequences* and considers all the cases we studied, it turns out that only 16 of the 60 (or 27%) of the false confession cases involved mentally handicapped defendants.⁴⁵

(C) Cassell’s Critique of our Sources is Inaccurate and Unpersuasive

Cassell attempts to shift the reader’s attention away from our research

⁴² Cassell, *Examination*, supra note 10 at 588.

⁴³ One consequence of this assertion is to inject into the literature the appearance of a flaw in our research so that it can be used in courtrooms as a talking point by district attorneys who are prosecuting the kinds of false confession cases we are studying.

⁴⁴ Cassell, *Examination*, supra note 10 at 584.

⁴⁵ These include: Ralph Jacobs, William Kelley, John Purvis, Melvin Reynolds, Donald Shoup, Christopher Smith, David Vasquez, Earl Washington, Johnny Lee Wilson, Jack Carmen, Richard Lapointe, Jessie Misskelley, Juan Rivera, Douglas Warney, Barry Fairchild, and Delbert Ward. See *Consequences*, supra note 8.

questions and findings by inaccurately claiming that we relied almost exclusively on media sources. He further asserts that there exists a media conspiracy to invent wrongful convictions and to overgeneralize the false confession problem. As a result of this, he contends we were somehow duped into misclassifying some guilty defendants as innocent.⁴⁶ Refusing to explicitly acknowledge even the most well-documented charges of error,⁴⁷ Cassell would have readers believe that the news media intentionally distort true cases of guilt and create false cases of innocence, especially in death penalty cases. Yet Cassell offers zero evidence to support his speculations.

Social scientists are well aware that the choice of the methodology with which to conduct research involves, among other things, a trade-off between level of effort and willingness to tolerate error. We had no reason to believe that our decision to sometimes rely, in part or principally, on reports published in the press introduced a significant likelihood of misclassifying a case. Nevertheless, we acknowledged in *Consequences* that there exists a margin of error in all empirical research and, due to the subject of our research and despite our best efforts, it was possible that one or more of the cases we studied may have involved a guilty defendant.⁴⁸

While we sometimes relied on information reported in newspaper articles, we did so to a far lesser extent than it might seem from our

⁴⁶ Cassell, *Examination*, supra note 10 at 578-580.

⁴⁷ Cassell suggests that the standard from which scholars should judge whether a miscarriage of justice occurred is whether the original prosecuting authority who charged the defendant believes the defendant is guilty. Cassell, *Examination*, supra note 10 at 581. Cassell fails to appreciate the significance of the fact that in several of the proven false confessions in our sample (e.g., Lavale Burt, Earl Washington, Steven Linscott, George Parker, and Johnny Lee Wilson, for example) the original prosecuting authorities still regard the exonerated defendant as guilty!

Clearly, Cassell's standard for determining whether a miscarriage of justice occurred — that prosecutors acknowledged error — must be rejected. For it should go without saying that prosecutors have a strong psychological, political and institutional self-interest in not admitting their most harmful errors, especially when, as in many of the cases discussed in this article, they spent tens of thousands of taxpayer dollars in high profile prosecutions that sent innocent men and women to prison for many years or to death row. It should also be obvious that if one accepts Cassell's standard for determining whether a miscarriage occurred, the absence of any acknowledgment of innocence by a prosecutor, by definition, undermines the claim of proven innocence, even when there is dispositive evidence of actual innocence, as, for example, in the cases of Burt, Washington, Linscott, Parker and Wilson. Cassell's standard for determining whether a miscarriage occurred is at odds with the existing empirical evidence and scholarship in the study of miscarriages of justice. See, generally, supra footnote 5. Unfortunately, the United States criminal justice system has no formal mechanism for adjudicating innocence. See Givelber, supra note 5.

⁴⁸ Leo & Ofshe, *Consequences*, supra note 10 at 437-438. See also text infra [citing pages in Section IV + Appendix].

referenced sources.⁴⁹ In fact, for many of the cases we had extensive files of police reports, pre-trial and trial transcripts, depositions and other materials but chose to cite a readily available published source for the same facts we knew from other sources because it was easier for law review cite checkers to verify sources directly available to them online.⁵⁰ Whether we cited press reports, court transcripts, police reports or original interviews as the basis for a fact, however, Cassell's criticism is meaningless unless he can show both that our sources were wrong in their statement of facts and that as a result we misclassified cases. Cassell never satisfies either criterion.

How much of a benefit would it have conferred if we had used only the trial transcripts that Cassell claims to have relied upon?⁵¹ Can anyone take seriously the suggestion that we ran a significant risk of misclassification by accepting the information which led us to conclude, for example, that Billy Gene Davis and Steven Linscott's prosecutions were based on false confessions? We learned about the case of Billy Gene Davis entirely from the press.⁵² The *Austin American Statesman* reported that the prosecution of Davis for murdering his girlfriend was dismissed despite his confession because the victim turned up alive.⁵³ How much of a risk of error did we run by failing to obtain a certified copy of the prosecution's motion to dismiss charges and failing to travel to Texas to personally verify that the victim was indeed alive? Similarly, we learned from multiple sources that although Steven Linscott had confessed and was convicted of murder, he was eventually exonerated and his conviction was overturned.⁵⁴ One of the sources we relied on was a United States Department of Justice Publication — *Convicted by Juries, Exonerated by Science*.⁵⁵ What risk did we run by not verifying from transcripts of Linscott's trial and inspection of the DNA test reports the same

⁴⁹ Cassell erroneously claims that we merely collated "a few readily accessible newspaper articles" in our case analyses. Cassell, *Examination*, supra note 10 at 587, Footnote 392.

⁵⁰ This became especially important in light of the number of footnotes in our original article (543!). See Leo & Ofshe, *Consequences*, supra note 8.

⁵¹ Despite his opinions about the methodological superiority of trial transcripts and the dangers of citing to news stories (or newspaper writers' opinions), Cassell often cites to news stories, newspaper writers' opinions and books written by journalists.

⁵² Leo & Ofshe, *Consequences*, supra note 8 at 449-450.

⁵³ Jim Phillips, *Man Who Said He Killed Friend Gets Probation for Scaring Her*, AUSTIN AM. STATESMAN, Nov. 9, 1990, at B3.

⁵⁴ Despite this fact, the district attorney who prosecuted Linscott has specifically declined to declare him innocent. See Cassell, *Examination*, supra note 10 at 582.

⁵⁵ Connors et. al. supra note 5.

facts that were reported in the press,⁵⁶ in Linscott's book,⁵⁷ and by the Justice Department?⁵⁸

Cassell's spurious critique of our sources obscures two important facts about the difficulty of documenting and studying cases of actual innocence and wrongful conviction in America. First, there is no organization or institution that documents, archives or catalogues miscarriages of justice. Second, courts virtually never rule upon, much less address, the question of whether a defendant is factually innocent.⁵⁹ As a result, there are no effective procedures for establishing that a conviction is false,⁶⁰ and it is the media — not the judicial system — that reports instances of courts releasing prisoners after years of incarceration once the court discovers that the prisoners were innocent all along. As Scheck, Neufeld and Dwyer point out:

America keeps virtually no records when a conviction is vacated based on new evidence of innocence. Judges write one-line orders, not official opinions, meaning that they don't analyze what went wrong. Neither does anyone else. The only place to study innocence is through accounts carried in newspapers and by broadcast news, a most haphazard net.⁶¹

Far from being the conspiratorial and tainted source of case information on miscarriages of justice that Cassell suggests, the electronic and broadcast media are — largely because of the legal system's wholesale failure to acknowledge, document or analyze cases of actual innocence — by default the most fertile source of data for the scholarly study of wrongful conviction in America.

(D) Cassell's Commentary Misses the Point

Cassell never demonstrates any significant errors of fact in the sources we cited. Nor does he introduce evidence demonstrating any defendant's actual guilt. But assume, for the sake of argument, that we had erred and misclassified a case: what impact would this have had on our appraisal of the biasing effect of a false confession? If we discovered that we were wrong on one or two cases and they were dropped from the analysis, the effect on the

⁵⁶ Sharon Cohen, *Dream Leads To a Prison Term Until DNA Evidence Frees Him; Slaying: Police Called Steven Linscott's Account a Confession, Not a Vision. Now, 12 Years Later, He Examines Lessons Painfully Learned*, L.A. TIMES, September 18, 1994 at A1.

⁵⁷ Steven Linscott, MAXIMUM SECURITY (1994).

⁵⁸ Connors et. al. supra note 5.

⁵⁹ Givelber, supra note 5.

⁶⁰ see Givelber, supra note 5.

⁶¹ Scheck, Neufeld, and Dwyer, supra Note 5 at 246. See also Givelber, supra note 5 at 1325 (“One does not “know” when the innocent have been convicted until years later (if ever) because the defense (and the factfinder) was unaware of evidence which would ultimately establish innocence. One does not read of false convictions in appellate decisions. There is no law on the subject, no body of carefully developed and parsed doctrine. The public learns of these cases, if at all, from newspaper reports and brief moments on “Larry King Live.””).

rates and probabilities of the outcomes would be *de minimis*. If one classification was discovered to be wrong and one case had to be dropped from our sample, the reduction of the study's base from 60 to 59 cases would have had a minute impact on the figures we reported. With a 60 case base, the contribution of each case to the final outcome is .0167th of the result. With a base of 59 cases the weight of each case increases to a factor of an .0169, a less than staggering increase of .0002. If we were wrong about two cases, the impact would have been to distort the effect on each of the 58 properly included cases on our conclusions by a factor of .0005.⁶²

What happens to the study's results if we consider only the restricted number of cases Cassell deems significant — those that produced convictions? If we further assume that all nine of Cassell's challenges are correct and drop all the disputed cases, what difference would it make to the final estimate of the impact of a false confession on the fate of an innocent defendant in front of a jury? Table 1 reports the study's finding about the fate of the 30 false confessors who went to trial and also the result that follows if Cassell's 8 disputed jury trial cases are dropped.⁶³ Even if Cassell's criticisms were correct, our published estimate of the risk of false confessors being wrongfully convicted at trial reduces from 73% to 64%. If Cassell were correct in disputing the nine cases he tries to challenge, we would be reporting that nearly $\frac{2}{3}$ of the innocent who went to trial suffered a miscarriage of justice.

TABLE 1
THE RISK OF MISCARRIAGE OF JUSTICE AT TRIAL
GIVEN A FALSE CONFESSION

<u>Outcome of Confessor's</u> <u>Decision to go to Trial</u>	<u>Number</u>	<u>Verdict</u> <u>of Guilt</u>	<u>Verdict</u> <u>of Innocent</u>
Leo and Ofshe's Result			
All False Confessors	30	73%	27%
Cassell's Cases Eliminated			
All False Confessors	22	64%	36%

Tables 2 and 3 report our original figures and the change caused by dropping all of the cases Cassell disputes while simultaneously controlling for the certainty of a defendant's innocence. Seven of the eight cases disputed by Cassell that went to a jury trial were in the *likely* false confession category, while one was in the *proven* false confession category.

⁶² Since we reported our findings in numbers rounded to two decimal places, it is unlikely that one or two errors of classification would cause us to change the reported numbers at all.

⁶³ One of the confessors whose cases Cassell challenges, Paul Ingram, did not go to trial but rather entered a guilty plea to avoid harsher punishment. See text *supra* at [pages discussing the Ingram case].

If we were to grant Cassell’s objections, the effect on cases in which the defendant’s guilt was eventually *proven* changes from a probability of .91 of being convicted at trial (the original sample) to .90 (granting Cassell’s challenge). For defendants who were classified as having given a proven false confession but were acquitted at trial, there is no change in our analysis because Cassell only challenged one case in this category. Almost all of Cassell’s challenges fall into the highly probable and probable false confession category. For this category of cases, if Cassell is correct the probability of being unjustly convicted due to having been made to confess drops from .63 to .42.

TABLE 2
THE RISK OF MISCARRIAGE OF JUSTICE BY
CERTAINTY OF GUILT FROM LEO AND OFSHE’S
ORIGINAL ARTICLE

<u>Proven False Confessors N = 34</u>	<u>Number /%</u>	<u>Likelihood of Miscarriage</u>	<u>Risk of a Guilty Verdict</u>
Released Prior to Decision Point	18 (53%)	—	—
Pled Guilty	5 (15%)	15%	—
Acquitted at Trial	1 (3%)	—	—
Convicted at Trial	10 (29%)	29%	91%
Totals	34 (100%)	44%	
<u>Highly Probable & Probable False Confessors N = 26</u>	<u>Number /%</u>	<u>Likelihood of Miscarriage</u>	<u>Risk of a Guilty Verdict</u>
Released prior to decision point	5 (19%)	—	—
Pled Guilty	2 (8%)	8%	—
Acquitted at Trial	7 (27%)	37%	
Convicted at Trial	12 (46%)	46%	63%
Totals	26 (100%)	54%	

TABLE 3
THE RISK OF MISCARRIAGE OF JUSTICE BY
CERTAINTY OF GUILT DROPPING THOSE CASES
CHALLENGED BY CASSELL

Proven False Confessors N = 33	Number /%	Likelihood of Miscarriage	Risk of a Guilty Verdict
Released Prior to Decision Point	18 (55%)	—	—
Pled Guilty	5 (15%)	15%	—
Acquitted at Trial	1 (3%)	—	—
Convicted at Trial	9 (27%)	27%	90%
Totals	33 (100%)	42%	

Proven False Confessors N = 18	Number /%	Likelihood of Miscarriage	Risk of a Guilty Verdict
Released Prior to Decision Point	5 (28%)	—	—
Pled Guilty	1 (6%)	6%	—
Acquitted at Trial	7 (39%)	—	—
Convicted at Trial	5 (28%)	28%	42%
Totals	18 (100%)	34%	

The findings relating to false confessors whose innocence is proven at any time (either pre-trial or post-conviction) by at least one dispositive fact tells the most unambiguous story of the fate of false confessors in the American criminal justice system.⁶⁴ Consider the 33 proven false confessors who Cassell concedes were innocent.⁶⁵ Eighteen (55%) of these individuals were discovered to be innocent prior to conviction and the state dismissed charges. These individuals were lucky because the fact of their innocence was established before they had to decide whether to accept a plea bargain or risk trial,⁶⁶ and they were spared the fate of their less fortunate peers. Cassell considers what happened to innocent citizens who were coerced into falsely confessing but were not convicted to demonstrate that the screens in the justice system “at least worked to prevent the ultimate miscarriage of jus-

⁶⁴ Even Cassell challenges only one of these cases. Cassell’s challenge is unpersuasive. See Text Infra [Pages discussing Reyos].

⁶⁵ We remove James Harry Reyos’ case here purely for the sake of argument.

⁶⁶ 12% (7/60) of our sample elected to enter a guilty plea in advance of trial. See Leo and Ofshe, *Consequences*, supra note 8 at 478.

tice.”⁶⁷ We regard these cases as evidence that a serious problem exists. All of these individuals spent an avoidable, unjustified, and sometimes lengthy period of time deprived of their liberty by the state. All suffered inexcusably only because they were made to falsely confess by police. Five of the proven false confessors (15%) elected to enter a guilty plea — even though they were innocent — because they did not wish to risk the harshest possible punishment (typically the death penalty) by taking their case to trial. 93% (14/15) of the *proven* false confessors who were not released prior to trial were convicted — condemned to prison or death based on nothing more than the fact that they said “I did it,” even when neither the specifics of their confession nor any significant evidence confirmed their guilt.

(E) Cassell Does Not Accurately Describe the Recommendations of Consequences

Cassell’s inaccurate description of *Consequences* extends to the recommendations we make regarding the import of our findings. Cassell writes that:

. . . Leo and Ofshe propose more sweeping changes to confession law. Among other things, Leo and Ofshe suggest that courts should “carefully scrutinize” a confessor’s “post admission narrative” against the known facts of the case. In their view “[t]he fit between the specifics of a confession and the crime facts determines whether the “I did it” statement admission should be judged as reliable or unreliable evidence. They further argue that, if discrepancies are substantial enough, courts should conclude that the confession is unreliable and suppress it.”⁶⁸

and

Leo and Ofshe propose, however, to go further and require courts to make a specific determination about “fit,” with that determination governing the admissibility of defendant’s statements.⁶⁹

Having created the erroneous impression that we advocate a standard that measures the difference between the crime facts and a perfectly fitting confession — one which covers every point of fact that defines the crime scene — Cassell proceeds to attack his straw man:

The problems only mount when we realize that the guilty suspect, even if “confessing” to all the charged crimes, such as murder, kidnap, and rape, might nonetheless provide a post-admission narrative that deviates from the crime’s facts.⁷⁰

Contrary to our position, Cassell imputes to us the view that the criminal

⁶⁷ Cassell, *Examination*, supra note 10 at 536.

⁶⁸ Cassell, *Examination*, supra note 10 at 590-591.

⁶⁹ *Id.* at 591.

⁷⁰ *Id.* at 594.

justice system should abandon its trust in juries and, instead, substitute judges for juries as the arbiters of the accuracy of confessions.⁷¹

However, in *Consequences* we actually wrote about how courts might use our research findings to control the prejudicial effect of false confessions. In a passage that Cassell cites, we wrote that there “is a compelling need for police, prosecutors, judges and juries to carefully scrutinize and evaluate a suspect’s post admission narrative against the known facts of the crime.”⁷² In *Consequences*, the only time we wrote about what courts should do appears nine lines from the end of the article (a passage not cited by Cassell), in which we wrote that courts should demand “a minimal indicia of reliability before admitting confession statements into evidence.”⁷³

Since there is precious little in *Consequences* about recommendations following from the research, and because nothing we have ever written would, by any stretch of a normal imagination, constitute a suggestion for sweeping or dramatic changes in the law, Cassell builds his straw man by overlooking what we wrote in our earlier article, *The Decision to Confess Falsely: Rational Choice and Irrational Action*.⁷⁴ All of Cassell’s citations to our earlier writing on this issue come from the following three paragraphs:

Both admission and confession statements are nothing more than two pieces of proposed evidence that, correctly interpreted, point either to a suspect’s guilt or innocence. No piece of evidence really speaks for itself, and even a photograph can be doctored. Answering the question of whether a piece of evidence is valid and appropriate for the purpose for which it will be used by a juror is fundamental to the reasoning behind rules governing the exclusion of potential evidence. A judge would never knowingly admit into evidence a doctored photograph that is the product of modern computer graphic techniques and depicts a scene that never happened. A false confession is analogous to a doctored photograph. The mechanism for creating it is the ancient technology of human influence carried forward into the interrogation room.

It is possible to establish a standard of minimum reliability for a confessions so that true confessions, like real photographs, can be separated from the doctored frauds constructed through the techniques of psychological interrogation. Police can be better trained to obtain statements that satisfy the legal definition of the word confession. Most investigators currently operate within legal constraints, but all could be trained to elicit more reliable confessions. A confession that fully describes the circumstances of a crime should and could be crafted to always permit the confession to be corroborated. Corroboration is the key to erecting a standard of minimum reliability for confession evidence.⁷⁵

and

By contrast, the innocent false confessor lacks personal knowledge of the crime facts. As a result, he can only repeat information given to him or

⁷¹ Id. at 601-603.

⁷² Leo and Ofshe, *Consequences*, supra note 8 at 495.

⁷³ Id. at 496.

⁷⁴ Ofshe & Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. L. REV. (1997).

⁷⁵ Id. at 1118 and 1119.

provide guesses to the interrogators' questions. A well-developed post-admission narrative by a false confessor is likely to be riddled with demonstrable factual errors, and thus casts substantial doubt on the validity of the confession. If a suspect's post-admission narrative fits poorly with facts of the crime, produces no corroboration, and is disconfirmed by the suspect's wrong answers to questions about major issues (such as the weapon used, how the victim was kept silent, etc.), the confession should be considered inadmissible because it lacks sufficient indicia of reliability. By focusing on the substantive accuracy of the suspect's statement rather than exclusively on the procedural fairness of the interrogation process courts can test for a minimum standard of reliability before admitting a confession into evidence.⁷⁶

All we propose is that if a statement is entirely wrong on every factual point raised in the interrogation it should be barred. Beyond this, all that we have ever advocated is some minimum standard of reliability be established as a consideration in the decision to admit confession evidence — not for the near perfect corroboration Cassell imputes to us.

What then might a minimum standard of corroboration entail? We have never presumed to offer specific rules to be implemented, but rather have only focused on general principles. In the *Decision to Confess* we pointed out that an innocent suspect can never prove his innocence even by getting all of his statements about the crime facts wrong, since errors can only demonstrate consistency with a lack of actual knowledge, not the fact of it.⁷⁷ We also pointed out that the only time that an innocent suspect should get an objectively demonstrable crime scene fact correct is when he has been contaminated by information given to him or makes a lucky guess,⁷⁸ and that the likelihood of making lucky guesses decreases with the number of possible answers to the question.⁷⁹ At a minimum, it only takes one objectively correct answer to a question that has a large number of possible answers to demonstrate that someone probably has actual knowledge of the crime. From a decision theory perspective, it would take very little to establish a basis of reliability before admitting a confession statement into evidence.

⁷⁶ Id. at 1119.

⁷⁷ Id. at 994.

⁷⁸ In any discussion of the evaluating of the fit between a suspect's statement and the crime scene facts, only statements that can be objectively evaluated have any value. A suspect's contribution of a story with a lot of details about what he and the murder victim talked about in private before she was killed has no value since it can never be verified. An accurate description of a number of related, or even one highly improbable, established fact(s) is necessary. For example if a suspect volunteered an accurate description of the crime scene — that the lace from one of the victim's boots was removed and used to tie her hands to a post, that a single boot and a single sock were removed and the sock was filled with sand and used as a gag and the victim's eyes were covered with a man's Calvin Klein scarf, the likelihood of correctly guessing all, or even a subset, of these facts is vanishingly small.

⁷⁹ No one should be impressed with a correct answer to the question "was the body face up or face down" since the probability of a correct guess is .50. We are all impressed, however, with the contribution of information that leads police to a missing murder weapon since the number of possible hiding places might run to the tens of millions or billions within a mile of the crime scene.

IV. Cassell's Failed Case Challenges

(A) Introduction⁸⁰

There are several reasons why Cassell's commentary does not identify any reason to cast doubt on our case analyses. First, Cassell overlooks the fundamental purpose of our research: to study the biasing effect of the defendant's "I did it" statements on the decision-making of triers of fact and criminal justice officials. To do so, we analyzed the case evidence *independent of the confession* that either supported or undermined the likely reliability of the confession. Cassell, however, routinely treated the opinions of the very people whose judgments we were studying (police, prosecutors, judges, juries) as establishing the fact of the defendant's guilt.⁸¹ A prosecutor's, judge's or jury's opinion that the defendant is guilty is not a fact demonstrating the defendant's guilt, but precisely what we sought to explain. For Cassell to rely on the opinions of third parties who have been exposed to the confession as evidence of the defendant's guilt is not only tautological, but also highlights the very point that our research sought to make: that confession evidence is highly prejudicial to the decision-making of triers of fact despite (1) their legal obligation to entertain a presumption of innocence; and (2) the existence of exculpatory evidence that casts substantial doubt on the confession's reliability. Cassell simply never deals with the question of the prejudice introduced by a false confession and seems not to notice its effect on his analysis.

Second, Cassell does little more than uncritically repeat the prosecution's case in his lawyer-like advocacy of the defendant's guilt in each of his case challenges. As a result, Cassell fails to add any information that was not al-

⁸⁰ Cassell offers no criteria for the 9 of 60 cases he chose to challenge. As our discussion in Section III demonstrates, Cassell chose the weakest cases he could find to challenge, even though he suggests that his choice of cases to critique was fair and systematic. Cassell, *Examination*, supra note 10 at 587-88, ft. 392.

⁸¹ For example, in Barry Lee Fairchild's case, Cassell quotes Judge Eisele's opinion as if it establishes the fact of the voluntariness of Fairchild's confession. Cassell, *Examination*, supra note 10 at 540 ("The Court specifically finds that [Fairchild] was not instructed or coached regarding the content of his confessions.") In the case of Jessie Misskelley, Cassell treats the opinions of jurors in two other cases — Damien Echols and Jason Balwin — as establishing the accuracy of Misskelley's confession. *Id.* at 557 ("The accuracy of Misskelley's identification of Baldwin and Echols as the killers was established by guilty verdicts at a separate trial . . ."). In the case of Bradley Page, Cassell's entire challenge is based on opinions which he presents as if they establish facts, including the appellate court's opinion that Page's confession must have been true ("The Court of Appeals also noted that Page's explanation at trial for the confession 'strained the jury's credulity to the breaking point. His explanation was rife with internal inconsistencies, and was also inconsistent with the explanation he gave the officers in his final taped statement.'" *Id.* at 563. These are only a few of the examples from Cassell's case challenges in which he treats third parties' opinions as if either they constitute overwhelming evidence for a fact or establish that fact.

ready known, does not fully present important case facts, and ignores enormous inconsistencies, implausibilities, and/or contradictions in the state's case. Most disturbingly, Cassell fails to acknowledge evidence that exculpates the defendants. For example, in many of these cases it was beyond dispute that the perpetrator left considerable physical evidence (fingerprints, blood, hair, saliva, semen, DNA, etc.) behind at the crime scene. Yet in none of the cases does any of this forensic evidence match the confessor. Cassell fails to explain why exculpatory physical evidence, *linking the perpetrator to the crime but not matching the confessor*, should be ignored.

Absent the psychological center of the state's evidence - the confession - Cassell's case summaries boil down to nothing more than rehashing an un rebutted version of the state's exceptionally weak circumstantial evidence. Cassell ignores the fact that once the confession is removed from consideration he is left where we began — with a case containing no compelling evidence of guilt and strong to indisputable evidence of innocence. No matter how often Cassell repeats the refrain that the defendants were found guilty by a judge or jury, this does not substitute for a showing of why such a judgment was sound.⁸²

(B) Illustrating Cassell's Inadequate Case Presentations

In his incomplete presentations of the cases reported in *Consequences*, Cassell repeats the same flawed approach that he and Markman⁸³ used in their critique⁸⁴ of Bedau and Radelet's landmark research on miscarriages of

⁸² As Alan Berlow points out, "if prosecutors present inaccurate, incomplete or fabricated evidence, even the most unprejudiced and fair-minded juror may vote to convict an innocent man. Alan Berlow, *The Wrong Man*, ATLANTIC MONTHLY, 66, 77 (1999).

⁸³ Cassell's criticism of Bedau and Radelet illustrates the problem of bias in his writings. For example, Cassell states that Bedau and Radelet's research, "ignores physical evidence of guilt, mis-cites sources that in fact indicated defendants were guilty, includes works of fiction as proving innocence, and contains other serious flaws." Cassell, *Examination*, supra Note 10 at 4-5. However, Cassell fails to mention that Bedau and Radelet wrote a response to Cassell refuting each of these false allegations. See Bedau & Radelet, *The Myth of Infallibility*, supra note 9. Bedau and Radelet point out the following: (1) Cassell and Markman distort their case summaries. *Id.* at 163, Ft 14; (2) Cassell and Markman merely reiterate the prosecution's case — as though that impeaches Bedau and Radelet's judgement— and treat the fact that a judge or jury convicted as if the trial court is the final authority on the factual question of the defendant's guilt. *Id.* at 163; (3) Bedau and Radelet did not ignore compelling evidence of physical guilt, but instead point out that Cassell's charge is false and misleading. *Id.* at 162; (4) Bedau and Radelet did not mis-cite sources as Cassell claims, but, unlike Cassell, "attempted to refer readers to all major sources where information could be obtained, not simply to those sources that buttress out conclusions." *Id.* at 163.

⁸⁴ It is not surprising that the case summaries and flawed conclusions in Cassell and Markman's critique of Bedau and Radelet do not stand up to scrutiny. Acker et

justice in capital cases.⁸⁵ In that critique, Cassell and Markman simply restated the prosecution's case,⁸⁶ while omitting any exculpatory evidence that undermined, contradicted or entirely discredited the state's case. Cassell and Markman treated the trial court as if it was the final authority on the factual question of the defendant's guilt,⁸⁷ then treated the fact that a trial court judged the defendant to be guilty "beyond a reasonable doubt" as

al. recently studied the cases of 8 (all New Yorkers) of the 23 individuals who in Bedau and Radelet's judgment were factually innocent of the crimes for which they were convicted and executed during the 20th century, but who in Markman and Cassell's judgment were rightfully convicted and executed. See James Acker, Eamon Cunningham, Patricia Donovan, Allison Fitzgerald, Jamie Flexon, Julie Lombard, Barbara Ryn, and Bivette Stodghill, *Gone But Not Forgotten: Investigating Cases of Eight New Yorkers (1914-1939) Who May Have Been Innocent* at 137. Paper presented at the Annual Meetings of the American Society of Criminology. November 11-14, 1998. Washington, D.C. In addition to describing these cases, Acker et. al. set out to "accept Bedau and Radelet's implicit invitation to have neutral observers independently examine the available evidence supporting the guilt or innocence of these eight New Yorkers and form a judgment about whether that evidence supports the conclusion that those men were executed for crimes they did not commit." Id. at 7. After carefully reviewing the totality of the case facts in each of these executions, Acker et al. conclude that:

Our Review thus leads us to concur with Bedau and Radelet (1987) in all eight cases—Frank Cirofici, Charles Becker, Thomas Bambrick, Stephen Grzechowiak, Max Rybarczyk, Edward Applegate, George Chew Wing, and Charles Sberna—that "a majority of neutral observers, given the evidence at our disposal, would judge the defendant in question to be innocent." We additionally are convinced that the claims of innocence are even more persuasive in some of these cases. Id. at 137.

⁸⁵ See Bedau & Radelet, *Miscarriages of Justice*, supra note 5.

⁸⁶ Bedau & Radelet, *The Myth of Infallibility*, supra note 9 at 163 (Markman and Cassell "prefer instead simply to restate the case for the prosecution, as though that by itself impeaches our judgment."). In one of the 9 cases (James Harry Reyos) that he challenges, Cassell had to choose between the position of the trial-level prosecution (that Reyos was guilty) and the position of the appellate level prosecutor (that Reyos could not possibly have committed the crime and therefore confessed falsely). Not surprisingly, Cassell sided with the trial-level prosecution and repeated their selective and misleading arguments about Reyos' guilt. See *Infra Text* at 86-90. However, Cassell failed to mention that at least one of the two trial level prosecutors has substantial doubts about Reyos' guilt. See Dennis Cadra letter to Governor Ann Richards, December 31, 1991 at Pp. 6-7 ("Two weeks ago I discussed this case with Anthony Foster, one of the two assistant district attorneys who had participated in the trial (who had subsequently left and then rejoined the district attorneys' staff). He told me, in no uncertain terms, that he is not sure Mr. Reyos is guilty, and he has never been sure).

⁸⁷ Bedau & Radelet, *The Myth of Infallibility*, supra note 9 at 162 ("Markman and Cassell write as if the trial court is the final authority on the factual question of the defendant's guilt.").

somehow constituting evidence of the defendant's guilt.⁸⁸ Cassell re-uses this formula in his critique of *Consequences*. His strategy for attacking a charge of error in the judicial system is simply to deny that the error happened because police, prosecutors, judges, juries and appellate panels almost never make such mistakes.⁸⁹ When a state error is challenged, Cassell charges that the critic, unlike Cassell, is relying on methodology and judgments that are "subjective."⁹⁰

As we will illustrate in the case of Barry Lee Fairchild below (and in the eight other challenged cases in the Appendix), the case summaries that Cassell presents are incomplete and based on inaccurate and misleading assertions, unwarranted inferences and arguments, and biased presentations of case materials.

(1) The Case of Barry Lee Fairchild⁹¹

(a) Voluntariness

Cassell ignores the substantial evidence that Barry Fairchild, along with 13 other African American men, was threatened, abused, physically assaulted and tortured by Pulaski County, Arkansas Sheriffs in the murder investigation of Marjorie Mason.⁹² Instead, he repeats Federal District Court Judge Thomas G. Eisele's opinion, and the Court of Appeals' affirmation, that Barry Fairchild's confession was voluntary, as if these legal opinions,

⁸⁸ Bedau & Radelet, *The Myth of Infallibility*, supra note 9 at 163 (Markman and Cassell "write as if part of the evidence against the defendant is the fact that a trial court judged the defendant to be guilty 'beyond a reasonable doubt.'").

⁸⁹ Bedau and Radelet noticed the same flaw in Markman and Cassell ("The basic problem with Markman and Cassell's response is that it seems bent on defending the criminal justice system in every regard that bears on the death penalty and its administration. This inflexible stance requires our critics to deny that anyone actually innocent has ever been executed, lest the criminal justice system itself be charged with such an error."). Bedau & Radelet, *The Myth of Infallibility*, supra note 9 at 169.

⁹⁰ See Cassell, *Examination*, supra note 10 at 538, 581, 587-88, Ft. 392-393. Our classifications are no more subjective than Cassell's; the critical difference is that we began our analysis with questions whereas Cassell began his with conclusions.

⁹¹ Even though we classified the case of Fairchild in the least certain of our three categories (*probable* false confession), we choose to illustrate the case of Barry Lee Fairchild in the main text of this article (rather than in the appendix), because it is the most consequential of the cases that Cassell chose to attack (Fairchild was executed).

⁹² These thirteen men were: Michael Martindale, Ronald Henderson, Nolan McCoy, Randy Mitchell, Frank Webb, Donald Lewis, Willie Washington, Ezekiel Williams, Robert Johnson, Michael Johnson, John Walker, Frank King and Leon Williams. See Brief for Appellant, Barry Lee Fairchild v. A.L. Lockhart. Appeal from the United States District Court, Eastern District of Arkansas (November 15, 1991). No. 90-2438EA [Hereinafter, Brief for Appellant].

merely because they were issued by a court,⁹³ resolve the factual dispute and undermine the multiple allegations of abuse that Fairchild's attorneys,⁹⁴ scholars⁹⁵ and journalists⁹⁶ have documented.

While a full review of the Fairchild case facts is beyond the scope of this response,⁹⁷ the task of evaluating the multiple allegations of coercion and abuse is more complicated and requires far more work than Cassell seems willing to admit. It is an impermissible short-cut to privilege one secondary source over another and pass the source off as if it were evidence rather than opinion.⁹⁸ Because the actual interrogation of Barry Fairchild was neither audio- nor video-recorded, no one can ever know with certainty what actually transpired. However, our research led to substantial evidence that Fairchild was physically and psychologically coerced into confessing to being an accessory in the Mason murder. We found no credible independent evidence corroborating Fairchild's confession, and we found some independent evidence discrediting it.⁹⁹ As a result, we classified the Fairchild confession as a *probable* false confession. Cassell's re-statement of the prosecution's case does not undermine this conclusion.

There are two contradictory versions of what occurred during the interrogations in the Marjorie Mason murder investigation. According to Fairchild, Major Larry Dill repeatedly kicked him in the stomach; Sheriff Tommy Robinson¹⁰⁰ threatened him with a shotgun, striking him in the chest and arm with it several times; and Robinson threatened to kill Fairchild if he did not

⁹³ It has been well-established in the research literature on miscarriages of justice that judges and juries sometimes mistakenly convict innocent defendants. As Cassell knows, the mere fact that a judge issues a legal opinion is not evidence of its factual accuracy. See Bedau and Radelet, *Miscarriages of Justice*, supra note 5.

⁹⁴ Brief for Appellant, supra note 92.

⁹⁵ See Sheri Lynn Johnson, *The Color of Truth: Race and the Assessment of Credibility*, 1 MICH. J. RACE & L., 261, 280-292 (1996).

⁹⁶ See Lynne Duke, *In Arkansas, a Death Row Struggle and Doubt*, THE WASHINGTON POST, A1 (January 9, 1994). [Hereinafter, Duke, "Death Row Struggle"].

⁹⁷ One evidentiary hearing alone, which occurred over 17 days in December, 1990, January 1991, and February 1991, involved 100 witnesses, 1000 pages of exhibits, and 4,300 pages of testimony. See Brief for Appellant, supra note 92 at 1.

⁹⁸ Cassell treats court opinions as if they are primary sources of evidence. They are not. In the context of an independent review of guilt or innocence, a judge's conclusion is the opinion of a secondary source.

⁹⁹ Blood, hair and semen failed to positively link Fairchild to the crime. See Leo and Ofshe, *Consequences*, supra note 8 at ft. 319. In addition, Fairchild's post-admission narrative contained several errors of fact. For example, Fairchild told officers where he had thrown his gloves away, but they were unable to find them. Fairchild also identified Harold Green as his accomplice, but Green was incarcerated in Colorado when the Mason murder occurred. *Id.*

¹⁰⁰ Sheriff Tommy Robinson had a reputation for using abusive law enforcement techniques. See Duke, *Death Row Struggle*, supra note 96 at A1.

confess.¹⁰¹ In addition, Fairchild identified two other officers (Bobby Woodward and Wayne Chaney) who participated in or were present during the abuse.¹⁰² After the dismissal of their third petition for post-conviction relief in August 1990,¹⁰³ Fairchild's appellate attorneys discovered that the Pulaski County Sheriff's department systematically picked up a number of suspects in the Mason murder investigation against whom they used physically coercive methods of interrogation in an effort to obtain a confession. The officers not only denied threatening, assaulting or abusing Fairchild, but the state also argued Barry Fairchild was the only real suspect,¹⁰⁴ that the sheriffs did not engage in any accusatorial or coercive questioning of other persons who were asked to come to the sheriff's office, and that the techniques of interrogation used on all suspects, including Mr. Fairchild, were simply straightforward, open-ended requests for relevant information.¹⁰⁵

In a videotape of the confession statement, Fairchild has swollen eyes and a bandage around his head. Sheriff Robinson and several deputies denied beating Fairchild, and claimed instead that his injuries were due to a police dog's attack during his arrest.¹⁰⁶

There is compelling direct, indirect and circumstantial evidence supporting Fairchild's allegations of abuse and contradicting the state's denials. At a 1987 hearing, former Russellville police officer Larry Dalton testified that he witnessed an unidentified deputy slap Fairchild, cause him to hit his head against a wall, and that a police dog was ordered to attack Fairchild after he was brought into custody.¹⁰⁷ In 1990, Frank Gibson, a former Pulaski County deputy, testified that it was common knowledge at the sheriff's office that

¹⁰¹ In addition, Fairchild "asserted that the officers coached him over and over about details of the crime, even wrote some key words on a piece of paper so he would remember specifics . . ." Id.

¹⁰² According to Fairchild, three or four other officers, whom he could not identify, were also present during the abuse. Appendix to Brief of Appellant, Volume II at 372. *Barry Lee Fairchild v. A.L. Lockhart*. United State Court of Appeals, Eighth Circuit. NO. 90-2438, No. 91-2532. [Hereinafter, Appendix to Brief of Appellant, Volume II].

¹⁰³ As Johnson points out, "News of this report was carried in the Little Rock press, and other Black men who had been similarly treated by the sheriff and his deputies came forward." See Johnson, *supra* note 95 at 281.

¹⁰⁴ Sheriff Tommy Robinson and several deputies had misrepresented at trial that Fairchild was the prime suspect at the time of his arrest, withholding the names of the other suspects who had been interrogated as part of the Mason murder investigation. Johnson, *supra* note 95 at 280-281.

¹⁰⁵ See Appendix to Brief of Appellant, Volume I at 32-33. *Barry Lee Fairchild v. A.L. Lockhart*. United States Court of Appeals, Eighth Circuit. No. 90-2438, No. 91-2532. [Hereinafter, Appendix to Brief of Appellant, Volume I].

¹⁰⁶ Johnson, *supra* note 95 at 280.

¹⁰⁷ Duke, *Death Row Struggle*, *supra* note 96. See also Appendix to Brief of Appellant, Volume I at 5.

FALSE CONFESSIONS

Fairchild was beaten into confessing.¹⁰⁸ By 1991, three more witnesses, including Deputy Sheriff Calvin Rollins,¹⁰⁹ testified that they heard Fairchild being beaten and verbally harrassed.¹¹⁰

In addition, thirteen African American men other than Fairchild allege that they were rounded up by sheriffs, accused of committing the Mason murder, and subjected to at least one, but usually multiple, physically and psychologically coercive interrogation procedures.¹¹¹ If we credit the account of these thirteen other African American men, then it stands to reason that Fairchild too was likely coerced and abused during his interrogation.

There is good reason to credit the truthfulness of their testimony. First,

¹⁰⁸ Gibson, an ex-deputy with the Pulaski County sheriff's office, also testified that he witnessed the beating of Robert Fairchild, Barry Fairchild's brother, who had also been interrogated by sheriffs in the Mason murder investigation. See Appendix to Brief of Appellant, Volume II, supra note 102 at 7.

¹⁰⁹ During a 1990 hearing, deputy Calvin Rollins testified that on the night that Fairchild was brought in, he saw Maj. Larry Dill yelling at Fairchild, using racial epithets, and that he heard the sound of open-handed blows hitting skin. Rollins added that when he looked at Fairchild's face through the viewfinder of the video-camera, he clearly saw that Fairchild's lips were swollen. See Appendix to Appellant Brief, Volume I, supra note 105. See also, Duke, *Death Row Struggle*, supra note 96.

¹¹⁰ See Appendix to Brief of Appellant, Volume I at 6-32. Deputy Sheriff Calvin Rollins heard Major Dill raise his voice and strike someone (whom Rollins believes was Fairchild) with a fist or an open hand. *Id.* at 9. Rollins also viewed what appeared to be physical injuries (swelling on the lips, welts behind the ears, and a cut on the inside of a bottom lip) that Fairchild appeared to sustain as a result of being slapped around. *Id.* at 10. Donald Price overheard Larry Dill and Tommy Robinson verbally abuse a person he reasonably believed to be Barry Fairchild. *Id.* at 22-26. Michael Johnson, who had been a suspect in the Mason murder investigation, saw a bloodied Fairchild and subsequently heard Officers in the CID area yelling at and beating Fairchild, as if hitting him with a gun in the stomach. *Id.* at 26-31.

¹¹¹ As Sheri Johnson notes, "Each testified that he had been picked up and accused of involvement in the Mason murder. Eleven of the men were verbally threatened. Of the two who were not verbally threatened, Donald Lewis was slapped, choked and punched in the stomach, and Ezekiel Williams was slapped and stomped upon. Of those who were verbally threatened, one, Nolan McCoy, was also threatened with a gun. Five more were verbally threatened, threatened with guns and physically abused; Randy Mitchell was beaten with clubs and fists through a telephone book; Frank Webb was hit with two telephone books; John Walker was hit with a blackjack through a telephone book; Robert Fairchild, the brother of Barry Lee Fairchild, was hit in the head with a nightstick and kicked; and Frank King testified that the sheriff had come into the room in which King was being interrogated and said to his deputies, "You all ain't hit him yet?" after which King was slapped so hard that he was forced out of his chair. Four of the suspects testified that they were pressed to admit abducting and raping Mason only and to blame a friend for the shooting, just as Fairchild had done in his confession. In addition to the thirteen Mason case suspects, two suspects from contemporaneous cases testified to brutal treatment by the county sheriffs's office. Racial slurs were prominent in the course of these interrogations." Johnson, supra note 95 at 282.

contrary to the trial testimony of Pulaski County sheriff's interrogators, each of these thirteen men was confirmed — either from the state's own records or from undisputed circumstantial evidence — to be a suspect in the Mason murder investigation.¹¹² Second, these thirteen men, who mostly had no connection to one another, provide remarkably consistent accounts (including similar abusive tactics and vulgarities that were not public knowledge) of their coercion at the hands of county sheriffs.¹¹³ Third, none of the thirteen suspects stood to gain personally from their testimony¹¹⁴ nor did they have any apparent motive to lie,¹¹⁵ unlike the police officers who denied abusing them.¹¹⁶ Fourth, many witnesses testified about what they observed or heard being done to various suspects,¹¹⁷ and many friends and relatives testified

¹¹² Appendix to Brief of Appellant, Volume I at 35-36. Five of the thirteen men (Henderson, King, Martindale, McCoy, Mitchell) were given *Miranda* warnings and advised in writing that they were a suspect in a capital murder. Three more (R. Fairchild, Johnson, Lewis) had hair samples taken from them for comparison to unidentified hair fragments found at the crime scene. Another (Washington) was the subject of a state crime lab memo advising that his fingerprints were necessary for comparison to latent prints developed in the Mason murder. For the remaining four suspects (Webb, E. Williams, Walker, L. Williams), state documents or testimony from state witnesses established that “they were picked up and interrogated by the sheriff’s office on the dates they alleged, that their interrogations were conducted in the midst of ongoing investigative efforts in the Mason case, and/or that they were questioned in relation to a search for physical evidence relevant to the Mason case.” *Id.* 36.

¹¹³ Appendix to Brief of Appellant, Volume I, *supra* note 105 at 3.

¹¹⁴ The statute of limitations had long since passed on any claim for damages that any of these men might have made. *Id.* at 38.

¹¹⁵ Johnson, *supra* note 95 at 290.

¹¹⁶ Johnson, *supra* note 95 at 290.

¹¹⁷ For Example, “Nolan McCoy testified that when he arrived at CID [Criminal Investigation Division], he saw Randall Mitchell there with uncharacteristically messy hair and puffy, teary eyes. Ronald Henderson testified that toward the end of the time he was at CID, he heard someone being beaten, crying out in response, and finally say, “Stop! I’m gonna talk.” Randy Mitchell and Nolan McCoy were both in CID interview rooms at that time. Thelma Bradford testified that when she was in an interview room at CID in the evening of March 2, she heard Robert Fairchild being abused, with officers saying, “Fuck him in the ass.” Ezekiel Williams heard someone moaning in a room near him when he was at CID at the time that Robert Fairchild was still there. Willie Washington testified that when he was at CID, Robert Fairchild was presented to him as a way of illustrating the fate that awaited him if he was uncooperative, and Ezekiel Williams was overheard complaining about being abused. Mr. Washington, Mr. Robert Fairchild and Mr. Williams all appear to have been at CID at overlapping times. Finally, Michael Johnson, Frank King, and Leon Williams were also all at CID at overlapping times. Mr. Walker overheard the frightened voices and outcries of Frank King and Michael Johnson. Michael Johnson heard the beating, outcries, and protestations of Frank King, and not long thereafter, saw Mr. King face-to-face, with tears running down his cheeks. Before this meeting, Frank King heard Michael Johnson “hollering.” And finally, Leon Williams heard

about the contemporaneous accounts many of the suspects provided of their abuse shortly after their release from the sheriff's office.¹¹⁸ The details in these accounts matched the details that the suspects had recounted in their own testimony.¹¹⁹ Fifth, witnesses observed signs of physical coercion and manifestations of psychological abuse on a number of the more severely mistreated suspects.¹²⁰ The evidence of injuries resulting from police brutality from two victims — who had been suspects in other contemporaneous cases in the Pulaski County sheriff's office — was documented by medical

John Walker being struck and crying out at about the same time he heard striking sounds and outcries from two other people whose voices he did not recognize." Appendix to Brief of Appellant, Volume I at 39-40.

¹¹⁸ For example, Susan Givens testified that she remembered Nolan McCoy's account of sheriff's personnel trying to make him sign a confession and putting a gun to his head. Richard Washington testified that he remembered Nolan McCoy's account of a gun being pulled on him and his fighting for it once he saw it was empty. Arthurene Mitchell testified that she remembered Randall Mitchell's account of sheriff's department personnel beating him to try to make him admit being involved in the murder. Charles Pennington testified that he remembered Randy Mitchell's account of sheriff's personnel "whipping [his] ass". Merdine Fairchild testified that she remembered Robert Fairchild told her the sheriff and his deputies beat him badly, took him to the scene of the murder, put a gun in his mouth, kneed him, and choked him until he passed out. Lena Thompson testified that she remembered that Ezekiel Williams told her that the police beat him up. Rose Hammonds testified that she remembered that John Walker told her that the sheriff's "whipped" him by putting a book on his head and hitting him through it. Kinley Chapman testified that he remembered that John Walker told him about the sheriff's putting a book on his head and beating him down on it with a blackjack. Delois Cullins testified that Frank King told her about being slapped onto the floor at the sheriff's office and having an officer put his foot on Mr. King's chest, pull him up, put a gun in his mouth, and threaten to blow his head off. Mary Johnson testified that upon arriving home from the Sheriff's office, Michael Johnson told her that sheriff's had put a gun in his mouth and pulled the trigger. Appendix to Brief of Appellant, Volume I at 40-41.

¹¹⁹ Johnson, *supra* note 95 at 283.

¹²⁰ For example, "Charles Pennington observed that Randy Mitchell was "bruised, skuffy, [had] puffy areas around the head, [and had] splotches of blood here and there. Arthurene Mitchell observed that Randy's "face was very swollen [and] puffy," that he "had little knots in his head," that his head was hurting and bruised, and that he was "withdrawn" and not his "normal self" for a while. Merdine Fairchild reported that when Robert Fairchild returned from the sheriff's office, he was real upset because he thought he was going to be killed, and he returned in a jail jumpsuit, with his clothes in a bag, because he had "BM'd and wetted" in his clothes. McKinley Chaptman reported that when he saw John E. Walker, his face was puffy and bruised like he had been in a fight, and he was "not the regular John" he knew because he was so stressed. Delois Cullins remembered that when Frank King returned from the sheriff's office, his eyes were red and he had been crying, and he was so mad and upset that it took him a few minutes to calm down." Appendix to Brief of Appellant, Volume I at 41-42.

personnel.¹²¹ Finally, a number of the suspects reported facts covered in their interrogations that had been known only to sheriffs at the time, revealing that the interrogators were using the disclosure of such facts as part of their questioning strategy.¹²²

Predictably, the state assailed the credibility of these witnesses and, predictably, each of the twelve officers accused of assaulting and mistreating Fairchild and the thirteen other African-American suspects denied using any coercion, and often denied having a recollection of any contact with the suspects.¹²³ Judge Eisele's determination of the voluntariness of Fairchild's confession therefore boiled down to a choice between the testimony of one white former deputy sheriff and thirty (30) black witnesses (who "testified that officers of the Pulaski County Sheriff's Department verbally and physically brutalized Black suspects during a murder investigation") versus fourteen white officers who denied these charges.¹²⁴ Judge Eisele declared none of the African American's primary witnesses entirely credible and, instead, credited the "vague and generalized testimony" of all of the state's witnesses who claimed they did not abuse Barry Fairchild.¹²⁵ Although Eisele ruled that Fairchild's confession was voluntary, he credited some of the accounts that the officers were coercive,¹²⁶ and implicitly conceded that some

¹²¹ Johnson, *supra* note 95 at 283.

¹²² For example, no suspect who was questioned before March 4, 1983 reported that he was shown post-mortem photographs of the victim. However, after these photographs were available, on March 3, 1983, every person who was subsequently interrogated, from March 4 on (Michael Johnson, Frank King, John Walker, Leon Williams, and Barry Fairchild) was shown the photographs. Two suspects were shown photographs of a man with a tattoo of a cross on his forehead and were asked if they knew whether this man was involved. And three suspects (Michael Johnson, Frank King, and Willie Washington) were asked about being in the McCain Mall area on February 26, 1983. Interview with Dick Burr (March 3, 1998 and July 28, 1998).

¹²³ Johnson, *supra* note 95 at 284.

¹²⁴ As Sheri Johnson notes, "The issue of race tainted the investigation, prosecution and habeas corpus review of Fairchild's case from the outset . . . As the Chief Judge of the Eighth Circuit noted, "The Evidence also unmistakably show a current of racism in the Sheriff's Department of 1983.'" Johnson, *supra* note 95 at 287.

¹²⁵ Johnson, *supra* note 95 at 286.

¹²⁶ For example, Judge Eisele generally credited Ezekiel Williams' testimony: "The Court generally credits Mr. Williams' testimony that he was slapped once and his foot was stepped on once by a Pulaski County Sheriff's Department officer." See Findings of Fact and Conclusions of Law at 360, *Fairchild v. Lockhart*, Civil No. PB-C-85-282 (E.D. Ark. June 4, 1991) [Hereinafter *Written Findings*]. Judge Eisele also credited some of Randy Mitchell's testimony. "On the difficult issues of his abuse at the Pulaski County Sheriff's office, the Court finds that it is more likely true than not true that Mr. Mitchell was the victim of verbal intimidation and some physical abuse by one or more officers . . . The Court credits his testimony that he was slapped and mistreated." *Id.* at 199. Another example is the testimony of Frank King: "The Court finds that it is more likely true than not that an unidentified officer

of the officers lied about abusing some of Fairchild's witnesses.¹²⁷ Evaluating Judge Eisele's performance, law professor Sheri Johnson has argued that he repeatedly applied different standards in assessing the credibility of the Black and white witnesses in Fairchild's case,¹²⁸ while demonstrating a "condescending and biased attitude towards Fairchild's Black witnesses."¹²⁹

Viewed as a whole, then, the evidence supporting the allegations of coercion and abuse in Fairchild's case is far more compelling than the state's categorical denials of even having any contact with any of the thirteen suspects.¹³⁰

(b) Reliability

If the first issue is whether Fairchild's confession was coerced, the next is whether it is reliable. While the weight of the evidence supports the conclusion that Fairchild's confession was physically coerced, it does not necessarily follow that the confession is unreliable. Cassell alleges that several important facts corroborate Fairchild's confession. We will review each of Cassell's allegations and demonstrate why each is wrong.

(1) Cassell erroneously states that during a failed chase of the suspects, police discovered a baseball cap that several witnesses reported seeing Fairchild wear at the time of the murder.¹³¹ The baseball cap was not found at the scene but may have been dropped by the unidentified suspects who fled from Ms. Mason's car. The police officer who chased them found the cap in a driveway where the suspects had fled and assumed that the suspects dropped it. Later, to build a case around Fairchild, the police showed the cap to one individual, who said that Barry Fairchild had such a cap.¹³² The same type of cap, however, was extremely popular with truckers in Arkansas and common in and around Little Rock at the time. In addition, the police officer who found it did not see it fall off of anyone's head. The cap does not constitute evidence of Fairchild's guilt and does not establish that he had even been at the scene from which the two suspects had fled.

(2) Cassell reports that police claimed to have received a tip that Fairchild and his brother had raped several women in the past.¹³³ In fact, Fair-

slapped Mr. King so hard that he fell to the floor." Id. at 292. The judge expressed ambivalence about others' testimony. For example, regarding Robert Fairchild, Barry Fairchild's brother, Judge Eisele wrote, "Some of Mr. Robert Fairchild's testimony that he was abused . . . may be true." Id. at 59. Regarding John Walker, Judge Eisele wrote, "He may have experienced some physical coercion and intimidation by one or more officers, but it is as likely that he did not." Id. at 265.

¹²⁷ Johnson, supra note 95 at 286.

¹²⁸ Johnson, supra note 95 at 287-289.

¹²⁹ Johnson, supra note 95 at 289.

¹³⁰ Appendix to Brief of Appellant, Volume I, supra note 105 at 44.

¹³¹ Cassell, *Examination*, supra note 10 at 539.

¹³² Interview with Steven Hawkins, February 19, 1998.

¹³³ Cassell, *Examination*, supra note 10 at 539.

child had no documented history of such crimes.¹³⁴ Not even the prosecution alleged any such history, either at trial or in the penalty phase where, if it such a history had existed, it would have constituted classic aggravating evidence in a rape-murder case such as this one. The speculation that Fairchild had committed previous rapes falls far short of reliable evidence in a serious discussion.

(3) Cassell states that an informant told police that Fairchild and his brother escaped the police on foot after the victim's car was stopped, an account that Cassell asserts was consistent with events occurring during the police chase.¹³⁵ He relies on the rumor that Fairchild admitted involvement to a third party, which even the prosecution did not attempt to present at trial.

(4) Cassell disputes our claim that the videotape shows Fairchild looking away from the camera and responding to the promptings of others in the room. Instead, Cassell quotes Judge Eisele's opinion that Fairchild's "statements give the feeling of truth,"¹³⁶ does not "give me the impression that it had been rehearsed,"¹³⁷ and "seems to have the indicia of spontaneity and truth."¹³⁸ Others disagree. For example, after viewing the taped confession, journalist Lynne Duke wrote that Fairchild "glances off camera and listens to the whispered voice of someone else who seems to be directing the proceedings in the room."¹³⁹ Cassell repeats Eisele's feeling that Fairchild was not instructed or coached, but once again Cassell merely privileges the state's interpretation. That does not resolve the matter. We believe that any fairminded person who views the videotape can see Fairchild looking away and responding to the promptings of others. Furthermore, the fact that the confession statement itself (rather than the coercive interrogation that produced it) was video recorded does not "cast doubt" on the coercion claim, as Cassell contends.¹⁴⁰ Taping the product of an interrogation does not, by itself, logically imply that the interrogation that produced the statement was either coercive or non-coercive. The only way to resolve this issue is to have an objective record of exactly what transpired during the interrogation. The Pulaski County sheriffs failed to record the interrogation in this case, even though the existence of the video recorded confession statements proves that they had the technology to record everything.

(5) Cassell relies on Judge Eisele's conclusion that "no reasonable

¹³⁴ Interview with Steven Hawkins, February 19, 1998.

¹³⁵ Cassell, *Examination*, supra note 10 at 539.

¹³⁶ Cassell, *Examination*, supra note 10 at 540.

¹³⁷ *Id.* Of course, if Fairchild was physically abused and coerced, as the record suggests, then his willingness to confess was the product of terror, and he likely believed that he had to perform well if he was going to save his life. Thus, he would have been extraordinarily motivated to give the appearance of cooperation, spontaneity and accurate recall.

¹³⁸ *Id.*

¹³⁹ Duke, *Death Row Struggle*, supra note 96 at A1.

¹⁴⁰ Cassell, *Examination*, supra note 10 at 540, Ft. 71.

person could listen to the evidence presented at the two-day hearing and view the videotaped confessions and still have any doubt about the involvement of Mr. Fairchild in the rape and murder of Ms. Mason” in lieu of case evidence.¹⁴¹ Cassell’s reliance on this opinion is highly problematic for two reasons. First, Judge Eisele’s conclusion was made at a two day hearing — well before the subsequent 17 day hearing in 1990-1991 on the same subject, at which Fairchild’s appellate attorneys introduced a great deal of new evidence casting doubt on the voluntariness and reliability of his confession.¹⁴²

Second, Judge Eisele’s opinion is transparently wrong. In fact, a number of reasonable people have expressed grave doubts about Fairchild’s guilt, including Congressman Don Conyers,¹⁴³ Congressman Don Edwards,¹⁴⁴ the State NAACP in Arkansas,¹⁴⁵ and writer Robert Perske.¹⁴⁶ Since there is no evidence corroborating Fairchild’s coerced confession and since there is evidence disconfirming it, it is hardly surprising that outside observers who have looked closely at the Fairchild case have been deeply troubled by it.

(6) Cassell states that details in Fairchild’s confession were corroborated, such as the fact, well known to Fairchild’s interrogators, that the gun that killed the victim was a .22.¹⁴⁷ Cassell ignores those details in Fairchild’s confession that were never corroborated. For example, Fairchild told officers where he had thrown his gloves away, but the officers were unable to find the gloves there.¹⁴⁸ Fairchild identified Harold Green as his accomplice, but Green was in Colorado when the crimes took place.¹⁴⁹ Fairchild also was wrong about the site of the victim’s abduction.¹⁵⁰

(7) Contrary to common sense and contrary to his earlier position that

¹⁴¹ Cassell, *Examination*, supra note 10 at 540.

¹⁴² That Cassell quotes Judge Eisele’s initial opinion based on the earlier two-day hearing rather than after the subsequent 17 day hearing — when Fairchild’s case had become far more complex and Judge Eisele’s observations were no longer so quotable to Cassell’s cause — belies Cassell’s willingness to disregard most of what happened in this case.

¹⁴³ Flyer on Congress of the United States Letterhead dated September 21, 1993 (in possession of authors).

¹⁴⁴ Id. In addition to Conyers and Edwards, Fourteen other congressmen and congresswomen, as well as Senator Carol Mosely-Braun, sent a letter to President Clinton demanding that the Department of Justice resume their abandoned investigation into the Fairchild case. Flyer, “Rally for Justice” (In possession of authors). See also Leo and Ofshe, *Consequences*, supra note 8 at 467, Ft. 320.

¹⁴⁵ Interview with Dick Burr, supra note 122.

¹⁴⁶ Robert Perske, *UNEQUAL JUSTICE: WHAT CAN HAPPEN WHEN PERSONS WITH RETARDATION OR OTHER DEVELOPMENTAL DISABILITIES ENCOUNTER THE CRIMINAL JUSTICE SYSTEM* (1991), at 102-103.

¹⁴⁷ Cassell, *Examination*, supra note 10 at 540.

¹⁴⁸ Leo and Ofshe, *Consequences*, supra note 8 at 467, Ft. 317.

¹⁴⁹ Id.

¹⁵⁰ Fairchild confessed that the site of the abduction occurred in the vicinity of the furniture stores on 600 East Washington Avenue of North Little Rock, but the

the details in Fairchild's confession were corroborated,¹⁵¹ Cassell states that inaccuracies in Fairchild's confession somehow make the confession more believable. In particular, Cassell suggests that Fairchild lied about Harold Green being his accomplice in order to cover for his brother, Robert Fairchild. In fact, Green was in prison in another state at the time of the offense. Cassell merely repeats the state's theory here, a theory which is based on an attempt made by Sheriff Tommy Robinson to cover up the interrogators' practice of obliging suspects to confess what the interrogators decided was the truth. Robinson claimed that it was Fairchild, not the interrogators, who first mentioned Harold Green's name as the second participant in the homicide. However, long after the trial, Fairchild's appellate attorneys obtained the Mason homicide investigation file maintained by the Pulaski County Sheriff's Office, and discovered a wealth of information in it identifying Harold Green as a suspect prior to the questioning of Barry Fairchild.¹⁵² This information suggests that at the time of Fairchild's interrogation, Pulaski County sheriffs suspected that Harold Green was involved in the Mason murder because they had not yet discovered that Green was in another state when Marjorie Mason was murdered, and later were embarrassed that Green's name appeared in Fairchild's confession statement.¹⁵³

(8) Cassell states that Fairchild guided the officers on a crime scene tour between his first and second confession statement and directed police to where Ms. Mason's body had been found.¹⁵⁴ The evidence, however, suggests that the officers directed the tour, not Fairchild, and that they took Fairchild on two tours (not one) — one tour before the first videotaped statement and another tour between the first and second videotaped statements.¹⁵⁵ This is significant because Fairchild's ability to provide some accurate information about the crime prior to his first confession has been taken as evidence of his guilt. However, if Fairchild was taken on a tour of the relevant sites

overwhelming weight of the evidence suggested it occurred in the McCain Mall area, several miles away from the 600 block of East Washington Avenue. Interview with Dick Burr, *supra* note 122.

¹⁵¹ Cassell applies a double standard here: On the one hand, Cassell asserts that "details in the confession were corroborated" Cassell, *Examination*, *Supra* Note 10 at 540. Cassell's assertion is wrong: the details in Fairchild's confession were never corroborated. However, when Cassell acknowledges this fact — as he does here — he suggests that this lack of corroboration somehow "makes the confession more believable." *Id.* at 541.

¹⁵² Brief for Appellant, *supra* note 92 at 21-22.

¹⁵³ One of the techniques that Pulaski County Sheriffs used on a number of the suspects in the Mason murder investigation was to accuse the suspect of the murder, then to accuse the suspect of being an accomplice, and, finally, to pressure the suspect to name someone else as the triggerperson. See Brief for Appellant, *supra* note 92. That Fairchild named Harold Green, who the police had already suspected of being involved in the Mason murder (but had not yet discovered that he could not possibly have been involved in the crime) suggests that they fed Fairchild Green's name and that he regurgitated it in his confession.

¹⁵⁴ Cassell, *Examination*, *supra* note 10 at 541.

¹⁵⁵ Brief for Appellant, *supra* note 92 at 93-115.

prior to the first videotaped confession statement — as the evidence from the discrepancies in the officers' accounts suggests¹⁵⁶ — then he was taught the necessary details about the crime scene *before* giving his first confession on videotape.

(9) Cassell reports that the victim's watch was found in the possession of Fairchild's sister and that this corroborates the component of Fairchild's confession in which he stated that he took the victim's watch and sold it to his sister.¹⁵⁷ Cassell's report is not supported by the case facts. *Two months before* Ms. Mason's death Fairchild sold his sister a black-banded watch that resembled a watch belonging to Ms. Mason.¹⁵⁸ However, the state could prove only that these were similar watches — not that they were one and the same — and was never able to explain away the time problem. Further, years after the jury trial, Fairchild's appellate attorneys discovered that the sheriff's office had withheld investigative notes stating that two of Ms. Mason's co-workers recalled her wearing a shiny metallic watch on the day she disappeared, not the black-banded watch.¹⁵⁹ The Lonoke County Circuit Court jury that convicted Fairchild never heard about this evidence. In the post-conviction appellate proceedings, the state eventually conceded that Ms. Mason owned a second watch when the defense produced a picture of her with the shiny platinum gold watch described by her co-workers.¹⁶⁰ If, as the evidence suggests, Ms. Mason was wearing this shiny gold watch on the day of the murder (not the black-banded watch that she also owned), then the fact that Fairchild had sold his sister a black-banded watch two months prior to Ms. Mason's death is doubly irrelevant to the issue of Fairchild's guilt or innocence.

(10) Reporting only Judge Eisele's opinion and ignoring the findings of the well-known and reputable experts who evaluated Fairchild, Cassell declares that Fairchild was not mentally retarded.¹⁶¹ In fact, five of the six experts who testified in a 1989 hearing found Fairchild to be mentally retarded. Eisele's ruling to the contrary was based on the testimony of the one witness at that hearing who disputed Fairchild's mental retardation.¹⁶² Acknowledging that Fairchild was below normal intelligence (his IQ scores

¹⁵⁶ *Id.*

¹⁵⁷ Cassell, *Examination*, supra note 10 at 541.

¹⁵⁸ Brief for Appellant, supra note 92.

¹⁵⁹ Johnson, supra note 95 at 281, Ft. 113.

¹⁶⁰ Duke, *Death Row Struggle*, supra note 96.

¹⁶¹ Cassell, *Examination*, supra note 10 at 542.

¹⁶² Lynne Duke, *Alleged Retarded Man Avoids Execution in Arkansas Ruling*, THE WASHINGTON POST at A1. (September 23, 1992) [Hereinafter, *Retarded Man*]. This so-called expert, Judy Johnson, may not even be competent to render an opinion about intelligence quotient. For example, she administered the Stanford-Binet Intelligence Scale, Fourth Edition, to Fairchild — who was 36 at the time — even though this test is normed on people who are ages 2 through 23. Accordingly, this test is invalid for Fairchild. In addition, rather than administer a recognized, standardized instrument, such as the Scales of Behavior, to judge Fairchild's adaptive behavior, Ms. Johnson relied merely on her subjective impressions of his verbal

had always fallen in or near the range of mental retardation),¹⁶³ was functionally illiterate, and had been recommended for special education in school and never finished high school, Eisele dismissed the claim that Fairchild was mentally retarded. Cassell offers the judge's conclusion instead of reporting the facts about Fairchild's capabilities.

In sum, the only evidence against Barry Fairchild was a confession that the weight of the evidence strongly suggests was physically coerced. There was no independent evidence connecting Fairchild to the crime; in fact, blood, hair and semen failed to link Fairchild to the crime.¹⁶⁴ There was no evidence corroborating Fairchild's questionable confession, yet there was evidence disconfirming it, including a number of inaccuracies in the confession statement itself. We contend that any fairminded reading of the Fairchild case record will arrive at the conclusion that Barry Lee Fairchild's confession is almost certainly false, and, therefore, that the State of Arkansas almost certainly executed an innocent man in 1995.

V. Conclusion

We have demonstrated that Paul Cassell's criticisms of *The Consequences of False Confessions* do not withstand scrutiny.¹⁶⁵ Cassell's nine case challenges are based on errors, omissions, statements presented out of context, and partisan presentations of case materials. Cassell's case challenges amount to little more than a selective restatement of the state's case to support the conclusion that the defendant was guilty by relying on the opinions of third parties who, knowing of the confession, became convinced of the defendant's guilt. Absent the questionable confession, there is no meaningful evidence of guilt in any of these nine cases and moderately strong to dispositive evidence of innocence. Because Cassell mischaracterizes the fundamental purpose of our research and does not even-handedly evaluate case evidence, he fails to raise any meaningful challenge to *Consequences*.

Instead, Cassell misses the point of *Consequences*: that the prosecutors, judges, jurors and appellate judges in the cases we studied easily came to conclude that the defendant was guilty precisely because they were pre-

and social skills. Finally, Ms. Johnson asserted that Fairchild is not retarded based on his uneven performance within particular subtests in the Weschler Adult Intelligence Scale-Revised, yet such scatter within subtests is typical of both the mentally retarded and non mentally retarded alike and therefore is an inappropriate basis for judging mental retardation, as the standards promulgated by the American Association on Mental Retardation make clear. See Letter from Candace Burns to Richard Burr dated August 30, 1990 (In authors' possession).

¹⁶³ Duke, *Retarded Man*, supra note 162.

¹⁶⁴ See Leo and Ofshe, *Consequences*, supra note 8.

¹⁶⁵ Interestingly, unlike Cassell, even William J. Bratton, the former Police Commissioner of New York City and Boston, acknowledges that false confessions are not rare. See William J. Bratton, "A Law Enforcement View of Confessions" (2000) at http://www.courtvtv.com/confession/bratton__essay.html.

sented with the state's weak circumstantial evidence in the context of first knowing that the defendant had confessed. Our article was about the biasing effect of unreliable confession evidence on the perceptions, reasoning and decision-making of criminal justice officials and triers of fact.

Cassell also fails to grasp the true policy implications of our research. In *Consequences*, we advocated establishing a minimum standard of reliability with which to evaluate the admissibility of a defendant's confession statement. We did not seek to "justify possibly dramatic changes in how the justice system handles interrogations and confessions."¹⁶⁶ Rather we reaffirmed the importance of one of the most fundamental principles of all investigatory police work: that a confession should be corroborated by objective evidence, independent of the "I did it statement," to establish its veracity.

We argued that police and prosecutors should evaluate the fit between a suspect's uncontaminated post-admission narrative and the crime facts to determine whether to go forward with a case — because we presume that almost all criminal justice officials desire to catch and prosecute the guilty, not merely close files.¹⁶⁷ In light of the substantial prejudicial impact of confession evidence, we do not think it revolutionary to recommend that a minimum threshold of reliability be established to keep false confessions out of courtrooms. The presence of a minimum corroboration requirement would oblige police to obtain better confessions and allow them to recognize a false confession before acting upon it.¹⁶⁸ The cases we studied in *Consequences* strongly suggest that if police and prosecutors sought to produce a higher quality of confession evidence, there would be far fewer wrongful prosecutions and convictions of the innocent.

Rather than acknowledge the false confession problem in America, or make any effort to help solve it, Cassell perpetuates the myth that people do not confess to crimes they did not commit unless they are tortured, mentally ill, or mentally retarded. This myth is dangerous because it not only obscures the problem of police-induced false confessions, but also undermines serious scholarship on the causes and consequences of wrongful convictions.

VI. APPENDIX: The Remaining Cases

(1) Joseph Giarratano

Joseph Giarratano gave five police-written confessions over a period of several days to the murder of 44 year old Barbara Kline and the sexual assault and murder of her 15 year old daughter, Michelle Kline, whose bodies

¹⁶⁶ Cassell, *Consequences*, supra note 10 at 524.

¹⁶⁷ We have encountered only the rare bad cop, overzealous prosecutor or ideologue in our work on interrogation and confession.

¹⁶⁸ Our suggestion to more rigorously evaluate a suspect's post-admission narrative and to establish a minimal standard of reliability is politically neutral because, once implemented, it would advantage neither the prosecution nor the defense.

were discovered in their apartment in Norfolk, Virginia on February 5, 1979. The first four confession statements that Jacksonville, Florida police wrote contained no independent knowledge of the details of the murders;¹⁶⁹ the final police-written confession statement was subsequently elicited by police detectives in Norfolk, Virginia, who knew the crime scene facts.¹⁷⁰ Giarratano's five police-written confessions were internally inconsistent,¹⁷¹ contradicted one another,¹⁷² and contradicted the physical evidence in the case.¹⁷³ None of Giarratano's confessions demonstrated any actual knowledge of the

¹⁶⁹ Gudjonsson, *THE PSYCHOLOGY OF INTERROGATIONS, CONFESSIONS AND TESTIMONY* (1992) at 317 (“No knowledge about the crime could possibly have been communicated to Giarratano by the Jacksonville officers as they had no details of the crime before the confession statements were made.”)

¹⁷⁰ One of the Norfolk Officers interrogating Giarratano testified that they “confronted [Giarratano] [with the] facts and circumstances” known to them, on at least some occasions using that information to suggest to Mr. Giarratano that he was not revealing what really happened.” Petition For Conditional Pardon in *Re Joseph Giarratano* (November 13, 1991) at 46 (Hereinafter, *Petition*).

¹⁷¹ Mr. Giarratano's confessions fall into two categories. In the first, given in several statements to officers in Jacksonville, Florida, Mr. Giarratano kills Barbara Kline first in an argument over money, then to remove her as a witness. In this category, Michelle was neither harmed nor sexually assaulted before she was killed. The second category of confession, given to Norfolk officers two days later, changes these facts. In this confession, Mr. Giarratano states that he first raped Michelle Kline, then killed her, and upon being discovered in the apartment thereafter by Barbara Kline, killed her too. A week after giving this statement to the Norfolk officers, Mr. Giarratano was sent to Central State Hospital, where he reverted to his original version of the crime (in which he stated that Barbara Kline was killed first, and then Michelle Kline, but that he did not kill Michelle), contradicting the account he had given to Norfolk, Virginia police. See *Petition*, supra note 170 at 30-31, 52.

¹⁷² For example, Giarratano erroneously reported to the Jacksonville, Florida Police that Barbara Kline was killed first and mentioned nothing about Michelle Kline's rape. After his subsequent interrogation with the Norfolk, Virginia Police, Giarratano's confession correctly recounted that Michelle Kline's murder preceded Barbara Kline's and that Michelle Kline was raped prior to her murder. *Petition For Conditional Pardon* at 43. Quoting a state psychiatrist, Cassell appears to attribute the multiple inconsistencies and contradictions between Giarratano's confession(s) to Jacksonville, Florida police and his confession to Norfolk, Virginia police to “a combination of drugs.” Cassell, *Examination*, supra note 10 at 545. Cassell then quotes a defense psychiatrist's *post-conviction opinion* that Giarratano was “very credible in his description [of the crime],” and that “the murders were symbolic acts by which the defendant's hatred was discharged against persons he identified in his mind with his mother and father,” as if this psychobabble somehow constitutes evidence of Giarratano's guilt. *Id.*

A more reasonable explanation for the inconsistencies and contradictions in Giarratano's multiple police-written statements is that Giarratano was ignorant of some key crime scene facts when he first spoke to Jacksonville, Florida interrogators and thus mis-stated them; that Norfolk, Virginia police interrogators suggested the correct crime scene facts to Giarratano, who then corrected his earlier statements to conform to the facts that they provided him. See *Petition*, supra note 170 at 38-53.

crime scene that would have been known only to the true killer, but instead demonstrated the kind of ignorance¹⁷⁴ of the underlying crime facts that one

See also Gudjonsson, *supra* note 169 at 317 (“Two days later Giarratano gave a totally different account to Norfolk detectives. He now claimed to have raped Michelle before murdering her, and then killed her mother to cover up the crime. This account was consistent with what the Norfolk detectives had told Giarratano, prior to interviewing him, about their knowledge of the murders”). See also Report of Dr. James MacKeith, June 15, 1990 at 25 (“In their trial testimony, the police officers indicated that they had not even considered the possibility that a homicide suspect might give a fabricated confession, and they admitted that Mr. Giarratano had been presented with detailed information about the scene of the crime before his testimony was later taken down in writing”). Since Norfolk, Virginia Police failed to tape record Giarratano’s interrogation, however, there is no definitive way to determine what information the interrogators provided to Giarratano and what information he generated independently. However, Cassell fails to mention the psychological and psychiatric evaluations of Giarratano that concluded he was highly vulnerable to suggestion and confabulations, thus casting doubt on the reliability of his confession statements. See Gudjonsson *supra* at 319 (“There was no doubt in my mind that Giarratano’s confabulation and suggestibility tendencies seriously challenged the reliability of the confessions he made to the police in 1979.”). See also MacKeith, *Supra* at 29 (“I conclude that no confidence can be placed in the reliability of Mr. Giarratano’s pre-trial self-incriminating statements”).

¹⁷³ See text and accompanying notes, *infra* at [two footnotes ahead]

¹⁷⁴ Giarratano’s confession statements did not reveal complete ignorance of the crime scene facts because Giarratano had seen police videos of the scene and photographs prior to his confession to Norfolk, Virginia police interrogators. Gudjonsson, *supra* note 169 at 320.

would expect from an innocent, false confessor.¹⁷⁵ Not a single piece of independent evidence connects Giarratano to the crime.¹⁷⁶

Cassell erroneously asserts that “opponents of the death penalty have distorted the record on Giarratano’s guilt for their own purposes”¹⁷⁷ and suggests that we relied on their intentionally distorted accounts of the Giarratano case facts. Cassell’s suggestion that Giarratano is a poster boy for anti-death penalty crusaders is an attempt to undermine opponents of the death penalty,¹⁷⁸ not a serious argument about the merits of the Giarratano case.¹⁷⁹ Cassell fails to mention that many conservative supporters of the death

¹⁷⁵ There are at least seven inconsistencies between Giarratano’s statements and the physical and crime scene evidence supporting the conclusion that Giarratano’s confession statements were false.

First, Giarratano confessed to strangling Michelle Kline with his hands, but an independent review by the Chief Medical Examiner of the State of Maryland, as well as a review by Cyril Wecht, conclude that it is unlikely that Michelle Kline was strangled manually. See Report of Cyril Wecht, July 30, 1990, at 7. The state’s medical examiner, Dr. Presswalla, had originally diagnosed the strangulation of Michelle Kline as having been done by “partial ligature” (an object rather than the hands), but changed his findings *following* the interrogation of Giarratano by the Norfolk officers apparently for no other reason than to conform to Giarratano’s confession. Petition, *supra* note 170 at 53-54, ft. 12.

Second, Giarratano confessed to stabbing Barbara Kline in the hallway between the living room and the door, but the crime scene evidence clearly indicated that the entire assault upon Barbara Kline occurred in the bathroom. *Id.* at 54-55.

Third, Giarratano confessed to killing Barbara Kline with a kitchen knife approximately seven inches long, but none of Kline’s three stab wounds were deeper than three and a half inches. Considering the force with which these wounds were inflicted, a 7-inch knife would likely have inflicted deeper wounds. *Id.* at 55.

Fourth, Giarratano confessed to throwing the knife into a location adjacent to the apartment house, but no knife was found there or anywhere else. *Id.* at 55.

Fifth, Giarratano confessed that Michelle Kline entered his bedroom voluntarily, but police investigating the crime scene noted the presence of “drag marks” indicating that she had been forcibly dragged into the bedroom. *Id.* at 55.

Sixth, Giarratano confessed to pulling Michelle Kline’s clothes off and raping her. The physical evidence indicates that she died with her clothes on. *Id.* at 55-56.

Seventh, Giarratano confessed that he locked the bottom door of the apartment after the rape, but the landlord, who first discovered the bodies, reported that the apartment of the bottom door had been unlocked. *Id.* at 56.

¹⁷⁶ See text and notes *infra* at 181 to 204.

¹⁷⁷ Cassell, *Examination*, *supra* note 10 at 547.

¹⁷⁸ For an example of Cassell’s commitment to advocacy over objectivity in the death penalty debate, see his response Bedau and Radelet’s classic study of miscarriages of justice in capital and potentially capital cases in the twentieth century. See Bedau and Radelet, *Miscarriages of Justice*, *supra* note 5; Markman and Cassell, *Protecting the Innocent*, *supra* note 9; and Bedau and Radelet, *The Myth of Infalibility*, *supra* note 9.

¹⁷⁹ Cassell asserts that the Giarratano case facts were spoon-fed to the media by opponents of the death penalty, but he offers no evidence to support this speculation.

penalty have also rallied behind Giarratano's innocence.¹⁸⁰ More importantly, the suggestion that we rely on inaccurate descriptions of the Giarratano case facts is simply incorrect.

Cassell's attempt to corroborate Giarratano's dubious confessions, like the prosecution's earlier attempts (which he repeats), is insupportable. First, Cassell misreports that seventeen fingerprints matching Giarratano's were found at the crime scene. In fact, only one matching fingerprint was found in a part of the apartment unrelated to where the crime occurred¹⁸¹ — despite the fact that police lifted twenty-one fingerprints from various areas of the Kline apartment that were sufficiently distinct to permit identification.¹⁸² Twenty fingerprints did not match Giarratano's. The single fingerprint that did is insignificant both because it was not found in or around the actual crime scenes and because Giarratano had lived with the Klines for several weeks¹⁸³ (and thus one would naturally expect to find his fingerprints somewhere inside the apartment).

Second, Cassell suggests that hair samples link Giarratano to the crime because "one of the pubic hairs found on Michelle's left hand, stomach and pubic area was consistent in race, color and microscopic characteristics with one of [Giarratano's] pubic hairs."¹⁸⁴ In fact, a single hair, of the thirty-four¹⁸⁵ human hairs found in the apartment, was found to be "consistent"

If, as our original article demonstrated, virtually everyone begins with a reflexive presumption of guilt once a confession has been elicited, then it is far more likely that the media began their evaluations of Giarratano's case with a bias toward believing in his guilt. There is no reason to believe, nor any evidence to support the conclusion that, journalists or opponents of the death penalty carry a different presumption once someone has confessed to police.

¹⁸⁰ For example, Joseph Giarratano's conservative supporters include James J. Kilpatrick, former Maryland Attorney General Stephen H. Sachs, and Richard Viguereie. See Jim Clardy, Reasonable Doubt? New Trial Sought for Death Row Prisoner., *The Washington Times*, May 24, 1990 at A1 ("Many people, including such ardent proponents of capital punishment as conservative columnist James J. Kilpatrick and former Maryland Attorney General Stephen H. Sachs, say Giarratano is at least entitled to a new trial, if not an outright pardon."). See also David A. Kaplan and Bob Cohn, "Did Politics Help Joe Giarratano Escape the Chair?" *Newsweek* (March 4, 1991) at 56 ("Support came in from Tories like direct mail wizard Richard Viguereie . . ."). Other conservative, supporters of the Death Penalty who questioned Giarratano's conviction included: Virginia Delegate Samuel Glasscock and Senator Thomas Michie, Jr., Virginia Senators Colgan Stallings and Kevin Miller, and former Virginia Commonwealth Attorney Douglas Baumgardner. *Petition*, supra note 170 at 22.

¹⁸¹ *Id.*

¹⁸² *Id.* at 37.

¹⁸³ *Id.* at 58.

¹⁸⁴ Cassell, *Examination*, supra note 10 at 546.

¹⁸⁵ Twenty-four human hairs, including head hairs and pubic hairs, were recovered from Michelle Kline's clothing, the Afghan covering her body, her body and immediately next to her body. Fourteen were identified as Michelle's head hairs.

with Giarratano's.¹⁸⁶ This does not mean that it was his hair or even likely his hair; no one identified that single pubic hair with any certainty as Giarratano's.¹⁸⁷ Even if the single pubic hair was Giarratano's, it is insignificant since he had lived with the Klines. More importantly, many other pubic and head hairs were found on or near Michelle Kline's body and were not consistent with either Giarratano's or Michelle Kline's.¹⁸⁸

Third, Cassell states that human blood type O ("the same one as the victim's")¹⁸⁹ was found on the front and side of one of Giarratano's boots.¹⁹⁰ However, he fails to mention that these two minute specks of blood did not originate from walking in the blood of Barbara Kline, as the prosecution tried to imply at trial.¹⁹¹ Nor did Michelle Kline bleed externally from any

Six were identified as human pubic hairs, but none of them was consistent with the Mr. Giarratano's pubic hair sample. The only pubic hair that was found to be consistent with Mr. Giarratano's hair was among three pubic hairs found on Michelle Kline's left hand, stomach, and pubic area. Unfortunately, no one identified in which of these three places this hair was found. Petition, *Supra* Note ____ at 36-37. The remaining ten hairs were found near Barbara Kline's purse, and they were all hers. Supplement to Petition for Conditional Pardon, *In Re Joseph Giarratano* (November 13, 1991) at 19 [Hereinafter, "Supplement to Petition."].

¹⁸⁶ Supplement to Petition, *Id.* at 19.

¹⁸⁷ Petition, *Supra* Note 170 at 58. As Cyril Wecht notes in his report, "The one hair sample consistent with Mr. Giarratano's pubic hair does not provide personal identification." Wecht, *supra* note 175 at 10.

¹⁸⁸ Petition, *supra* note 170 at 58.

¹⁸⁹ Cassell, *Examination*, *Supra* Note 10 at 546. Cassell fails to mention that 45% of the population has type "O" blood. Appendix to Petition for Conditional Pardon at 2.

¹⁹⁰ Cassell, *Examination*, *supra* note 10 at 546.

¹⁹¹ At trial, the prosecution submitted as direct evidence, "(1) Photographs and a videotape of the crime scene, which revealed shoeprints in and emerging from a pool of blood near Barbara (Toni) Kline's body; (2) A pair of Joe Giarratano's boots, one of which had two drops of type 'O=' human blood on the top and side; and (3) A forensic report identifying the blood type of Michelle Kline as O+." Supplement to Petition, *supra* note 185 at 2. Notwithstanding Cassell's claim that the prosecution never claimed the bloody shoeprints matched Giarratano's boots (see Cassell, *Examination*, *Supra* Note 10 at 546, Ft. 125), clearly the prosecution's purpose in introducing these three items of evidence was to imply that the blood on Giarratano's boots matched the blood of one of the victims. Supplement to Petition, *supra* 185 at 2.

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injury, including her vaginal lacerations, in sufficient quantity or manner to have accounted for the blood on Giarratano's boot.¹⁹² Thus, given the crime scene evidence, there is no basis in fact to suggest or imply that the minute specks of blood on Giarratano's shoe came from either of the two victims.¹⁹³

Fourth, Cassell apparently misunderstands the medical facts and overreaches when he challenges our assertion that Giarratano was left-handed with only limited use of his right hand due to childhood neurological damage. He asserts that Giarratano's "own medical materials confirm that right upper extremity sensory deficit was attributable to a wrist laceration associated with his 1983 suicide attempt (some four years after the murder)"¹⁹⁴ and that "at the time of the murders, it should be noted, Giarratano was sufficiently dexterous to work on a scallop boat."¹⁹⁵ In fact, far from confirming anything, the medical report by Dr. Jeffrey Barth (which Cassell cites) states only that Giarratano's right upper extremity deficit *may* be due to a 1983 suicide attempt.¹⁹⁶ And, in fact, Giarratano is left-handed.¹⁹⁷ As we stated in our original article, Giarratano has only limited use of his right hand due to

Giarratano's boots matched the blood of one of the victims. Supplement to Petition, supra 185 at 2.

¹⁹² Petition, supra note 170 at 59. Moreover, June Browne Tillman, the state's serologist and expert witness at trial, subsequently submitted an affidavit indicating that:

"It is my opinion that the footwear which produced the bloody footprints would have blood on the soles, in areas of stitching, around the heels, and possibly the edge of the sole and in the welt. A forensic examination would have shown visual, microscopic or chemical traces of blood, even if the footwear had been washed. When I examined Mr. Giarratano's boots, no traces of blood were found in these areas. Blood was only found on the front and right side of the left boot. Had I been shown these photographs in connection with my examination of Mr. Giarratano's boots, I would have recommended that the police obtain the shoes of other possible suspects for examination for the presence of human blood and that a physical comparison be made between the suspected footwear and sealed photographs of the bloody footprints." Affidavit of June Browne Tillman (March 20, 1989) at 2. See also Wecht, Supra Note 175 at 10 ("The absence of blood on the soles of Mr. Giarratano's boots indicate that the bloody shoe prints leaving the bathroom where Mrs. Kline's body was found were not left by him.").

¹⁹³ The prosecution did not present evidence that Giarratano's boots made the shoeprints in the photographs. Nor were any comparative measurements taken, and there was no other evidence suggesting that the prints matched his boots. The prosecution's own serologist eliminated Giarratano's boots as those which made the shoe prints. In addition, the arresting officer stated that Giarratano had no blood on him or his clothes when he was arrested. Thus, the blood probably did not come from the crime scene at all. Supplement to Petition, supra note 185 at 3, 7-8.

¹⁹⁴ Cassell, *Examination*, supra note 10 at 547.

¹⁹⁵ *Id.*

¹⁹⁶ As Dr. Barth indicates, "it is my understanding that this patient has been deaf in his left ear since birth and his right upper extremity sensory deficit may be due to the wrist laceration associate with his 1983 suicide attempt." Report of Dr. Jeffrey T. Barth, Director, Neuropsychology Assessment Laboratory, on Joseph Giarratano

childhood neurological damage.¹⁹⁸ Cassell overlooks this fact because, in his rush to demonize Giarratano, he did not properly read Dr. Barth's neurological evaluation, which determined only that Giarratano's right-sided *sensory* deficits were probably caused by his 1983 suicide attempt.¹⁹⁹ But Giarratano also had right-sided *motor speed* and *coordination* deficits,²⁰⁰ which Dr. Barth did not attribute to the 1983 suicide attempt, and which almost certainly pre-date the crime.²⁰¹ Finally, Cassell's statement that Giarratano was "sufficiently dexterous to work on a scallop boat" is meaningless since Giarratano worked as a cook, not a dredge handler or winch hand, on the boat.²⁰²

In sum, there is not a shred of significant or credible physical evidence supporting the conclusion that Joseph Giarratano's contradictory and inconsistent confessions are reliable or link him to the deaths of Barbara and Michelle Kline.²⁰³ Yet there is considerable evidence supporting the conclusion that his confessions are false.²⁰⁴ Joseph Giarratano is in all likelihood an innocent man who was wrongfully convicted of a capital crime.

(2) Paul Ingram

Cassell's assertion that Paul Ingram committed the crimes to which he pleaded guilty is groundless. The Ingram case, perhaps more than any other discussed in this article, illustrates Cassell's poor judgment in his case challenges and his willingness to ignore substantial exculpatory, inconsistent and/or contradictory evidence in his attempt to assert the guilt of an almost certainly innocent defendant.²⁰⁵ There is no evidence that the crimes to which Ingram pled guilty ever occurred.²⁰⁶ There is dispositive evidence that most of the crimes that Ingram's accusers (his daughters Ericka Ingram and Julie Ingram) alleged either did not, in fact, occur or could not have possibly oc-

at 3 (Dec. 1, 1986). Cassell fails to mention that it also reveals that Giarratano attempted suicide two to three times prior to the crime. *Id.* at 2.

¹⁹⁷ Supplement to Petition, *supra* note 185 at 23.

¹⁹⁸ Leo & Ofshe, *Consequences*, *supra* note 8 at 489.

¹⁹⁹ Barth, *supra* note 196 at.

²⁰⁰ *Id.* at 3 ("Deficits were noted in right upper extremity motor speed and coordination in relationship to the left (dominant), and his motor strength appeared essentially intact bilaterally.').

²⁰¹ Supplement to Petition, *supra* note 185 at 23-25.

²⁰² Phone interview with Marie Deans, February 3, 1998.

²⁰³ Gudjonsson, *supra* note 169 at 317 ("No tangible evidence has ever emerged that clearly indicates that Giarratano committed the two murders.').

²⁰⁴ See text and accompanying notes *supra* (the footnote with the 7 points).

²⁰⁵ As Peter Brooks points out, "[I]t is almost impossible to believe in the content of Ingram's confessions, and no confirmation for any of them has been discovered." Peter Brooks, *TROUBLING CONFESSIONS: SPEAKING GUILT IN LAW AND LITERATURE* (2000).

²⁰⁶ See Ofshe, *supra* note ____; Ethan Watters, *The Devil and Mr. Ingram*, *MOTHER JONES MAGAZINE* (January/February, 1991) at 30-33, 65-68; Lawrence Wright, *REMEMBERING SATAN* (1994).

curred.²⁰⁷ And there is substantial evidence that Paul Ingram's so-called confessions — induced during at least twenty-three interrogations over a five month period — were completely false.²⁰⁸

Many of the crimes that Ericka Ingram and Julie Ingram alleged either did not occur or could not have occurred. For example, Ericka Ingram alleged that she attended 850 Satanic rituals over 17 years in which at least 25 babies were murdered (some aborted by coat-hangers on the spot, some cut up and smeared on her body, and some eaten by members of the cult) and then buried. Yet when the burial sites identified by Ericka Ingram were excavated as part of a massive police investigation, nothing was found.²⁰⁹ As a result of these supposed cannibalizing Satanic orgies, Ericka maintained that she had been repeatedly raped, tortured and severely scarred all over her body.²¹⁰ Yet a court-ordered medical examination revealed that Ericka had no scars on her body (despite her numerous public claims to the contrary),²¹¹ and that there was no evidence that she had been tortured or *even that she had ever been sexually active*.²¹² Yet Ericka Ingram also had claimed to have caught a sexually transmitted disease from her father and to have been impregnated by him, claims that were easily disproven by the fact that she was a virgin at the time.²¹³

Many of Julie Ingram's parallel accusations were equally preposterous and also demonstrably false. Like Ericka, Julie Ingram claimed to have attended hundreds of murderous Satanic rituals (in which bestiality, group sex, and blood-drinking, among other atrocities, were regularly featured), yet there was no evidence that any such meetings ever occurred or that any of the people whom either sister had named were members of any cult.²¹⁴ Like Ericka, Julie Ingram identified locations where she remembered that bodies from these rituals had been buried (including animal remains), but the excavations of these burial sites revealed no such evidence.²¹⁵ Like Ericka, Julie Ingram claimed that she carried marks, cuts and scars all over her body

²⁰⁷ Id.

²⁰⁸ These interrogations were highly suggestive and often unrelenting. The interrogations went on for hours, sometimes beginning in the early morning and lasting into the evening. Ofshe supra note ____.

²⁰⁹ Numerous police officers dug up the Ingram property looking for the murdered babies and turned up only a single elk-bone fragment. Ofshe, supra note ____.

²¹⁰ Ofshe, supra note ____.

²¹¹ Notwithstanding the court-ordered medical examinations that revealed no scars, Ericka Ingram still publicly maintains that she carries these marks. Richard Ofshe and Ethan Watters, MAKING MONSTERS: FALSE MEMORIES, PSYCHOTHERAPY AND SEXUAL HYSTERIA (1996) at 172.

²¹² Ofshe, supra note ____.

²¹³ Ofshe, supra note ____; Wright, supra note 206.

²¹⁴ Other people who had been named by the daughters as members of the cult maintained their innocence, and there was no evidence to dispute their word. Wright, supra note 206.

²¹⁵ Nor did the excavations lead to the diary of contemporaneous writings about the group that Julie Ingram claimed to have buried. Ofshe, supra note ____.

(including on her upper arms, back and legs) from the repeated sexual abuse, fire burns and ceremonial incisions inflicted by knife-wielding cult members.²¹⁶ Yet a court-ordered medical examination also revealed no evidence of any abortions, torture, or scarring (despite Julie Ingram's numerous testimonials about the allegedly extensive scarring all over her body). Julie Ingram also claimed to have been impregnated by Paul Ingram and to have had her fetus aborted in an abortion clinic in Shelton, Washington. There was no abortion clinic in Shelton, Washington, and no abortion clinic in the area surrounding Olympia, Washington had any record of ever performing an abortion for her.²¹⁷ Julie Ingram gave the prosecutor a letter purportedly written by Paul Ingram threatening to kill Julie Ingram. Both the prosecution's and the defense's handwriting experts agreed that the letter was in Julie's handwriting.²¹⁸

Rather than cite any actual *evidence* that Ingram molested either of his daughters, Cassell repeats the *opinions* of third parties who believed that Ingram had confessed to sexually molesting his daughters and therefore must have been guilty.²¹⁹ Ignoring the biasing effect of confession evidence, Cassell repeats the opinion of a judge who did not believe that anyone with a law enforcement background could give a false confession.²²⁰ Cassell cites the judge's belief that Ingram's confession contained "virtually incontestable evidence of guilt."²²¹ However, the evidence the judge thought he found turned out not to exist.²²²

Cassell criticizes Richard Ofshe by repeating a hearing judge's statement that one cannot infer whether someone is under hypnosis by reading a

²¹⁶ Like Ericka, Julie Ingram was willing to describe her rapes and abominable tortures (including having nails driven through her flesh and the arm of a baby inserted into her vagina) at the hands of the cannibalizing Satanic cult, but could not discuss the group's mundane activities. Neither Ericka nor Julie Ingram were able to describe the Satanic cult's ceremonies, pattern of organization or any facet of its social life. Ofshe, *supra* note ____.

²¹⁷ Additional evidence casts doubt on the credibility of Ericka Ingram's numerous demonstrably false and/or preposterous allegations. For example, Ericka Ingram eventually reported that she was raped by Paul Ingram every night from the ages of 5 to 22, yet Ericka Ingram's evolving and contradictory accusations not only shifted time frames and initially excluded (but later included) her mother, but also left out Julie Ingram, although the sisters had been roommates for most of their lives. Ofshe, *supra* note ____; Wright, *supra* note 206.

²¹⁸ Ofshe, *supra* note _____. Additional evidence calls into question the credibility and veracity of Julie Ingram's allegations. For example, Julie Ingram claimed that *all* of the men who attended Saturday night poker parties at her home (who were Paul Ingram's law enforcement associates) would enter her bedroom, one or two at a time, and rape her while her father watched, yet there simply was no evidence that any such abuse ever occurred.

²¹⁹ Cassell, *Examination*, *supra* note 10 at 547-553.

²²⁰ *Id.*

²²¹ Cassell, *Examination*, *supra* note 10 at 549.

²²² This so-called "incontestable evidence" turned out to be no more than Ingram's verbalized guesses about how he would have had a sexual encounter with

transcript.²²³ Cassell neglects to mention that Ofshe submitted the transcripts of Ingram's hypnotic sessions to the reviewers for *The International Journal of Clinical and Experimental Hypnosis* (the world's leading scientific journal on the study of hypnosis), who concurred with his conclusion that Ingram was hypnotized and published his paper on the case.²²⁴ Cassell also criticizes Ofshe's testimony that Ingram's statements were hypnotically-induced fantasies,²²⁵ but fails to mention that the judge who denied Ingram's motion to withdraw his guilty plea based this decision solely on the statements that Ingram made in the one interrogation session that *preceded* the use of the interrogators' hypnotic procedures. The judge specifically excluded from consideration those statements that Ofshe testified were elicited while Ingram was under hypnosis, thus crediting Ofshe's testimony.²²⁶

This fact is significant because Ingram's supposed first session confession — on which the judge based his decision to deny Ingram's motion to withdraw his guilty plea — was never really a confession. Instead, in response to the interrogators' false claims that it was common for sexual abusers to repress knowledge of their acts, Ingram agreed on 16 separate occasions that if his daughters said he sexually abused them, then he must have done so — even though he had no memory of any improper act.²²⁷ If Cassell had analyzed the so-called confession that resulted from Ingram's first interrogation session — the transcript of which was available and had been analyzed in Ofshe's published paper²²⁸ — he would have found that it was nothing more than a set of compliant responses to the interrogators' suggestive tactics, that it never demonstrated any guilty knowledge, and that it never produced any corroboration. This so-called confession was merely the opinion that the interrogators' evidence claims and tactics had created in the mind of Paul Ingram.

The claim that Paul Ingram and his wife, Sandy, sexually abused their daughters for seventeen years and that Paul was the leader of a satanic cult that had murdered hundreds of babies lacks any evidence that might lead a reasonable investigator (or for that matter a judge or jury) to consider the story seriously. Both Ericka and Julie Ingram proved to be wholly unreliable witnesses: their allegations are either inconsistent, illogical and/or contradicted by all existing physical and medical evidence. Paul Ingram's initial, pre-hypnotic interrogation session statements amount to no more than the conclusion that logically follows if the claimed evidence were true. Paul Ingram's subsequent, hypnotically induced confessions — the genesis of which

one of his daughters if such an event had ever happened. See Ofshe, *supra* note _____.

²²³ Cassell, *Examination*, *supra* note 10 at 547-553.

²²⁴ See Ofshe, *supra* note _____.

²²⁵ Cassell, *Examination*, *supra* note 10 at 547-553.

²²⁶ Richard Ofshe was present in the courtroom when the judge made this election.

²²⁷ See Ofshe, *supra* note _____; Ofshe and Watters, *supra* note 211 at 165-175.

²²⁸ Ofshe, *supra* note _____.

we have written about at great length elsewhere²²⁹ — are not supported by any evidence, and are utterly implausible and/or demonstrably false.²³⁰ The fact that all the evidence allegedly supporting Ingram's guilt was false was not known to the hearing judge who denied Ingram's motion to withdraw his plea at the time of his decision. In light of all the exculpatory evidence that has surfaced subsequent to his decision, there is no question that Paul Ingram is almost certainly an innocent man convicted of crimes that did not occur. Our conclusion is shared by numerous social scientists and independent writers who have scrutinized the facts of this bizarre and troubling case.²³¹ Meanwhile, Ericka Ingram has turned her accusations on the sheriff's officers who at first believed her, publicly claiming that they have refused to arrest the thirty police officers, doctors, lawyers, and judges whom she has identified as cult members and who supposedly continue their regular practice of sacrificing babies to Satan.

(3) Richard Lapointe

Cassell's argument that Richard Lapointe's confession is both truthful and corroborated by the record is unpersuasive because Cassell's claims are either factually inaccurate, misleading, omit key facts or rely on innuendo.²³² Despite the claims of the prosecution at trial (and Cassell's repetition of

²²⁹ Ofshe, supra note ____; Richard A. Leo, *The Social and Legal Construction of Repressed Memory*, 22 LAW & SOC. INQU. (1997), 653-693.

²³⁰ For example, Ingram confessed to raping and sexually abusing his daughters, to sodomizing, dismembering, murdering and cannibalizing children, and that he was a high priest in a Satanic cult that he was a high priest in a Satanic cult, all insupportable statements that he subsequently recanted. Ingram also named approximately a dozen of past and present employees of the Thurston County Sheriff's Department (including police dogs) that supposedly took part in the cannibalizing Satanic orgies and tortures. Ingram also confessed to murdering a prostitute in Seattle in 1983 with Jim Rabie, which police investigated and dismissed as unfounded. Ingram also confessed to impregnating his daughter Julie and taking her to have an abortion, another demonstrably false statement. See Ofshe, supra note ____; Wright, supra note 206.

²³¹ See, for example, Watters, supra note 206; Wright, supra note 206; Saul Kasin, supra note ____ at 226-227; Elizabeth Loftus, THE MYTH OF REPRESSED MEMORY: FALSE MEMORIES AND ALLEGATIONS OF SEXUAL ABUSE (1994) at 227-263; Debbie Nathan and Michael Snedeker, SATAN'S SILENCE: RITUAL ABUSE AND THE MAKING OF A MODERN AMERICAN WITCH-HUNT (1995) at 168-169, 236-237; and Peter Brooks, TROUBLING CONFESIONS: SPEAKING GUILT IN LAW AND LITERATURE (2000) at 119-121.

²³² Rather than go to the trial record itself (although Cassell elsewhere criticizes us for failing to go to the trial record), Cassell relies almost entirely on the Connecticut Supreme Court statement of facts. However, Cassell does not mention that this decision has been the subject of considerable criticism in the Connecticut legal community. *The Connecticut Law Tribune* (February 1, 1997), for example, characterized the Connecticut Supreme Court's ruling as the worst decision of 1996. At the same time, Cassell criticizes us for "citing a tract prepared by a group called "The Friends of Richard Lapointe." Cassell, *Examination*, supra note 10 at 553. But none of the facts we cited in our original article were incorrect.

those claims in his article), there is no evidence of any significance linking Richard Lapointe to the murder and rape of his wife's grandmother, Bernice Martin. Moreover, Cassell's repetition of the prosecution's case against Richard Lapointe is based on circular reasoning: One has to presume Richard Lapointe guilty for any of the insignificant, misleading or irrelevant details that Cassell seizes on to serve as "evidence" of Lapointe's guilt.

It is true that a stain on the victim's bedspread came from a person who is a Type A secretor, as is Lapointe. However, this hardly qualifies as pivotal physical evidence since at least 28% of males in the United States are also Type A secretors.²³³

Cassell asserts that the same semen stain was aspermatic, arguably consistent with Lapointe's vasectomy.²³⁴ However, Cassell neglects to mention that Beryl Novitch, the lead criminalist for the Connecticut State Police Forensic Sciences Laboratory, testified for the state at Lapointe's trial that she could not be certain that the entire stain was aspermatic.²³⁵

Cassell asserts that Lapointe's wife "falsely told" police early in the investigation, in the presence of Lapointe, that his blood was Type O.²³⁶ It is not clear why this statement is significant. While Karen Lapointe did tell the police that she thought Richard Lapointe had type O blood, this was almost certainly an innocent mistake. How many people know their own blood type, let alone their spouse's? Moreover, if Richard Lapointe was present when this mistake was made, it is of little import because his hearing is so wretched that he has hearing aids in both ears, and thus it is possible that he did not even hear the comment.

Cassell then asserts that "other evidence also pointed to Lapointe. When a relative called Lapointe's wife to express concern about the victim on the night of the murder, Lapointe picked up another phone and volunteered to check on the victim himself."²³⁷ This is not evidence of anything. Cassell seems to suggest there is something sinister in Lapointe's volunteering to check on his wife's grandmother, but isn't that what any reasonable person would have done? Despite Cassell's suggestion to the contrary, Lapointe's actions here are normal.

Cassell believes that further evidence of Lapointe's guilt is that he "took a less-than-direct route to her apartment,"²³⁸ where he discovered the fire, implying sinister behavior from Lapointe's supposed route to the crime scene. Lapointe was aware of the shortcut and may have taken it once or twice, but did not habitually take it to the Martin residence and did not recall

²³³ *Sixty Minutes: Did He Do It?*, (CBS Television Broadcast, June 30, 1996).

²³⁴ Cassell, *Examination*, supra note 10 at 553.

²³⁵ See Trial testimony of Beryl Novich, 6/17-6/20, and 6/22-6/23 at 617. (May 13, 1992).

²³⁶ Cassell, *Examination*, supra note 10 at 554, Ft. 179. By using the word "falsely" rather than "incorrectly," Cassell implies that Karen Lapointe was an accomplice to the crime.

²³⁷ Cassell, *Examination*, supra note 10 at 554.

²³⁸ Cassell, *Examination*, supra note 10 at 554.

taking it on the evening of the crime.²³⁹ However, even if Lapointe did take a less-than-direct route, the difference in response time would only have been less than a minute. The prosecution tried to imply, as does Cassell, that Lapointe was trying to delay discovery of, and therefore cover up, the crime. But given the minimal time difference, this suggestion is not persuasive. Moreover, the inference of Lapointe's guilt here is based on circular reasoning: the only way it would make sense for Richard Lapointe to take one of the alternate routes that was suggested by police and prosecutors, cutting through the back yards of people's houses at night, is if he knew or had a strong suspicion that something was very wrong. In other words, one has to assume Lapointe's guilt for this "evidence" to be probative of guilt.

Cassell states that "although unable to gain access, he [Lapointe] telephoned the relative from a neighboring apartment to report everything was fine,"²⁴⁰ again attributing sinister motives to Lapointe. Mrs. Howard's testimony at trial, however, was much more matter of fact and less sinister: "He said he had gone to my mother's door, and it was locked. And he couldn't get in. And he said the curtains were drawn so Nana must be in bed."²⁴¹ In other words, Lapointe was merely describing what he had found.

Cassell asserts that after Mrs. Howard said she was going to check herself, Lapointe returned to the victim's apartment and "discovered" the fire.²⁴² However, this assertion is inaccurate. Lapointe did not go back to Mrs. Martin's apartment because Mrs. Howard said she was coming right over. Rather, he went back because he called his wife and she said maybe Mrs. Martin was sleeping.²⁴³ When he went back to check again, he noticed smoke and called 911.

Cassell asserts that after the murder Lapointe knew that the victim had been sexually assaulted, even though no medical personnel could recall anything being said about this.²⁴⁴ Cassell fails to mention that Mrs. Martin was pulled out of her apartment by paramedics with barely a shred of clothing on her and bleeding from a significant wound in her abdomen. She was placed on the ground where attempts were made to revive her. This area was milling with dozens of police, firemen and bystanders, including neighbors and relatives of the victim's family. Richard Lapointe was standing nearby. The idea that no one said or observed anything at the crime scene about the possibility of a sexual assault is not only wrong, but it is fanciful under the circumstances.²⁴⁵ It is also fanciful to believe that no one said or observed anything about the possibility of a sexual assault at the hospital, where the victim was transported and where, once again, many people were milling

²³⁹ Testimony of Richard Lapointe, June 5, 1992, at 2291-2295.

²⁴⁰ Cassell, *Examination*, supra note 10 at 554.

²⁴¹ Trial Testimony of Natalie Howard, May 13, 1992, at 664.

²⁴² Cassell, *Examination*, supra note 10 at 554.

²⁴³ Trial Testimony of Richard Lapointe, June 4, 1992 at 2224.

²⁴⁴ Cassell, *Examination*, supra note 10 at 554.

²⁴⁵ Elizabeth Martin, the victim's daughter-in-law, testified at trial that she spoke to Captain Joseph Brooks of the Manchester Police department on the telephone the

around. Under such conditions, it is simply not possible for the prosecutor, the medical personnel, or anyone else to know everything that was *not* said to Lapointe at both locations. At the very least, it is plausible — if not highly likely — that Richard Lapointe found out about the sexual assault as a result of his observations or conversations at the crime scene and/or the hospital.

Cassell asserts that Lapointe exhibited “considerable curiosity” about the results of the autopsy at his initial police interview on March 9, 1987,²⁴⁶ as if this somehow constitutes evidence of Lapointe’s guilt. Unlike Lapointe’s July 4, 1989 interrogation, however, the Manchester Police chose to tape-record this interview, and nothing about it is unusual. It hardly seems out of place that a family member would be curious about the details a day after the murder. Once again, Cassell relies on insinuation to implicate Lapointe rather than on any facts pointing to Lapointe’s guilt.

Cassell makes much of the court’s opinion (which was based on a single test) that Lapointe has an IQ of 92, which, if true, would place Lapointe within the average range of intelligence. Whether Lapointe has an IQ of 92 is open to question, however. The IQ tests reflected in Lapointe’s school records were consistently lower than that.²⁴⁷ Regardless of which tests we credit, the issue of mental retardation is ultimately irrelevant to understanding Lapointe’s case because Lapointe indisputably suffers from severe, neurological brain-damage as a result of childhood hydrocephalus. This brain-damage, which is related to Dandy Walker Syndrome, imposes serious limitations on his cognitive and motor skills.²⁴⁸ As a result, Lapointe is extremely limited in his ability to process and respond to information intellectually.²⁴⁹ Therefore, a highly stressful, manipulative and lengthy accusatorial interrogation could have easily confused Lapointe and led him to sign a police-written “confession” to a crime he did not commit.

Cassell suggests that it was possible for Lapointe to have committed the murder in the time frame available,²⁵⁰ despite his wife’s alibi that gave him virtually no time to commit such a crime. Cassell writes that, “the police re-

morning after the murder and that he told her that her mother-in-law had been raped (Trial Testimony of Elizabeth Martin, June 15-26, 1992, at 186-189.

²⁴⁶ Cassell, *Examination*, supra note 10 at 554.

²⁴⁷ The actual school record was introduced evidence at trial. Hartford Schools General Information Record, Defense Exhibit F. *State of Connecticut v. Richard Lapointe* (June 15-26, 1992).

²⁴⁸ Memorandum of Law in Support of Petitioner’s Motion for Summary Judgment, *Richard Lapointe v. Warden, State Prison*. No. CV 970571161S (March 16, 1999).

²⁴⁹ *Id.*

²⁵⁰ Newly discovered evidence, suppressed by the state at trial, suggests that it may have been impossible for Lapointe to have committed the crime. The state suppressed the expert opinion of fire marshal Stephen Igoe (which had been given to Manchester police detective Michael Ludlow and Sergeant Grant Gould of the State Attorney’s Office Major Crimes Squad, on May 9, 1987) estimating that the fire’s burn time was between 30 and 40 minutes. If true, this fact alone may have established that it was impossible for Lapointe to have committed the crime because,

interviewed Lapointe's wife on the day he confessed. She conceded that Lapointe left their house around the time of the murder, contrary to the story both she and Lapointe previously gave police."²⁵¹ Cassell's report is wrong. Karen Lapointe "conceded" only that Richard Lapointe had gone out to walk the dog shortly after they returned from an after-church visit to Mrs. Martin and that he was back home for dinner long before 5:45 p.m., when Mrs. Martin was seen alive by her daughter Nathalie Howard.²⁵² In other words, Karen Lapointe's statement did not contradict Richard Lapointe's alibi. Rather, she said that Richard Lapointe was home with her the whole night, giving Richard Lapointe an absolute alibi (a fact that Cassell fails to mention).

Contrary to Cassell's speculations, no clear testimony supports the theory that Lapointe had any window of opportunity to commit the murder and rape. In her tape-recorded interrogation, Karen Lapointe said Richard Lapointe could not have committed the crime because he was with her during the entire evening.²⁵³ She later acknowledged that he went out to walk the dog, well before the murder. Both Richard and Karen Lapointe agree that he left to walk the dog between 4:15 and 4:30 p.m., and was gone for 1/2 hour. This puts Lapointe back home 45 minutes before Ms. Martin was seen alive by her daughter at 5:45 p.m. After Richard Lapointe returned from walking the dog, the Lapointes had dinner, they washed the dishes together, and at approximately 6:15-6:30 p.m., Karen Lapointe went upstairs to give

under the state's theory that the same person who sexually abused and stabbed Bernice Martin also set the fire in her apartment, this would not have left Lapointe with sufficient time to perform all the acts that the perpetrator committed against Ms. Martin. A fire burning between 30 and 40 minutes meant that Lapointe would have been home when it was set because, as the state acknowledged, Lapointe was, in fact, at home until shortly after 8:00 p.m. when Natalie Howard called and asked him to walk over to Ms. Martin's house (which was 3/10ths of a mile away from his house). Yet the firemen discovered the fire still burning when they arrived at Ms. Martin's apartment shortly after 8:27 p.m. (when Lapointe called 911), and they extinguished it by 8:33 p.m. In other words, if Fire Marshal Igoe's estimate is accurate, the fire could only have been started when Lapointe was, indisputably, at home with his wife and son. Moreover, it should be remembered that the assaults upon the decedent (stabbing her 11 times, tying a cloth ligature around her neck, binding her arms with cloth materials, and sexually abusing her) must necessarily have preceded the setting of the fire, which would have necessarily forced the perpetrator out of the apartment. And the assaults, because they were extensive, must necessarily have taken a considerable amount of time to commit and thus must have occurred well before 8:00 p.m. In addition, the fire could not possibly have occurred as early as between 6:15/6:30 p.m. and 7:00 p.m. (the only time, after the victim was last seen alive, that Lapointe was out of his wife's presence and could, theoretically, have committed the crime) given the fire's burn time. See Brief of Petitioner-Appellant (March, 2001), *Richard Lapointe v. Warden*. A.C. No. 21249 (on file with authors).

²⁵¹ Cassell, *Examination*, supra note 10 at 554.

²⁵² Transcript of Karen Lapointe by Detective Michael Morrissey, July 4, 1989 at 27.

²⁵³ *Id.* at 10, 27.

their son Sean a bath and get him ready for bed. She returned downstairs at or around 7:00 p.m., when the three Lapointes watched a television show together.²⁵⁴ Thus, there is a time frame of approximately 25-45 minutes²⁵⁵ in which Richard Lapointe was out of his wife's presence while she was upstairs. To have committed the crime during this period (the only time frame available to him), Richard Lapointe would have had to walk over to Ms. Martin's apartment (5-10 minutes away), have coffee and tea with her, attack her with a knife, stab her 11 times in the back and abdomen, bind clothing around her legs and her hands around her neck, bind her neck tightly with knots and ligatures, partially strangle her (apparently with a blunt instrument), sexually assault her, attempt to set a fire, and then return home (another 5-10 minute walk) without appearing dishevelled, sweaty or nervous. It is hard to imagine how anyone — especially the brain-damaged and clumsy Lapointe — could have possibly done all of this in the brief time available. Neither the prosecution nor Cassell offer a coherent explanation for this problem because no such explanation is possible. The evidence about the time frames from the night of the crime supports the conclusion that Lapointe could not have committed this crime.

Relying again on opinions based on no specifiable evidence, Cassell repeats what two policemen said at trial that Lapointe's supposed demeanor and body language during part of his nine and one-half hour interrogation somehow prove his guilt. It is astounding that the self-serving *opinions* of two police officers about a suspect's body language and demeanor could be regarded as constituting evidence of guilt. Like so much of Cassell's case against Lapointe (and the other eight alleged false confessors), this "evidence" is simply too flimsy to be credited.

Cassell asserts that another detective (Michael Morrissey) then destroyed Lapointe's alibi.²⁵⁶ This assertion is not supported by the true case facts. Moreover, Cassell fails to mention that Richard Lapointe testified that Detective Morrissey threatened to arrest Lapointe's wife and make his son a ward of the state if he did not confess.²⁵⁷ In his testimony at trial, Detective Morrissey, of course, denied issuing these threats during Richard Lapointe's interrogation,²⁵⁸ but the undisputed record shows that he made the very same threats during his interrogation of Karen Lapointe earlier in the same day — an interview that was secretly recorded.²⁵⁹ Cassell is apparently willing to believe that Morrissey would use a coercive interrogation technique against a witness, but would not employ it with the primary suspect. Morrissey's denial that he used coercive tactics is contradicted by the objective record.

²⁵⁴ See Morrissey interview of Karen Lapointe, supra note 251 at 15-17, 27. See also trial testimony of Richard Lapointe, supra note 239.

²⁵⁵ Common sense suggests that it is likely that they came down a few minutes early to watch the 7:00 p.m. show.

²⁵⁶ Cassell, *Examination*, supra note 10 at 555.

²⁵⁷ Trial testimony Richard Lapointe, June 5, 1992, at 2381.

²⁵⁸ Trial testimony of Detective Michael Morrissey, May 26, 1992, at 1688.

²⁵⁹ Morrissey interview of Karen Lapointe, supra note 251 at 41-42.

Cassell suggests that Lapointe's guilt is corroborated by the "highly detailed" account of the crime that Lapointe signed in the three police-written confession statements. Of course, these statements did get some of the details right — exactly as one would expect from a suspect complying with the demands of interrogators who were writing down what they believed to be the case facts. However, Cassell fails to mention that the details of the confession that the police wrote down is full of errors. Lapointe's statement admitted to killing the victim at the location in her apartment where the police believed she had been stabbed, on the couch.²⁶⁰ However, virtually all of the evidence of the crime was found in the bedroom, and there is no evidence in the record, or anywhere, that she was ever on the couch during the commission of the crime.²⁶¹ In addition, the confession the police wrote down conformed to an erroneous police theory of the victim's death, manual strangulation with both hands.²⁶² However, the medical examiner reported that the victim appeared to die from strangulation by compression (a blunt object had been pushed against the right side of her neck).²⁶³ The third statement that the police wrote down admits to the sexual assault theory of the crime held by the police — rape with his penis.²⁶⁴ However, detective Lombardo testified that the medical examiner felt the vaginal trauma "was the result of a foreign object, and not intercourse."²⁶⁵ Clearly, the confession the police wrote down gets wrong many of the details that one would expect to be correct if they were being contributed by someone with actual knowledge of the crime facts. The numerous errors in the statement authored by Detective Morrissey²⁶⁶ are not surprising since this was not Morrissey's case and he was unfamiliar with many of the exact case details at the time of the interrogation.²⁶⁷ As a result, he did not know how to shape Lapointe's confession to make it accurate.

²⁶⁰ 3rd Statement of Richard Lapointe, July 4, 1989.

²⁶¹ Cassell asserts that "there is no discernable inconsistency between medical testimony and the confession on this issue," Cassell, *Examination*, supra note 10 at 556. but this argument is implausible. Significant quantities of blood were found on the bed, and that is clearly where most of the crime occurred. No blood was found on the couch. There is no evidence that Mrs. Martin was ever on the couch during the commission of the crime.

²⁶² During his interrogation, Lapointe supposedly told Morrissey that he strangled Bernice Martin. Michael Morrissey testified that when they were talking about Ms. Martin's strangulation, Lapointe made a gesture suggesting wringing the neck with both hands. Trial transcript, May 22nd, 1992, at 1516.

²⁶³ Trial testimony of Dr. Arcady Katsnelson May, 1992 at 85.

²⁶⁴ 3rd Statement of Richard Lapointe, July 4, 1989.

²⁶⁵ Trial Testimony of Paul Lombardo, May 20, 1992, at 1312-1313.

²⁶⁶ Moreover, it is at best ambiguous from the evidence how much of these statements actually came from Lapointe and, if so, to what extent they were coached or suggested.

²⁶⁷ Cassell reports that Manchester Police investigated the possibility that a man who was involved in a hit and run accident at the same time as the Martin murder may have been involved in it, but were able to clear him through blood typing.

In sum, there is no reason to accept Cassell's re-statement of the prosecution's case against Richard Lapointe because it fails to establish any significant evidence corroborating Lapointe's confession or otherwise pointing to Lapointe's guilt. Cassell mischaracterizes and selectively reads the factual record in a strained attempt to make it fit Richard Lapointe, while ignoring all the exculpatory evidence of Lapointe's innocence.²⁶⁸ Contrary to the misleading assertions, unwarranted inferences and innuendo that Cassell treats as evidence, Richard Lapointe's police-written confession is demonstrably wrong and very probably false. There is substantial case evidence demonstrating that he could not possibly have murdered Bernice Martin and that he lacked the actual knowledge of the crime facts that would be expected from the true perpetrator. As a result, we stand by our conclusion — which is shared by many others²⁶⁹ — that Richard Lapointe is in all likelihood innocent, and that only the state's claim that he confessed could explain why a jury found him guilty.

(4) Jessie Misskelley

Cassell's assertion of Jessie Misskelley's guilt relies on misleading statements, strained logic, and guilt by association.²⁷⁰ Cassell essentially argues that because Misskelley's confession included the names of Damien Echols and Jason Baldwin and because they were subsequently convicted, Misskelley's confession must be true.²⁷¹ Not only is this argument illogical, it is unsupported by the specific facts he cites to promote it. In addition, Cassell ignores the fact that no physical or other evidence linked Misskelley to the

However, eyewitnesses saw a large man, not matching Lapointe, running away from the crime scene. *Sixty Minutes*, supra note 233.

²⁶⁸ For example, Cassell simply ignores the pair of men's gloves found at the crime scene that almost certainly belonged to the perpetrator. At trial, the prosecution put these gloves into evidence, thereby acknowledging that they had significance. However, the prosecutor never linked them to Lapointe. Not surprisingly, these gloves appear far too large for Lapointe's hands. *Sixty Minutes*, supra note 233.

²⁶⁹ For example, journalists Donald Connery, Tom Condon, and Alex Wood, independent writer Robert Perske, novelist William Styron and psychologist Stephan Greenspan, among others, have all called into question Lapointe's confession and believe that it is false. See generally Donald S. Connery, Ed., *CONVICTING THE INNOCENT: THE STORY OF A MURDER, A FALSE CONFESSION AND THE STRUGGLE TO FREE A "WRONG MAN"* (1996).

²⁷⁰ Cassell, *Examination*, supra note 10 at 557-560.

²⁷¹ *Id.* Cassell claims that Misskelley's confession "was proved beyond a reasonable doubt to be consistent in its most important respect: the identity of the main killers." *Id.* at 557. Cassell bases this conclusion on the fact that co-defendants Jason Baldwin and Damien Echols were also convicted by a jury, following Misskelley's conviction. Cassell fails to mention that *The Memphis Commercial Appeal* (one of the largest newspapers in the south) published Misskelley's confession on its front page, virtually insuring that the three accused teens could not receive a fair trial. Even though Misskelley's confession was not introduced in the trial of Echols and Baldwin, every potential juror in Echols' and Baldwin's trial was acutely aware of

murders of James Moore, Steve Branch or Chris Byers, as well as the exculpatory evidence that strongly suggests the innocence of Misskelley.

Cassell writes that based on Misskelley's incriminating statement, "police arrested Echols and Baldwin as principals in the murders and Misskelley as their accomplice."²⁷² Cassell thereby invites readers to presume that Misskelley led the police to Echols and Baldwin, yet this could hardly be further from the truth. Damien Echols was the main target of police interest from almost the beginning of the investigation.²⁷³ The police asked Misskelley to come to the station because they sought to confirm that Echols was a member of a Satanic cult. The police had presumed from the outset that the killings were Satanic cult inspired ritual murders, even though there was no evidence to support this far-fetched theory.²⁷⁴

Although West Memphis, Arkansas police chose not record Misskelley's more than 10 hour interrogation, they did memorialize his 20 minute statement on audio tape.²⁷⁵ The police threatened Misskelley, a seventeen year old, borderline retarded young man,²⁷⁶ with being treated as one of the perpetrators of the triple homicide if he did not cooperate with them and tell them how Echols and Baldwin killed the boys.²⁷⁷ Over the course of this lengthy, coercive interrogation, the detectives' tactics — which included falsely reporting to Misskelley that he failed a polygraph exam²⁷⁸ — caused Misskelley to break down and comply with their suggestions. The interrogators decided to turn the tape recorder on *only after* the account they sought had been rehearsed several times.

When police agencies fail to record their interrogations, they make it

the Misskelley confession and conviction. Interview with Dan Stidham, June 28, 1999.

²⁷² Cassell, *Examination*, supra note 10 at 557.

²⁷³ The day after the bodies were discovered, Police interviewed Echols because he was believed to be involved in the Occult. Echols denied any involvement in the murders and voluntarily gave blood and hair samples. Interview with Dan Stidham, January 25, 1999.

²⁷⁴ There is no evidence that the murders of Steve Branch, Chris Byers or James Moore were Satanically inspired or cult related. See Brent Turvey, *CRIMINAL PROFILING: AN INTRODUCTION TO BEHAVIORAL EVIDENCE* (1999) at 357-388.

²⁷⁵ Interrogation Transcripts Nos. 1 & 2 of Jessie Misskelley, Jr., West Memphis, Ark. Police Dep't (June 3, 1993) (No. 93-05-0666).

²⁷⁶ Leo and Ofshe, *Consequences*, supra note 8.

²⁷⁷ Interview of Jessie Misskelley by Richard Ofshe, Clay County, Arkansas. December 15, 1993.

²⁷⁸ Contrary to what police told Misskelley, he did not fail the polygraph. Cassell repeats this false statement. Cassell, *Examination*, supra note 10 at 558, Ft. 210. The defense retained Warren Holmes, a highly respected polygraph expert, who determined that Misskelley passed the questions pertaining to the murder, contrary to the interrogators' assertions that he was "lying his ass off." The judge, however, refused to allow Mr. Holmes to share his findings with the jury. Interview with Stidham, supra note 270.

FALSE CONFESSIONS

difficult, sometimes even impossible, for an independent evaluator to determine how much the police contaminated the suspect by revealing crime facts and how much the defendant actually knew about the crime. If contamination cannot be ruled out or precisely determined by reviewing a complete record of the interrogation, the defendant's accurate statements about facts also known to the police are no basis for concluding either that the defendant possessed actual knowledge of the crime or was ignorant of things the perpetrator would likely know. If contamination is a problem, as it was in the Misskelley confession, only two classes of information remain useful for evaluating whether or not the defendant had actual knowledge of the crime. The first is information that was not known to the police (hence eliminating possible contamination) that objectively can be proven correct or incorrect. The second is errors that the suspect makes about details the perpetrator would certainly know, since such errors would be consistent with a lack of actual knowledge of the crime.²⁷⁹

Cassell's claim that Misskelley's confession contained details consistent with the crime facts — that the Byers' boy was already dead before his body was dumped in the river, that the body had been mutilated, and that one boy had a facial laceration²⁸⁰ — were all facts well known to the investigators when Misskelley was interrogated a month after the killings.²⁸¹ Misskelley reports that during his interrogation the police told him what happened at the crime scene.²⁸² The failure of the police to record the interrogation makes the statements Cassell cites as indicators of actual knowledge beyond impartial evaluation and of no use in assessing Misskelley's likely guilt or innocence.

When police produce a false confession, they often deliberately or inadvertently contaminate the suspect. When they finally decide to make a record of their handiwork, they make the mistake of asking about something that they have not prepared the innocent (and therefore ignorant) suspect to answer.²⁸³ This may happen because the police believe that the suspect is guilty and so presume he can answer questions not previously explored, or because they are sloppy in their attempt to incriminate the defendant. The Misskelley interrogation is a good demonstration of this problem.

During the taking of the recorded confession statement, Misskelley was asked about the time the killings occurred. In his first answer he describes

²⁷⁹ See Ofshe and Leo, *The Decision to Confess Falsely*, supra note 74 at 990-997.

²⁸⁰ Cassell, *Examination*, supra note 10 at 558.

²⁸¹ Interview with Stidham, supra note 270.

²⁸² Interview of Jessie Misskelley, supra note 276. In addition, newspaper articles and information leaks by police and search and rescue personnel made it common knowledge in the community what injuries the victims had received and the fact that one boy had been sexually mutilated. Also, a member of the search and rescue team which recovered the bodies with police lived directly behind Jessie Misskelley and had a detailed conversation with Misskelley regarding the injuries to the victims. Interview with Dan Stidham, supra note 270.

²⁸³ Ofshe and Leo, *The Decision to Confess Falsely*, supra note 74.

the killings as happening at noon.²⁸⁴ This answer created a problem for the prosecutor, Mr. Fogelman, who was supervising the interrogation and Detective Gitchel, who was conducting it. Both of them, but not Jessie Misskelley, knew that the boys did not get out of school until after 3:00 p.m. and did not disappear until after 6:30 p.m.²⁸⁵ It took Gitchel, under Fogelman's direction, five revisiting of this subject, added pressure and numerous suggestions to move Misskelley's wrong answer progressively from noon to a time after the boys had left school, finished playing on their street and were last seen.²⁸⁶

Misskelley's confession also included the following demonstrably false statements, revealing that he did not possess the kind of knowledge one would expect from the true perpetrator:²⁸⁷

1. Misskelley said that the victims skipped school the day they were killed when in fact they were at school;²⁸⁸
2. Misskelley said that the victims were sodomized when in fact there was no trauma to the anuses of the victims according to the medical examiners testimony at trial;²⁸⁹
3. Misskelley said the victims were bound with a big brown rope when they were tied with their own shoelaces;²⁹⁰
4. Misskelley said that the victims were choked by Echols with a big stick but the medical examiner testified at trial that there were no injuries to the victims' throats;²⁹¹ and
5. Misskelley said that the victims were killed on the dirt bank where they were found when in fact no blood was found there, indicating that the victims were killed elsewhere.²⁹²

Cassell suggests that developments after Misskelley's trial confirm the accuracy of Misskelley's conviction,²⁹³ but this statement is both inaccurate and misleading. It is true that Misskelley made two additional statements to the guards who transported him to prison and to the prosecutor over the course of at least five questioning sessions (despite defense counsel's ex-

²⁸⁴ Leo and Ofshe, *Consequences*, supra note 8 at 461-462.

²⁸⁵ Id.; Interview with Stidham, supra note 270.

²⁸⁶ Interrogation Transcript Nos. 1 & 2 of Jessie Misskelley, Jr., West Memphis, Ark. Police Dep't (June 3, 1993) (No. 93-05-0666).

²⁸⁷ Cassell speculates that "some of the discrepancies appear to have been deliberate ploys by Misskelley to make parts of his confession seem less believable," Cassell, *Examination*, supra note 10 at 558, ft. 207. But his position is not supported by any evidence or logic.

²⁸⁸ transcripts of Jessie Misskelley, supra note 285. Turvey, supra note 273.

²⁸⁹ Id.

²⁹⁰ Id.

²⁹¹ Id.

²⁹² Id.

²⁹³ Cassell, *Examination*, supra note 10 at 559.

PLICIT instruction that the authorities not communicate with Misskelley).²⁹⁴ However, Cassell fails to mention that Misskelley did so only because the sheriff's deputies promised to get him out of prison if he would testify against his co-defendants, and promised that his girlfriend would be delivered to the jail while he remained in prison.²⁹⁵ Cassell's assertion that Misskelley's post-trial statements are corroborated by the existence of a broken whiskey bottle under a highway overpass close to the woods also is not convincing because there were literally dozens of broken bottles under the overpass, one of which appeared to be of the brand Misskelley had mentioned.²⁹⁶

More significantly, Cassell's assertion that post-trial developments confirm the accuracy of Misskelley's conviction is erroneous. Subsequent to Misskelley's trial, defense counsel discovered forensic evidence — obvious bite marks, inflicted by the perpetrator, from victim Steve Branch's face — that had been missed by police investigators. Dr. Thomas J. David, a board certified forensic odontologist, examined these bite marks and subsequently acquired dental casts from Misskelley, Baldwin and Echols. After comparing the bite marks and the dental casts, Dr. David excluded all three convicted defendants as the source of the bite marks.²⁹⁷

There is no meaningful evidence corroborating Misskelley's coerced, unrecorded confession.²⁹⁸ Ample evidence contradicts Misskelley's inconsistent confession, including alibi evidence that Cassell derides but fails to refute,²⁹⁹ and demonstrably false statements in Misskelley's confession that Cassell implausibly asserts were “deliberate ploys” by the mentally retarded

²⁹⁴ This led Baldwin's and Echols' defense counsel to file a motion alleging prosecutorial misconduct. Interview with Stidham, supra note 270.

²⁹⁵ Interview with Stidham, supra note 270.

²⁹⁶ Interview with Stidham, supra note 270.

²⁹⁷ Turvey, supra note 273 at 93-94. Much like fingerprints, bite marks can be positively associated with the teeth of a perpetrator. *Id.* The state produced an opposing expert who challenged Dr. David's conclusions.

²⁹⁸ Cassell suggests that “clothing fibers found on the victims' clothes that were microscopically indistinguishable from items found in the Baldwin and Echols residences” somehow corroborate Misskelley's police-induced statements. Cassell, *Examination*, supra note 10 at 557. Cassell's suggestion cannot be taken seriously for two reasons. First, it amounts to no more than guilt by association; even if physical evidence linked Baldwin and Echols to (and it does not), that is not evidence of Misskelley's guilt. Second, as Cassell knows, fiber evidence is properly regarded only as exclusionary evidence because fiber, like hair, cannot be matched but can only be determined to be microscopically similar or dissimilar. It is not surprising, for example, that while one fiber was similar to Jason Baldwin's mother's housecoat, it was also similar to one of the victim's mothers sweaters. Interview with Stidham, supra note 270.

²⁹⁹ Cassell, *Examination*, supra note 10 at 558-559. Cassell repeats his mantra that “the defense fully explored all of the issues,” as if that somehow nullifies the fact of eleven alibi witnesses. *Id.* See Leo & Ofshe, *Consequences*, Supra Note 8 at 462. It bears mentioning that Cassell's assertion that the defense “fully explored all of the issues” is inaccurate and misleading, because they were not permitted to introduce the testimony of polygraph expert Warren Holmes, the testimony of

Misskelley to “make parts of his confession seem less believable.”³⁰⁰ In addition, exculpatory physical evidence (left behind by the true perpetrator but not matching any of the convicted defendants) suggests his innocence. Absent his coerced and grossly inaccurate confession, there is nothing connecting Jessie Misskelley to the murders of James Moore, Steve Branch or Chris Byers. We conclude that Jessie Misskelley is an innocent victim of police coercion and prosecutorial misconduct who was wrongfully convicted based on a demonstrably false confession, a conclusion shared by numerous outside observers.³⁰¹

(5) Bradley Page

Cassell largely ignores Bradley Page’s 16 hour-long, selectively recorded interrogation,³⁰² although it is central to understanding this case.³⁰³ Nor is he able to cite any meaningful evidence in his assertion of Page’s guilt, *because there is no evidence connecting Bradley Page to the murder of Bibi Lee*. Instead, Cassell relies on insignificant,³⁰⁴ erroneous,³⁰⁵ and/or

Richard Ofshe was highly circumscribed, and the defense was not provided with adequate funding to consult with necessary forensic experts.

³⁰⁰ Cassell, *Examination*, supra note 10 at 558, Ft. 207.

³⁰¹ See, for example, the two Home Box Office documentaries, “Paradise Lost” (1996) and “Paradise Lost 2” (2000).

³⁰² Cassell, *Examination*, supra note 10 at 560-564.

³⁰³ For a fuller discussion of Page’s interrogation, see Lawrence Wrightsman and Saul Kassin, *CONFESSIONS IN THE COURTROOM* (1993) at 131-135; and Anthony Pratkanis and Elliot Aronson, *AGE OF PROPAGANDA: THE EVERYDAY USE AND ABUSE OF PERSUASION* (1991) at 174-178.

³⁰⁴ For example, Cassell asserts that Page did not seem particularly worried about Lee on the day of her disappearance. Cassell, *Examination*, Supra Note 10 at 561. However, after he got back to campus, Page called Lee’s roommate to remind her of an outing and later called her again, asking that she call him when she came in. When Lee’s roommate called Page at midnight saying that Lee had not returned, Page went to their place and spent the night. Interview with Kyle Gee (August 23, 2000).

³⁰⁵ For example, Cassell asserts that Lee and Page had “several fights” prior to the morning of the murder. Cassell, *Examination*, supra note 10 at 560. But this is factually inaccurate — there was a strained atmosphere, but there had been no fights. Interview with Kyle Gee, supra note 303. Another example is that Cassell asserts that we reported incorrectly that Page was falsely told that he failed the polygraph. Cassell, *Examination*, supra note 10 at 561, Ft. 232. However, it is Cassell who is in error. Oakland Sergeant Furry, who administered the polygraph test on Page, had not been licensed in polygraphy at the time and had mis-read the charts when he erroneously asserted that Page had failed the polygraph exam (a curious interpretation in any event since Page had broken down crying prior to the completion of the exam). At trial, the defense called the well-known and widely-respected polygrapher Cleve Backster, who had designed and copyrighted the very forms used by Furry. Pointing out Sergeant Furry’s errors, Backster scored the two charts done by Furry

misleading statements³⁰⁶ to draw incorrect inferences about Page's case.³⁰⁷ In addition, Cassell ignores the exculpatory evidence demonstrating Bradley

as "inconclusive" at most. Trial testimony of Cleve Backster, Page Trial Tr., *infra* note 305 at 4575-4643.

³⁰⁶ For example, in *Consequences*, we pointed out that if Page had dragged Lee's body more than 100 yards before burying it, as he stated in his so-called confession, there would have been a trail of blood that surely would have been found by the various search and rescue and dog tracking teams that spent hundreds of hours combing the area where Lee's body was later found. Leo and Ofshe, *Consequences*, *supra* note 8 at 456. Cassell attempts to disprove this fact by asserting that one of the search dogs began "digging wildly at the ground at the site where Lee's body was eventually discovered. The handler, however, misread the signal." Cassell, *Examination*, *supra* note 10 at 561, ft. 231. However, Cassell fails to mention the highly dubious nature of this assertion. The dog handler, Harold Drummond, "remembered" this supposed fact only when it became necessary for the prosecution to explain why sixteen explorer scouts and six dog teams who had extensively swept the area prior to Page's interrogation had not found the body or the bloody trail that, if Page's so-called confession had been true, should have been there before the search began. Drummond testified at trial that his dog had been trying to lead him to the grave that all the other searchers missed but that he somehow misread the signal. However, in his brief handwritten report the day after the search Drummond had conceded that he felt the victim had left the park on foot and had gotten into a vehicle, that he had been lost in the park the night of the search, and that he only learned where the body had been found three months later when it had been pointed out to him by another handler. Even though Drummond claimed at trial that he recognized this spot as that of his dog's tugging on the evening of the search, he never made an amended report. However, a few days before testifying Drummond decided to write another report — after being questioned in detail by Prosecutor Ken Burr and an investigator from Burr's office, whom he described as helping him recover his lost memory of the dog supposedly trying to lead him to Bibi Lee's grave. Testimony of Harold Drummond, *People v. Page*, No. 81366, Trial Tr. at 6808-6858 (Alameda Cty. Superior Ct., 1988) [Hereafter Page Trial Tr.].

³⁰⁷ Cassell criticizes us for "relying on second-hand accounts from Page's father." Cassell, *Examination*, *supra* note 10 at 562. Yet Cassell fails to point out any factual errors in our citation to Page's article, all of which are factually accurate and are supported by the trial transcripts. Cassell's guilt-by-association criticisms are therefore irrelevant to our analysis of Page's case in *Consequences*. There is no meaningful evidence supporting Page's guilt other than his coerced "confession," but there is substantial exculpatory evidence strongly supporting his innocence.

Page's highly probable innocence,³⁰⁸ and dismisses the far more compelling possibility that a convicted serial killer murdered Lee.³⁰⁹

The day after Bibi Lee's body was found, Oakland, California police detectives Ralph Lacer and Jerry Harris subjected Bradley Page, a University of California at Berkeley undergraduate at the time, to a lengthy, high pressure interrogation. Although there was no evidence linking Page to the crime, Lacer and Harris presumed Page's guilt from the moment they learned of Lee's death. They did so *for no other reason than that he was the victim's boyfriend*, as Lacer later explained on national television.³¹⁰ Although they led Page to believe that he was coming to the stationhouse merely to answer a few questions to help them solve the crime, Lacer and Harris intended from the start of their interrogation to exert as much pressure as necessary to extract a confession from him.

During the crucial, unrecorded six hours of Page's interrogation, Lacer and Harris pressured, confused, intimidated and threatened Page until he was willing to provide a hypothetical, confabulated statement that satisfied their desire to close the case. Lacer and Harris repeatedly accused Page of murdering Lee, attacked his denials, and confronted him with false evidence that they claimed objectively proved his guilt. For example, Lacer and Harris called in Sergeant Furry, who administered a polygraph to Page, and then *falsely* told Page that the test confirmed he was lying. Although in truth Page had neither passed nor failed the polygraph,³¹¹ Lacer and Harris would repeat the lie that Page had failed the exam over the next six hours in order to break down Page's resistance to their accusations. Lacer and Harris also repeatedly lied to Page when they told him that eyewitnesses saw him kill Bibi Lee³¹² and that his fingerprints were found at the crime scene.³¹³

Lacer and Harris' repeated accusations, attacks on Page's responses, and false evidence ploys caused Page to lose confidence in the reliability of his

³⁰⁸ For example, as we pointed out in *Consequences*, Page's co-called confession did not match the crime facts and was not corroborated by *any* evidence. Page stated that Lee died after her slapped her with the back of his hand, but that was not consistent with the subsequently discovered fact that she died after three separate blows to the head from a heavy sharp-edged instrument. Page stated that he made love to the victim's dead body on a blanket taken from his vehicle, but the blanket contained no evidence of sexual activity, no blood stains from Lee's massive headwounds, no signs of having been washed, and the hairs found on the blanket were not Lee's. Page guessed that he used a spare hubcap that was in his vehicle in an attempt to bury Lee, but the fibers and soil from the hubcap did not match either the fibers of Lee's clothing or the soil where her body was found. Page also stated that he dragged Lee's body more than 100 yards before burying it but there was no blood trail to the body. *Id.* at 455-456.

³⁰⁹ See text and analysis *infra* at ____ [pages re Ihde discussion]

³¹⁰ *Eye to Eye with Connie Chung* (CBS News Television Broadcast, Jan. 13, 1994).

³¹¹ See footnote ____ , *supra* note 304 (the one that discusses the polygraph)

³¹² Pratkanis and Aronson, *supra* note 302 at 176.

³¹³ *Id.*

memory. By convincing Page that they had multiple types of incontrovertible evidence against him and by playing on his guilt for leaving Lee at the Redwood Regional Park on the day she disappeared, Lacer and Harris manipulated Page to doubt himself and entertain the possibility that he may have blacked out and killed Lee without realizing it. When Page denied committing the crime, Lacer and Harris insisted that he was lying. When Page protested that he had no memory of killing Lee, Lacer and Harris told him that the objective evidence — the “failed” polygraph, the eyewitnesses and the fingerprints — irrefutably “proved” that he had killed Lee. When Page asked the detectives how he could possibly have killed Lee without any memory of it, Lacer and Harris told him that he had “repressed” his memory of the murder. As the lengthy interrogation wore on, Page progressively became more confused, exhausted, desperate and uncertain.

Lacer and Harris continued to pressure Page by threatening him with the specter of spending the rest of his life in prison if he did not admit to killing Lee, and supply them with the details of the crime. Convinced by Lacer and Harris that he must have somehow killed Lee and frightened that he would go to prison for the rest of his life if he did not come up with a story that satisfied them, Page began to confabulate an account of how he might have killed Lee even though he possessed no memory of the event. Lacer and Harris persuaded Page to imagine a scenario in which he could have killed Lee. After Lacer asked Page to close his eyes and try to remember what happened, Page began to describe the images that came to him but could not remember a time, place, or motive for these images.

According to Page,³¹⁴ the detectives then fed him the details that Cassell cites as Page’s supposed knowledge of the crime — the location of the body, the location of head and nose injuries, and the method of burial³¹⁵ — and they rehearsed his account of the crime. Having been lied to, confused, coerced and rehearsed, Page was now ready to give the confession the detectives wanted. After hours of unrecorded interrogation, Lacer and Harris turned the tape recorder back on, walked Page through the rehearsed story and recorded Page’s so-called confession.³¹⁶

Lacer and Harris’ decision to turn the tape recorder off for the vast majority of the interrogation prevents anyone from ever knowing with certainty the tactics they used, the information they supplied to Page, and the information Page contributed independently. The detectives’ failure to tape record, therefore, makes it difficult, if not impossible, to objectively determine the extent to which the detectives’ suggestions contaminated Page. As noted earlier, under these circumstances only new information unknown to the police or errors³¹⁷ in the suspect’s description of the crime are of value in assessing the likely reliability of the interrogation-induced statements.

³¹⁴ Trial Testimony of Bradley Page, Page Trial Tr., supra note 305 at 5069-5822.

³¹⁵ Cassell, *Examination*, supra note 10 at 562-563.

³¹⁶ Interrogation Transcript of Bradley Page, Oakland, Cal. Police Dep’t (Dec. 10, 1984) (on file with authors).

³¹⁷ See text and notes supra at ____ [Pages of Misskelley discussion]

In his so-called confession, Page contributed no information that indicated any guilty knowledge, led the police to no new evidence, nor corroborated any of his incriminating statements. However, Page's description of the crime revealed numerous provable errors. For example, Page stated that he backhandedly slapped Lee once and she fell — which is grossly inconsistent with the fact that she had three large breaks at the base of her skull.³¹⁸ Page also stated that he made love to Lee's corpse on a blanket he took from his car — but there was no blood from Lee's massive head wounds on the blanket that was still in his car.³¹⁹ When asked how he buried Lee, Page first said that he used his hands to dig the grave. When Lacer and Harris refused to accept this answer, Page said that he used a hubcap that, like

³¹⁸ Cassell disputes our assertion that Page's confession did not fit the known facts of the crime. Cassell does so by creating the erroneous impression that Bibi Lee's injuries could have been caused by a backhand blow to the nose. Cassell attempts to support this inference by referring to the trial testimony of the pathologist, who stated that the fractures to Lee's nose bone and right eye socket "could have been caused by someone administering a backhand blow to the nose." Cassell, *Examination*, supra note 10 at 563, Ft. 241. Cassell's assertion here is pure sleight of hand. Our contention in *Consequences* was that there is no way that the backhanded slap described in Page's confession could have caused Lee's three large skull fractures. What Cassell fails to mention is that Bibi Lee suffered three skull fractures and two additional ring fractures — one to the bridge of the nose and another to the orbit of the right eye. Dr. Rogers testified *only* that the latter two injuries — the ring fractures to the bridge of the nose and the orbit of the right eye — could possibly each have been caused by a backhand blow. Testimony of Dr. Thomas William Rogers, Page Trial Tr., supra note 305 at 640-711. Dr. Rogers did *not* testify that the three large breaks could have been caused the backhand blow described in Page's confession, contrary to Cassell's suggestion, as clearly they could not have. The three large fractures at the base of Bibi Lee's skull are plainly and grossly inconsistent with Page's description of how he could have killed her in his so-called confession.

³¹⁹ Leo & Ofshe, *Consequences*, supra note 8 at 456. Cassell attempts to counter this point by repeating Prosecutor Ken Burr's unsupported speculation that Page would have had five weeks to dispose of the blanket and so one should not expect to find the evidence. See Cassell, *Examination*, supra note 10 at 563, Ft. 242. In fact, there is no evidence that Page disposed of the blanket. The Oakland Police Department found the very same green wool army blanket that Page described in his confession in the back of his 1970 Dodge station wagon, and they initially claimed that it provided the physical evidence that would corroborate his confession. However, as we stated in *Consequences*, the blanket contained no evidence of sexual activity, no blood stains from Lee's massive head wounds, no signs of having been washed, and the hairs found on the blanket were not Lee's — all of which should have been reported if Page's so-called confession were true. See Trial Testimony of Martha Blake, Page Trial Tr., supra note 305 at 4289-4383; and Trial Testimony of Mary Gibbons, Page Trial Tr., supra note 305 at 4384-4459.

the blanket, was also in his car. But the fiber and soil residue in the hubcap were not from the area where Lee was found nor from her clothing.³²⁰

As with the 34 *proven* false confession cases we reported in *Consequences*,³²¹ evidence finally came to light that should have proven Bradley Page's innocence when the CBS News Show "Eye to Eye" identified Michael Ihde as Lee's probable murderer. Ihde, a convicted multiple murderer, had told fellow prisoners in the State of Washington that he had killed several women in the San Francisco Bay Area, one of whom was non-white, a decade earlier.³²² Ihde's appearance resembled the man seen hustling Lee into a van shortly before her disappearance.³²³ Lee was within Ihde's territory at the time, and her killing matched the victim type and murder-rape pattern Ihde had established.³²⁴ When the Alameda County Sheriff's Department learned of Ihde, they re-opened several contemporaneous murder files and discovered that Ihde's DNA matched semen found in a woman who had been kidnapped (as was Lee according to eyewitness testimony), murdered

³²⁰ Leo & Ofshe, *Consequences*, supra note 10 at 456. See also Trial testimony of John Strother, Page Trial Tr., supra note 305 at 4459-4464.

³²¹ See Leo and Ofshe, *Consequences*, supra note 8 at 449-455.

³²² Don Martinez, *Killer Tied to E. Bay Slaying; Authorities also Investigate Convict's Connection to 3 Killings from a Decade Ago*, S.F. EXAMINER, Jan. 11, 1994 at A1.

³²³ Cassell asserts that the testimony of an eyewitness who saw a woman whom she thought to be Lee was "severely undercut at trial." Cassell, *Examination*, supra note 10 at 563-564. This is not quite accurate. Karen Marquardt, who was driving up Park Boulevard on November 4, 1984 (the day of Lee's disappearance) after going to church, saw a Caucasian man and an Asian woman (whom Marquardt subsequently identified as Lee) struggling at a roadside three miles away from where Lee had jogged away from Page and a mutual friend earlier in the morning; the man was pulling the woman up a slope and eventually pulled her into the van. See Trial testimony of Karen Marquardt, Page Trial Tr., supra note 305 at 4759-4852. Another churchgoer, Lynn Eberts, also identified Lee jogging in the same vicinity earlier in the morning. See Trial testimony of Lynn Eberts, Page Trial Tr., supra note 305 at 4676-4759. On November 16, 1984 (twelve days after Lee's disappearance) a bloodhound picked up her scent beside the road where Marquardt had observed the struggle occurred and then lost it, which the handler testified was consistent with a woman having gotten into a vehicle there. See Trial testimony of Evan Hubbard, Page Trial Tr., supra note 305 at 4852-4917.

Cassell also asserts that Marquardt's description with the individual she saw abduct Lee into a van "is not remotely consistent with Ihde's appearance" and adds that "Ihde was without a car when Lee was killed." Cassell, *Examination*, supra note 10 at 564. Once again, Cassell does not report all of the facts. Ihde does not fit exactly the description of the "van man" seen struggling with Lee on the day she vanished — Ihde is thinner — but Ihde's face, hair and beard correspond to Marquardt's eyewitness description. Furthermore, Ihde worked as a delivery man at the time and had access to a van only six miles away from where Lee was killed. *Eye to Eye with Connie Chung*, supra note 309.

³²⁴ Martinez, supra note 321.

(as was Lee) and raped (as Lee might have been)³²⁵ in the East Bay only three weeks after Lee's murder.

In Lee's case, however, Alameda County assistant district attorney Ken Burr, who prosecuted Page, was unimpressed with Ihde's admission and simply disregarded it. Burr claimed that Ihde really meant that the non-white woman he had raped and killed a decade earlier was black. Based on this statement, Burr dismissed the possibility that Ihde murdered Lee and that he (Burr) had prosecuted an innocent man who had only a few months left to serve of his prison sentence. However, no one seems to have investigated whether there was a black female murder victim in the East Bay during the time that Ihde could have killed or even whether there existed an unsolved killing to credit to Ihde.

In sum, Oakland homicide detectives Ralph Lacer and Jerry Harris pressured, manipulated, confused and then coerced Bradley Page into agreeing to the possibility that he killed Bibi Lee and then repressed any memory of the event. Lacer and Harris coerced Page into confabulating an account of speculations and guesses that purported to establish how, in the absence of memory, he might have killed Lee. Delivered in the hypothetical and tentative language (the "grammar of uncertainty") that characterizes *persuaded* false confessions,³²⁶ Page's confabulated statements are demonstrably false, and there is no physical or corroborating evidence linking him to the murder of Bibi Lee. There is, however, exculpatory evidence that overwhelmingly supports Page's innocence. Cassell simply ignores the exculpatory evidence and merely repeats the trial prosecutor's strained, circumstantial case against Page, as if that somehow refutes the overwhelming evidence of Page's innocence. Nothing in Cassell's account in any way undermines our conclusion that Bradley Page was almost certainly innocent of Lee's murder, and that his so-called confession was demonstrably false, as the other social science experts who have reviewed this case have also either stated or strongly implied.³²⁷

(6) James Harry Reyos

Father Patrick Ryan was brutally murdered between 6 p.m. and mid-

³²⁵ This woman's body, unlike Lee's, was discovered within a day of her disappearance. The fact that Lee's body was discovered five weeks after her disappearance, unfortunately, made a biological evidence link to Lee's killer impossible.

³²⁶ See Ofshe and Leo, *The Decision to Confess Falsely*, supra note 74 at 1107-1114.

³²⁷ In addition to ourselves, social psychologists Saul Kassin, Lawrence Wrightsman, Elliot Aronson, and Anthony Pratkanis have all called into question the credibility of Page's coerced confession. See Wrightsman and Kassin, supra note 302 at 131-135; and Pratkanis and Aronson, supra note 302 at 174-178. Professor Aronson referred to Page's confession as "bogus" on national television. *Eye to Eye with Connie Chung*, supra note 309.

FALSE CONFESSIONS

night³²⁸ on December 21, 1981 at the Sage and Sand Motel in Odessa, Texas.³²⁹ Viciously beaten with an unidentified heavy object,³³⁰ Ryan's body was found nude with a bloody sock tying his hands behind him.³³¹ In November, 1982, James Harry Reyos confessed to the murder of the popular priest.³³² None of the extensive physical evidence at the crime scene — the blood stains that filled the room, the fingerprints, palm prints, head and public hairs, saliva, and traces of semen — could be matched to Reyos.³³³ Despite the fact that none of the physical evidence left at the crime scene by the true perpetrator matched Reyos or corroborated his questionable confes-

³²⁸ Trial testimony of Dr. Richard Martin, June 7, 1983 at 122. State of Texas v. James Harry Reyos, No. A-14583. 70th District Court, Ector County, Texas.

³²⁹ Trial testimony of Philip R. Miles, June 7, 1983 at 7. State of Texas v. James Harry Reyos, No. A-14583. 70th District Court, Ector, County, Texas.

³³⁰ The coroner ruled that the blows were so severe that they caused Ryan's heart to stop. See Trial testimony of Dr. Richard Martin, supra note 327 at 111-112.

³³¹ Trial testimony of Officer Jerry Smith, June 7, 1983 at 28. State of Texas v. James Harry Reyos, No. A-14583. 70th District Court, Ector, County, Texas. See also John Gallagher, *Forgive Me Father: A Young Gay Man Confesses to the Violent Murder of a Catholic Priest. But is he the Real Killer?* THE ADVOCATE, April 6, 1983 at 37-41.

³³² Leo and Ofshe, *Consequences*, supra note 8 at 451.

³³³ Trial testimony of Burgess Cooke (Chemist-toxicologist of the Texas Department of Public Safety) to Corporal Kevin Jones, June 9, 1983 at 61-71. State of Texas v. James Harry Reyos, No. A-14583. 70th District Court, Ector County, Texas. See also Howard Swindle, *Shadows of a Doubt: Prosecutor, Bishop Believe Man Convicted in Priest's '81 Slaying is Not Guilty*. THE DALLAS MORNING NEWS (July 4, 1993) at 1A. In 1992, The Odessa Police Department destroyed the latent fingerprints obtained at the crime scene, in violation of their own policies to archive all evidence. Interview with Tim Wyatt, February 2, 1999.

sion,³³⁴ a jury convicted him of murder after a four day trial in 1983,³³⁵ and he was subsequently sentenced to 38 years in prison.³³⁶

In 1991, Dennis Cadra, the Ector County, Texas prosecutor assigned to Reyos' appeal, "came to the firm conclusion that it was physically impossible for Mr. Reyos to have committed the crime,"³³⁷ and outlined the factual basis for this conclusion in an eight page, single-spaced letter to then Texas-governor Ann Richards.³³⁸ Based on date-stamped gasoline credit-card receipts, time-stamped towing and repair receipts, a traffic ticket issued by the New Mexico Highway Patrol³³⁹ (all made out to, and signed by, Reyos) as well as the testimony of David Myer,³⁴⁰ Cadra explained that Reyos was in Roswell, New Mexico until at least 8 p.m. Texas time on December 21st (some 200 miles from Odessa, Texas), and that he was 15 miles West of Ro-

³³⁴ In addition, it is highly unlikely that Reyos could have physically pulled off a such a brutal murder. The crime scene indicated that there had been a violent fight between the perpetrator and the victim: the bed was broken (i.e., knocked through its frame onto the floor and the headboard was splintered), a table was overturned, there was a gaping hole in the wall, a phone was shattered, the air conditioner was broken, and blood was everywhere. See Testimony of Officer Philip Miles, June 7, 1983, at 6-23 and Testimony of Officer Kevin Jones, June 8, 1983, at 2-16. State of Texas v. James Harry Reyos, No. A-14583. Yet while the victim weighed over 200 lbs, Reyos weighed only 125 lbs. It is hard to imagine that Reyos could have surmounted a more than 75 lb weight difference to cause so much damage to the victim and to the room. In addition, it is hard to imagine that Reyos would have survived such a fight without sustaining any significant cuts, scrapes or bruises, yet when checked by police on December 26th, only a few days after the crime, only a small cut was found on one of Reyos' hands — hardly what one would have expected to find if Reyos were, in fact, the true perpetrator of this violent crime. See testimony of Officer Jerry Smith, June 9, 1983 at 44. State of Texas v. James Harry Reyos, No. A-14583.

³³⁵ Reyos appears to have been convicted almost exclusively on the confession alone. According to John Gallagher, "one juror told me that when they got back in the jury room, they started on the assumption that Reyos did it because he confessed to it." Gallagher, *supra* note 330 at 40.

³³⁶ Reyos was released from prison in 1995 after serving 12 years of the 38 year sentence. Dean Stephens, *Released Convict Works To Clear Name; Man Wants Pardon for Murder of Priest That He Says He Did Not Commit*, AUSTIN-AMERICAN STATESMAN at B3. (August 3, 1995).

³³⁷ Letter from Dennis Cadra to Gov. Ann Richards (Dec. 31, 1991) at 2.

³³⁸ Id. Cadra noted that, "This is the only letter like this one which I have written in my sixteen years of experience as a felony prosecutor who has prosecuted thousands of cases." Id. at 1.

³³⁹ See id.

³⁴⁰ Trial Testimony of David Myer, June 8, 1983, at 101-120. State of Texas v. James Harry Reyos, No. A-14583. 70th District Court, Ector County, Texas.

swell, New Mexico at 12:15 a.m. Texas time on December 22nd.³⁴¹ As Cadra stated in his letter:³⁴²

For Mr. Reyos to have killed the priest, he had to have left Roswell immediately upon leaving Mr. Myer's home (no sooner than 8:00 p.m. Texas time on December 21), driven over two hundred (200) miles to Odessa, met the priest and murdered him, driven over two hundred and fifteen (215) miles to a point at least fifteen miles west of Roswell, turned around, and then got a speeding ticket at 12:15 a.m. Texas time — a total time span of not more than 4 1/2 hours. Even assuming it took as little as thirty minutes (a very conservative estimate) to meet up with the priest, get into a fight, strip him, bind his hands behind his back and murder him Mr. Reyos would have had to have *averaged* a driving speed of over 111 miles per hour.³⁴³

Cassell's attempt to assert the guilt of James Harry Reyos is misleading and wholly unpersuasive. Cassell is misleading for three reasons when he suggests that Cadra's conclusion "rests on a foundation of sand,"³⁴⁴ merely because David Myer could not pinpoint the precise date in late December of 1981 on which Mr. Reyos had been with him. First, Cassell fails to mention that multiple sources of evidence (including a date stamped gasoline receipt in Tatum, New Mexico) support Cadra's conclusion that Reyos was with Myer on December 21, 1981 until 8 p.m.³⁴⁵ Second, Cassell fails to mention

³⁴¹ Id.

³⁴² Id. at 6.

³⁴³ This would have been quite a treacherous drive — both trips would have been at night, mostly over narrow, two lane ranch roads. See Gallagher, *Supra* Note 330. Dennis Cadra's letter admit of a second impossibility: "The only other possibility is for Mr. Reyos to have gone to Odessa and murdered the priest after he got the speeding ticket at 12:15 a.m. Texas time. However, since he called a wrecker to tow his truck in Roswell at 4:00 a.m. Texas time (stamped wrecker receipt with time was admitted into evidence) this would have required him to average over 127 miles per hour driving speed (again assuming he spent as little as thirty minutes in Odessa)." Cadra, *supra* note 336 at 6.

³⁴⁴ Cassell, *Examination*, *supra* note 10 at 566.

³⁴⁵ Cadra Letter, *supra* note 336. In addition, Cassell's assertion that on December 22nd there was "ample time for Reyos to meet Myer after leaving the garage around 6 p.m., hang out and drink with him for an hour, and then later be arrested" is contradicted by the evidence. Cassell, *Examination*, *supra* note 10 at 565-566, ft. 262. David Myer testified that he met Reyos when the sun was setting, and that they drank together for an hour and a half. Testimony of David Myer, *supra* note 339 at 105. Weather records show that the sun set at approximately 4:55 p.m. in Roswell on December 22nd, 1981. Defendant's Exhibit #12, *State of Texas v. James Harry Reyos*, No. A-14583. 70th District Court, Ector County, Texas (June 7-11, 1983). Reyos was arrested "soon after leaving the garage" on December 22nd. Id. at 5. Contrary to Cassell's assertion, it would not have been possible for Reyos to meet Myer at or around sunset on December 22nd and drink with him for an hour to an hour and a half, because Reyos would have had to do so before he was able to leave the garage. It also would not have been possible for Reyos to meet Myer on December 23rd because Reyos was in Edgewood, New Mexico during the day of

those factors that lend credibility to Myer's testimony.³⁴⁶ And, third, Cassell fails to mention that part of Cadra's letter which, anticipating Cassell's criticism, describes why "the undisputed facts demonstrate that Mr. Reyos could have been with Mr. Myer *only* on the evening of December 21."³⁴⁷

Cassell is unpersuasive when he writes that "the most compelling fact supporting Reyos' guilt is that all of the alleged exculpatory evidence — including the alleged alibi — was capably presented to the jury. No good reason is offered to believe the presumptively conscientious jurors found Reyos guilty beyond a reasonable doubt when he was innocent."³⁴⁸ Clearly Cassell missed the point of our article: that a confession statement — even when it is contradicted by all the existing physical evidence and supported by no other credible or significant evidence — so prejudices a trier of fact that it is, nevertheless, highly likely to lead to a conviction.³⁴⁹ It is quite telling that Cassell regards the jury's verdict — rather than any piece of evi-

the 23rd and spent the evening in Albuquerque. Interview with Howard Swindle. (January 29, 1998).

³⁴⁶ Dennis Cadra described these in the letter to Governor Richards.

"According to Mr. Myer's testimony Mr. Reyos was at his apartment in Roswell until at least 8:00 p.m. Texas time on the December 21. There are several factors which lend credibility to Mr. Myer's testimony. First, he and Mr. Reyos were not close friends in college, having merely lived in the same dormitory. Second, Mr. Myer was not located by the defense until some two months before trial since, in the interim, he had got married and moved to Texas. Third, Mr. Myer could not positively say that Mr. Reyos had been with him on December 21, saying it could have been any time between the 19th and the 22nd. Under these circumstances it is hard to dispute Mr. Myer's credibility." Cadra Letter, *supra* note 336 at 5.

³⁴⁷ Cadra Letter, *supra* note 336_____ at 6. As Cadra writes,

"The state made no intimation that Mr. Myer was lying for Mr. Reyos, and attempted to rebut his alibi testimony by merely referring to the fact that Mr. Myer could not pinpoint (one and a half years after the fact) the *exact* date on which Mr. Reyos had been with him. The kindest way to characterize this rebuttal argument is misleading.

Mr. Reyos and Mr. Myer could not have been together on either the 19th or the 20th since Mr. Myer testified that Mr. Reyos had his pick-up when they met and, according to the bondsman in Hobbs, the pick-up was in the bondsman's custody until noon of the 21st. Similarly, Mr. Reyos and Mr. Myer could not have been together on the 22nd since, by documented receipts and other testimony, Mr. Reyos was already drunk and at a garage until after 6:00 on that date and was later arrested and spent the night of the 22nd in Roswell jail.

In short, the undisputed facts demonstrate that Mr. Reyos could have been with Mr. Myer *only* on the evening of December 21. In fact, the state never really contended that they weren't, they merely attempted to blur Mr. Myer's honesty by emphasizing his inability to pinpoint the exact date." *Id.* at 5-6.

³⁴⁸ Cassell, *Examination*, *supra* note 10 at 568.

³⁴⁹ Leo and Ofshe, *Consequences*, *supra* note 8. The jury presumed Mr. Reyos' guilt because of the confession. See Gallagher, *Supra* Note 330 at 40. ("One juror told me that when they got back in the jury room, they started on the assumption that Reyos did it because he confessed to it.").

dence — as the most compelling fact supporting his assertion of Reyos' guilt. This is because other than Reyos' confession there simply is no credible evidence supporting his guilt.³⁵⁰

The undisputed facts demonstrate that it was not physically possible for James Harry Reyos to have killed Patrick Ryan, for exactly those reasons that prosecutor Dennis Cadra articulated in his letter of December 31, 1991. Cassell's repetition of the trial prosecutor's unsupported assertions does not cast doubt on the validity of this conclusion.³⁵¹ James Harry Reyos was innocent of the murder for which he was convicted and served 12 years in prison.³⁵²

(7) Linda Stangel

In his treatment of Linda Stangel's case, Cassell once again overlooks

³⁵⁰ Cassell points to the trial testimony of Olivia Gonzales, who asserted that she saw, for a few brief seconds, Reyos driving the victim's car by himself in Denver City during daylight at around 5 p.m. on December 22nd, the day after the murder. Cassell, *Examination*, supra note 10 at 566. But it would have been physically impossible for Mrs. Gonzales' eyewitness description to be true and therefore it must be dismissed as not credible. It was not possible for Mrs. Gonzalez to have seen Reyos driving the victim's car at around 5 p.m. on December 22, 1981, because from 3-5 p.m. on that day Reyos was having his truck towed into the Chevron station in Roswell, which is more than 100 miles away from Denver City. In addition, the owner of the Chevron station testified that it was almost dark by the time the tire was put on, and his testimony is confirmed by weather records that establish that sunset in Roswell, New Mexico on December 22, 1981 occurred at 4:55 p.m. Defendant's Exhibit #12, State of Texas v. James Harry Reyos, No. A-14583. 70th Circuit, Ector County, Texas (June 7-11, 1983). Moreover, as Cassell knows, Mrs. Gonzalez claimed that she notified the Denver City Police Department of her identification of Reyos the day after the murder (December 22, 1981) and that the Denver City Police Department interviewed her about it. Trial testimony of Olivia Gonzalez, June 8, 1983 at 16-43. But the Denver City Police Department's contained no record of any interview with Mrs. Gonzalez, and no one, including the prosecution, had even heard of Mrs. Gonzalez until the day before she appeared to testify in court in June, 1983 — more than a year and a half after her alleged identification. *Id.* Interview with Howard Swindle and Tim Wyatt, January 29, 1998.

³⁵¹ Cassell suggests that the fit between Reyos' post-admission narrative and the unknown crime scene facts establishes his guilt. Cassell, *Examination*, supra note 10 at _____. It does not. The facts that Reyos reported in his confession statement were already publicly available. See, for example, Associated Press, "Slain Priest's Car Discovered." (December 28, 1981). Interview with Howard Swindle and Tim Wyatt, January 29, 1998.

³⁵² Numerous individuals other than ourselves — including police officers, prosecutors, journalists, psychologists and priests — have doubted Mr. Reyos' guilt and called into question his Reyos' wrongful conviction. See Cadra letter, supra note 336; Interview with Howard Swindle and Tim Wyatt, January 29, 1998; Testimony of Dr. Samuel Roll, June 9, 1983 at 9-53. State of Texas v. James Harry Reyos, A-14583. 70th Circuit Court. Ector County, Texas; Letter from Bishop LeRoy Matthiesen to Kathy King (Feb. 12, 1992).

the absence of any evidence proving the defendant's guilt.³⁵³ Instead, he simply repeats that the defendant must be guilty because triers of fact and/or criminal justice officials have judged the defendant guilty. Cassell relies on the trial judge's choice at a voluntariness hearing to believe police officers' account of what happened during an unrecorded interrogation, rather than the defendant's, as evidence of the defendant's guilt.³⁵⁴ Cassell treats a verdict of guilty reached by jurors as evidence of the defendant's guilt rather than as evidence of the persuasive effect of knowledge that a suspect has confessed.³⁵⁵ Further, Cassell not only ignores evidence exculpating Stangel, but also evidence that the interrogators employed one of the most widely recognized coercive interrogation tactics in use in America today.³⁵⁶

No one knows or probably ever will know how David Wahl died. The prosecutor's claim in his closing argument that the injuries to Wahl's body were caused by a sudden impact such as falling from an extreme height is simply implausible.³⁵⁷ David Wahl's body was washed up fifty miles from where he disappeared after spending six weeks in the ocean along the rough and rocky Oregon/Washington coast.³⁵⁸ Wahl's skull, except for the lower jaw, was missing.³⁵⁹ While it might have been possible to rule out a gunshot wound to the body as the cause of Wahl's death, neither the prosecutor (Josh Marquis) nor Cassell is convincing in suggesting that there was evidence that he died in a fall.³⁶⁰

The two primary questions surrounding Linda Stangel's confession are whether it was voluntary and whether it was true. The senior Oregon State Police detective (Alan Corson) who was training the detective (Travis Hampton) who took the lead in Linda Stangel's interrogation has a record of poor police work that had already produced a celebrated false confession case³⁶¹ and resulted in Corson's being successfully sued for coercing a false statement from a witness.

³⁵³ Cassell, *Examination*, supra note 10 at 568-573.

³⁵⁴ *Id.* at 571-572.

³⁵⁵ *Id.* at 572.

³⁵⁶ Report of Det. Hampton of Or. State Police, June 24, 1996, 13-16 (No. 96151205). See also Interview with Linda Stangel, in Astoria, Or. (Oct. 10, 1996). The accident scenario technique relies on communicating a promise of leniency for its efficacy and has been demonstrated to elicit false confessions. See Ofshe and Leo, *The Decision to Confess*, supra note 74; Saul Kassin and Karlyn McNall, *Police Interrogations and Confessions: Communicating Promises and Threats by Pragmatic Implication*, 15 LAW & HUM. BEHAV. 233, 247-250 (1991).

³⁵⁷ Closing Argument, *State v. Stangel*, No. CC96-1278 (Clatsop County Cir. Ct. 1996).

³⁵⁸ Leo and Ofshe, *Consequences*, supra note 8 at 471.

³⁵⁹ *Dateline NBC* ("Cliffhanger"). January 5, 1998.

³⁶⁰ Cassell, *Examination*, supra note 10 at 568.

³⁶¹ Barry Siegel, *A Question of Guilt When Taunja Bennett was Killed in 1990; Portland, Oregon Prosecutor Thought He Had a Rock-Solic Case Against Laverne Pavlinac and Joh Sosnovske; Then Someone Started Writing Anonymous Letters Claiming Credit for the Murder*, L.A. TIMES, Sept. 1, 1996 (Magazine).

At the suppression hearing, Hampton admitted that during Stangel's interrogation there was some discussion of David Wahl dying by accident.³⁶² Linda Stangel described the techniques that Corson and Hampton used in suggesting that she knew more than she was telling and that if Wahl's death was accidental it would not be a "crime."³⁶³ If his suppression hearing testimony about the exchange is credited, Hampton said that it would not be "murder."³⁶⁴ Even if Hampton's memory is correct and the word used was "murder" not "crime," it would not be surprising that Linda Stangel, a young high school-educated woman from rural Minnesota, understood this to mean that she had nothing to fear legally if Wahl's death had been an accident. The important point is that Hampton's admission and Stangel's detailed description of the interrogation confirm that an interrogation tactic known as maximization/ minimization (or the accident scenario technique) was in play.³⁶⁵ This technique is recognized as inherently coercive because it is designed to communicate to suspects the threat of maximum punishment if they remain silent and the promise of little or no punishment if they agree to the interrogator's (accident or self-defense) description of the crime.³⁶⁶

Linda Stangel's account of the interrogation is simple. She was pressured to change the account of what happened from the version she had recounted since the day of Wahl's disappearance — that he went for a walk alone and never returned. Next, the detectives, who knew of her fear of heights, pressed her to agree to go up the narrow bluff trail they thought Wahl probably took on his walk.³⁶⁷ Stangel agreed to go because the detectives were insistent. As they mounted the steep, cliffside trail, Stangel's and the detectives' reports agree that she began to be overcome by her fear of heights.³⁶⁸ After she broke down in fear, the detectives assured her that she would be all right and urged her up the trail. At this point she began to consider whether to agree to their suggested accident story in order to escape the distress of being on the trail. Eventually she complied and agreed that Wahl had died by accident. The police allowed her to retire from the trail at this point.³⁶⁹

Having coerced agreement from Stangel, the detectives had her tell the story several times, each time making notes of what she said. Hampton's memorialization of Stangel's account of the accident was contained in his

³⁶² Richard Ofshe was present in the courtroom when this occurred. *State v. Stangel*, No. CC96-1278 (Clatsop County Cir. Ct. 1996).

³⁶³ Interview with Linda Stangel, in Astoria, Or. (Oct. 10, 1996).

³⁶⁴ Richard Ofshe was present in the courtroom when this statement was made. *State v. Stangel*, No. CC96-1278 (Clatsop County Cir. Ct. 1996).

³⁶⁵ Interview with Linda Stangel, in Astoria, Or. (Oct. 10, 1996).

³⁶⁶ See Ofshe & Leo, *The Decision to Confess*, supra note 74; Kassin and McNall, supra note 355.

³⁶⁷ Interview with Linda Stangel, in Astoria, Or. (Oct. 10, 1996).

³⁶⁸ Id.; Report of Det. Hampton of Or. State Police, June 24, 1996 (No. 96151205).

³⁶⁹ Interview with Linda Stangel, in Astoria, Or. (Oct. 10, 1996).

report of the interrogation.³⁷⁰ Stangel told the accident story several times, each time describing what happened in slightly, but significantly, different ways.³⁷¹ The accounts always included a description of Wahl coming up to her and giving her a “fake push” to scare her (as he had done earlier that day when they were on a jetty).³⁷² Supposedly, her panic response was to push back and for Wahl to accidentally fall off the cliff.³⁷³

Apparently, neither Corson nor Hampton noticed that none of the accounts Stangel gave would have resulted in Wahl’s falling off the cliff. In all of the accounts, Stangel was standing closer to the cliff than was Wahl, and all of her descriptions have him being pushed backwards, away from the cliff and towards the bluffside.³⁷⁴ Richard Ofshe discovered this discrepancy in Stangel’s account, and testified about it as one of the points of evidence supporting Stangel’s version of the interrogation and her lack of knowledge of how Wahl died.³⁷⁵ The trial judge did not care that the confession, even as selectively recorded by the police, was on its face inconsistent with the police theory that Wahl had fallen from the cliff.³⁷⁶

The police detectives and the prosecutor were more concerned about these details than was the judge, and so at trial Hampton testified to a new version of the accident that neither appeared in his notes nor in his testimony at the suppression hearing.³⁷⁷

Linda Stangel’s confession also contradicts the assertion that she knew that David Wahl was dead when she left the area in another way. The prosecutor sent the detectives to obtain a recorded version of the confession statement after administering *Miranda* warnings (which they had neglected to do before coercing the accident story from Stangel).³⁷⁸ In her recorded statement Stangel tells an accident story and then continues to relate the events that happened after the invented trip up the bluff with Wahl. Stangel relates that she eventually left the park and drove home. Upon entering her residence, she noticed that her answering machine indicated a waiting message. Stangel went to the phone hoping that it was a message from Wahl (who she had previously said she thought had not returned because he was angry with her). In making this remark as part of her account of the day’s events, Stangel appears to be relying on her memory of the day, which does

³⁷⁰ Report of Det. Hampton of Or. State Police, June 24, 1996 (No. 96151205).

³⁷¹ Interview with Linda Stangel, in Asotria, Or. (Oct. 10, 1996).

³⁷² *Id.*

³⁷³ Leo and Ofshe, *Consequences*, supra note 8 at 470-472.

³⁷⁴ *Id.*

³⁷⁵ Trial testimony of Richard Ofshe, *State v. Stangel*, No. CC96-1278 (Clatsop Cir. Ct. 1996).

³⁷⁶ Leo and Ofshe, *Consequences*, supra note 8 at 470-472.

³⁷⁷ Richard Ofshe was present in the courtroom when this testimony occurred. *Sate v. Stangel*, No. CC96-1278 (Clatsop County Cir. Ct. 1996).

³⁷⁸ *Dateline NBC*, supra note 358.

not include having killed David Wahl and does include hoping to hear from him.³⁷⁹

We offer one piece of opinion evidence. The prosecutor, Marquis, got his 15 seconds of fame when *Dateline* aired an hour long story on the Stangel case.³⁸⁰ In his air time, Marquis volunteered that he did not believe that Linda Stangel's confession was true, therefore admitting that he prosecuted Stangel based entirely on a confession he acknowledged was factually false. Marquis went on to opine that he believed that the true story was worse than the one admitted in Stangel's confession, but that charging and trying her as he did was the best he could do.³⁸¹ Marquis' comment illustrates the point of our research. Only if Marquis assumes that an innocent person would never confess falsely is it possible for him both to recognize that the accident story is nonsense and to presume that the truth is worse. But if Linda Stangel is a diabolical murderer, cool enough to stick to an airtight story for months, one wonders how Marquis explains why it was so easy for him to trick her into returning from Minnesota to Portland, Oregon by secretly funding a plane ticket and getting Wahl's family to invite Stangel to attend a memorial service.³⁸² How does Marquis imagine that detectives Corson and Hampton got the diabolical murderer Stangel to admit to any involvement in Wahl's death if they did not coerce her as she describes?

Finally, Marquis and Cassell have another problem in arguing the case that Stangel was guilty to anyone not already prejudiced by the confession. Cassell acknowledges that Linda Stangel took and passed a polygraph examination but suggests this is insignificant because under Oregon law the prosecutor was able to keep its result away from the jury.³⁸³ While this may have contributed to the jury's verdict, there is no law that prohibits fair minded investigators from considering polygraph evidence on its merits. After Stangel had given her accident confession but before she was charged, at Marquis' instruction, Stangel agreed to a polygraph examination by a police examiner in Minnesota, passed the polygraph and was thereby judged by police as being truthful in her claim that she did not kill David Wahl.³⁸⁴

(8) Martin Tankleff

Cassell's assertions relating to the case of Martin Tankleff are simply a re-statement of the prosecution's theory that Martin Tankleff — a happy, well-adjusted 17 year old with no prior criminal history and from an affluent family — would brutally murder both of his parents because he wanted a new car.³⁸⁵ In support of this remarkably thin motive theory, Cassell notes that Tankleff had an "ugly, public" argument with his father a few days

³⁷⁹ Id.

³⁸⁰ Id.

³⁸¹ Id.

³⁸² Leo and Ofshe, *Consequences*, supra note 8 at 470-472.

³⁸³ Cassell, *Examination*, supra note 10 at 572.

³⁸⁴ Leo and Ofshe, *Consequences*, supra note 8 at 470-472.

³⁸⁵ Cassell, *Examination*, supra note 10 at 573-575.

before his parents were fatally attacked.³⁸⁶ However, the very testimony regarding the argument on which Cassell relies negates his theory of motive. Mr. Peter Cherouvis, the individual who testified that he overheard Tankleff have an argument with his father, also testified that he heard Tankleff's father inform Tankleff in that very same conversation that he would buy Tankleff a new car.³⁸⁷

Cassell notes that when police responded to "a 9-1-1 call," they found Tankleff alone at home, "soiled with blood."³⁸⁸ Cassell neglects to state that Tankleff was the one who called "9-1-1" (upon finding his parents' bodies when he awoke at approximately 6:00 a.m.). Nor was Tankleff "soiled in blood." Tankleff did have a few spots of blood on him, but this was because he followed the "9-1-1" operator's instructions about how to render first aid to his father (who was severely wounded, but still alive).³⁸⁹ Calling for the police and rendering first-aid to a still living victim is hardly conduct consistent with a person who supposedly wanted to murder the victims.

Cassell also focuses on Tankleff's "confession" to the attacks on his parents.³⁹⁰ There is no doubt that Tankleff gave an inculpatory statement to the police on the day of the attacks — a statement that Tankleff subsequently has repeatedly and consistently disavowed. Tankleff presented at trial, and has subsequently presented on direct appeal and habeas review, substantial evidence demonstrating that his statement was given under tremendous coercion and was in fact false.

Cassell reports that the statement was given little more than two hours after the police questioning of Tankleff commenced.³⁹¹ In fact, the statement was made after the traumatized youngster had been subjected to more than five hours of increasingly hostile and accusatory questioning.³⁹² The interrogating detectives lied to Tankleff and made it clear to him that any answer to their questions other than admissions of guilt were simply unacceptable. The detectives falsely told him that his own father had identified him as the perpetrator of the attack. Tankleff, thoroughly confused by this incomprehensible assertion, came to accept the officers' suggestion that he must have committed the crime, even though he had no memory of doing so. Although Tankleff attempted to provide the detectives with the facts surrounding his supposed attack on his parents (facts in most critical instances supplied by the detectives who had already visited the crime scene), subsequent forensics testimony demonstrated that Tankleff's story to the detectives was just that, a story.

While Cassell acknowledges that the knife and the barbell Tankleff

³⁸⁶ Id. at 573.

³⁸⁷ *People v. Tankleff*, No. 1290-88 (Suffolk Cty. Ct. 1990) Trial Tr. at 4670-72.

³⁸⁸ Cassell, *Examination*, supra note 10 at 573.

³⁸⁹ *People v. Tankleff*, No. 1290-88 (Suffolk Cty. Ct. 1990), trial tr. at 3441.

³⁹⁰ Cassell, *Examination*, supra note 10 at 574.

³⁹¹ Cassell, *Examination*, supra note 10 at 574.

³⁹² *People v. Tankleff*, No. 1290-88 (Suffolk Cty. Ct. 1990), trial tr. at 387, 2888-89, 3488.

claimed to have used³⁹³ showed no traces of blood when subjected to exacting forensics tests, he attempts to explain this by noting that Tankleff claimed to have cleaned these weapons in his shower.³⁹⁴ However, no cleaning would have removed every trace of blood, including between the blade of the knife and its handle³⁹⁵ and within the threads of the screws of the barbells.³⁹⁶ Further, there was no trace of blood in Tankleff's shower drain (or in any other drain in the house).³⁹⁷ Plainly, Tankleff's "confession" that he used these weapons and then cleaned them in the shower is not to be believed.

Remarkably, Cassell also asserts that following Tankleff's confession to the police one of the detectives overheard Tankleff admit to his sister (actually a half-sister) that he committed the crimes.³⁹⁸ While the detective did testify that Tankleff admitted to his sister that he committed the crimes, Tankleff also testified that he had told his sister that he had confessed to the crimes. When asked to explain, Tankleff told his sister that he did so because the police made him.³⁹⁹ Tankleff's half-sister testified under oath prior to trial that Tankleff's version of this critical conversation, not the detective's, was in fact what transpired.⁴⁰⁰ Unfortunately, Tankleff's half-sister was never called at trial, and the jury never learned of this critical testimony corroborating Tankleff and raising serious doubts about the detective's credibility. Worse yet, the trial judge allowed the prosecutor falsely to suggest to the jury in his closing argument that if only the half-sister had been called at trial, she would have supported the detective's version of this telephone call.⁴⁰¹

Further, Cassell suggests that the forensics evidence was consistent with Tankleff's "confession" that he attacked his parents after waking at approximately 5:30 a.m.⁴⁰² However, the emergency technician, responding to the scene around 6:15 a.m., found dried, coagulated blood that suggested that the murders took place hours earlier.⁴⁰³

That the attacks occurred hours earlier than the time Tankleff "con-

³⁹³ Tankleff's father's treating physician found it more likely that the murder weapon was a hammer than a barbell. *Id.* at 4347 and 4351.

³⁹⁴ Cassell, *Examination*, *supra* note 10 at 574.

³⁹⁵ *People v. Tankleff*, No. 1290-88 (Suffolk Cty. Ct. 1990), trial tr. at 2237, 2309-2310, 2280-2282, 2306.

³⁹⁶ *Id.* at 2313-2315.

³⁹⁷ *Id.* at 1967-1968, 2046-2048, 3700-3702.

³⁹⁸ Cassell, *Examination*, *supra* note 10 at 574.

³⁹⁹ *People v. Tankleff*, No. 1290-88 (Suffolk Cty. Ct. 1990), trial tr. at 4166-4167.

⁴⁰⁰ *People v. Tankleff*, No. 1290-88 (Suffolk Cty. Ct.). Suppression Hearing Testimony of Shari Rother, 3/28/99, at 11.

⁴⁰¹ *People v. Tankleff*, No. 1290-88 (Suffolk Cty. Ct. 1990), trial tr. at 4897.

⁴⁰² Cassell, *Examination*, *supra* note 10 at 575.

⁴⁰³ *People v. Tankleff*, No. 1290-88 (Suffolk Cty. Ct. 1990), trial tr. at 471-472. Indeed, even the lead interrogating detective did not believe Tankleff's "confession" that he awoke around 5:30 a.m. and, in the next forty-five minutes, attacked his parents and cleaned the entire crime scene. *Id.* at 3845.

fessed” to committing them is vitally important. Cassell ignores altogether the fact that hours earlier Tankleff’s father’s business partner was alone in the house. This individual owed Tankleff’s father substantial sums of money and his relationship with Tankleff’s father had been rapidly deteriorating.⁴⁰⁴ Following the attacks, with Tankleff’s father still in a coma, his business partner feigned his own death and fled the jurisdiction.⁴⁰⁵ He was subsequently found living in California under an assumed name, having changed his appearance. Remarkably, rather than focus their attention on someone who engaged in this highly suspicious conduct and had a credible motive, the detectives brought this individual back to Long Island so he could testify as a witness against Tankleff.⁴⁰⁶

The combination of this paper-thin motive ascribed to Tankleff, the highly coercive nature of Tankleff’s interrogation, the failure of any physical evidence to corroborate that “confession,” the significant respects in which the forensics evidence affirmatively contradicts that “confession,” and the motive, opportunity and subsequent behavior of a likely alternative suspect lead to only one reasonable conclusion: That Martin Tankleff’s “confession” is in all likelihood false, and that his conviction can only be explained by the fact that the jury knew he had confessed.

⁴⁰⁴ Id. at 894-896.

⁴⁰⁵ Id. at 1190-1194.

⁴⁰⁶ Perhaps, their decision to use this witness reflected merely the fact that having coerced a confession and initiated the prosecution of Martin Tankleff, neither the detectives nor the prosecutor were in a mood to admit that they had made a mistake.