ESSAY

CAN WE HANDLE THE TRUTH?

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"[F]alsehood is in itself mean and culpable, and truth noble and worthy of praise."[1]

I. INTRODUCTION

My purpose is not to change the law, at least not now, at this point in the debate. The fact that courts, including the Supreme Court and most federal and state courts, have given such short shrift to arguments opposing deception in interrogation signals that much work needs to be done to lay the groundwork for such a sea of change.[2] So rather than abolish the network of deceptive practices, I want to use the doctrine of containment to ensure that these practices do not grow larger and more accepted.

It took forty-five years for George F. Kennan's containment doctrine to halt the growth and then bring about the collapse of the Soviet Union.[3] This was done without a single volley being fired across its borders. I am prepared to wait that long, and, realistically, it may take that long.

What I aim to do is challenge the doctrinal and psychological framework that allows for deception. Gradually, appellate courts and scholars may force recognition of the practice's faulty rationale. Perhaps then courts will begin to dismantle the structure that allows it.

Deception has no justification except pragmatism: it may, in some instances, lead to the conviction of a factually guilty suspect who succumbs to it.[4] There is no proof that such a person would not have confessed anyway if treated fairly in a deception-free

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1. ARISTOTLE, NICOMACHEAN ETHICS 76 (David Ross & Lesley Brown trans., Oxford University Press 2009).

2. *See, e.g.*, Frazier v. Cupp, 394 U.S. 731, 739 (1969) (holding that even though the police misrepresented that the defendant's companion confessed, it was not enough to make a confession inadmissible).

3. Containment was the American foreign policy strategy used during the Cold War to halt the spread of Soviet expansion, which eventually helped bring about the Soviet Union's demise. WALTER LAFEBER, THE AMERICAN AGE: U.S. FOREIGN POLICY AT HOME AND ABROAD 1750 TO THE PRESENT 474–76 (2d ed. 1994).

4. *See* Laurie Magid, *Deceptive Police Interrogation Practices: How Far is too Far?*, 99 MICH. L. REV. 1168, 1197 (2001).

environment. Many investigators in other military and civilian settings can claim success in obtaining admissions based on honest and humane practices.

The apologists for deceptive practices—including Fred Inbau, John Reid, and Laurie Magid—speak of the "need" to solve serious crimes and of the "costs" of not using deception.[5] But that rationale is flawed in many ways, as one could make the same argument about the costs of not torturing a suspect, of not using coercion, or rejecting the third degree. Thus, as in many other instances involving egregious police practices, pragmatism must yield to basic guarantees of individual rights.

Indeed, there is always the problem, perhaps even the likelihood, of a false confession made to end the oppressive interrogation. We know from the spate of recent high-profile cases, such as West Memphis,[6] Norfolk sailors,[7] and Michael Crowe,[8] that these practices persist. On tape we can see these practices and even listen to detectives praise their use. No one on either side of the debate can establish with any degree of certainty how often false confessions occur. Moreover, there is little likelihood under present conditions that anyone will ever be able to prove it. The best answer is that we just do not know their precise frequency but only that they happen in a disturbing number of serious and high-profile cases.[9]

Several theories have been advanced regarding the need for police flexibility in investigative situations. Paul Cassell developed a theory of lost confessions.[10] His argument ran that Miranda and other limits on police questioning resulted in severe societal harm because suspects did not, or would not, confess. Thus crimes are not

5. FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS, at xiv (5th ed. 2013); Magid, *supra* note 4, at 1197.

6. *See* Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 461–62 (1998) (describing the coerced confession of a mentally handicapped seventeen-year old, which later led to the individual's conviction for a life sentence, "despite the complete lack of any evidence of [defendant's] participation in the crime").

7. *See* Ben Pesta, *The Wrong Guys: Murder, False Confessions, and the Norfolk Four by Tom Wells and Richard A. Leo*, CHAMPION, June 2009, at 21 (describing false confessions which led to the imprisonment of several suspects).

8. *See* Courtney L. Davenport, *Police Wrongfully Detain Teen for Sister's Murder*, TRIAL, Jan. 2012, at 54 (detailing a police strategy which involved lying to the defendant by telling him that a murder victim's blood had been found in his room and the victim's hair in his fingers).

9. Saul M. Kassin et al., *Police- Induced Confessions: Risk Factors and Recommendations*, 34 L. & HUM. BEHAV. 3, 3–5 (2010); *see also* Paul Cassell, *The Guilty and the "Innocent": An Examination of Alleged Cases of Wrongful Conviction from False Confession*, 22 HARV. J.L. & PUB. POLICY 523, 527 (1999) (noting that critics of police interrogation techniques "argue that it is impossible to derive any estimate of the frequency of false confessions because of an obvious lack of precise records and related methodological difficulties"); Brandon Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1054 (2010) (noting that a case study examining forty false confessions confirmed by DNA evidence still "cannot speak to how often people confess falsely"). *But see* Magid, *supra* note 4, at 1196 (questioning the methodology used to establish the innocence of convicted persons and criticizing estimates of false confession statistics).

10. *See* Paul G. Cassell, *Protecting the Innocent from False Confessions and Lost Confessions—and from* Miranda, 88 J.L. & CRIMINOLOGY 497, 498 (1988) ("The innocent are at risk not only when police extract untruthful confessions—the false confession problem—but also when police fail to obtain truthful confessions from criminals—the lost confession problem. The lost confession problem arises because restrictions on interrogations can reduce the number of confessions police obtain, which will in turn prevent police from solving crimes.").

solved, and guilty persons are not convicted, not imprisoned, and remain free to prey on an innocent and unprotected public.[11]

Of course, this emotionally powerful argument makes a number of assumptions. Most importantly, it assumes that a suspect, who requires *Miranda* protection, has a true confession to give. Without factual guilt there is no need to confess and nothing to be lost. Cassell's argument is simply a rehash of the old Inbau argument that society should employ "less refined methods"[12] to search out crime. Inbau concedes, while Cassell does not, that some pressurized police practices, including deception, may lead innocent persons, as well as guilty ones, to confess.

Inbau even cautions that two particularly vulnerable groups may be in danger of falsely confessing: the developmentally disabled and juveniles. The Nine Steps approach, designed by Inbau and his coauthors,[13] excludes these groups from the uses of police deception.[14] The Reid method, however, does not exclude other vulnerable adults—e.g. those with mental or emotional problems, or those addicted to drugs or alcohol, or those recently traumatized by the news that someone close to them has been brutally murdered. Nor does Reid attempt to restrain desperate police officers, who will use every legal tool available to solve a serious crime. In my view, the Reid product and brand are easily misused. In fact, most of the recent false confession cases involve persons in these vulnerable categories—retarded, some under eighteen years of age, others young adults and those who have severe mental illness.[15]

Reid defends the use of the method by explaining that innocent people are not subject to the method. Before the Reid Nine Steps method is unsheathed, the "subject," as distinguished from "suspect," is evaluated by use of a Behavior Analysis Interview, or "BAI."[16]

This Essay argues that Reid-based confessions are excludable for two separate reasons, both dealing exclusively with the Behavioral Assessment Interview: First, this Essay argues that the Reid's analysis of the subject's body language and verbal responses in sorting the truth-tellers from the liars is based on sham science. Second, the use of the bait question, in which the police untruthfully suggest that they have evidence linking the subject to the crime, is an impermissible deceptive practice.

II. THE REID METHOD

The Reid Method and other police confession practices are bottomed on the assumption that there is a way to distinguish suspects who are truthful from those who

11. Cassell, *supra* note 10, at 598.

12. INBAU ET AL., *supra* note 5, at xiv.

13. *Id.* at 185.

14. *See, e.g.*, *id.* at 418–21 (describing issues with competency and juvenile interrogations).

15. *See* Garrett, *supra* note 9, at 1064 (indicating that a high percentage of DNA exonorees who had given false confessions were mentally handicapped people or juveniles); Kassin et al., *supra* note 9, at 5 (analyzing a study finding that a significant percentage of a sample of false confessions were obtained from mentally impaired and underage persons).

16. Richard A. Leo, *The Third Degree and the Origins of Psychological Interrogation in the United States*, *in* INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT 37, 67 (G. Daniel Lassiter ed., 2004). See *infra* Part II.A for a more thorough description of the BAI.

are deceptive and thus likely guilty. Under the Reid method, the case investigator or detective distinguishes the innocent from the guilty by employing a pre-interview technique called the Behavior Analysis Interview (BAI).[17] The interviewer determines truthfulness by observing various behavioral indicators,[18] none of which is determinative but which culminate in an assessment of whether or not the suspect is the wrongdoer.

The signs and keys recommended are no better at sorting out the truth-tellers from the liars than a mother's wisdom. Some examples of indicators supposedly indicative of truthfulness include: showing up on time, affirmatively denying culpability, offering up other persons who had motive and opportunity to commit the crime, and admitting that they may, in fact, have had similar motives or opportunity. On the other hand, behaviors supposedly indicating culpability include: not looking the interviewer in the eyes, creating delays, however slight, when answering questions that imply that the subject is guilty, and not acknowledging they had the opportunity to commit the crime.[19]

The more intensive Nine Steps session, associated with the Reid technique, only takes place if the investigator is reasonably certain of the subject's guilt, as determined by the investigator's opinion of the BAI's outcome.[20]

While Professor Gallini,[21] and others,[22] have focused on the Reid Nine Steps, this Essay will parse out the BAI. It is important to consider why and how an interviewee moves from the level of a subject to that of a suspect who must be given *Miranda* warnings and can be targeted for custodial interrogation. Suspects are not free to leave and are held incommunicado while forced to endure intense, forceful, and dramatically deceptive questioning. Some well-known examples of such environments include the evocative Christian burial speech in *Brewer v. Williams*[23] and the deception used in *Miller v. Fenton*,[24] or the Michael Crowe case.[25]

Because of shortcomings with the BAI, questions continue to plague the Reid

17. *See* Leo, *supra* note 16, at 64–65 (explaining that the method relies on the assumption that innocent and guilty suspects display different behaviors in response to the interview questions).

18. *Id.*

19. INBAU ET AL., *supra* note 5, at 154–57.

20. *Id.* at 185.

21. Brain R Gallini, *Police "Science" in the Interrogation Room: Seventy Years of Pseudo-Psychological Interrogation Methods to Obtain Inadmissible Confessions*, 61 HASTINGS L.J. 529, 536–43 (2010).

22. *E.g.*, Kassin et al., *supra* note 9, at 6–7. See *infra* note 32 for additional articles discussing the Reid Nine Steps.

23. Brewer v. Williams, 430 U.S. 387, 392–93 (1977) (playing on knowledge that suspect was deeply religious, detective made repeated emotional appeals to suspect in custody to help police locate the victim's body so the deceased child could be given a "proper Christian burial" before snowfall arrived).

24. Miller v. Fenton, 474 U.S. 104, 106–08 (1985) (discussing how detectives succeeded in obtaining "voluntary" confession in an hour long interrogation session where they employed false evidence and suggestive, empathetic support to accused that he needed psychiatric help).

25. Crowe v. County of San Diego, 608 F.3d 406, 418–20 (9th Cir. 2010) (describing how detectives violated Fourteenth Amendment due process rights by subjecting fourteen- and fifteen-year-old suspects to lengthy interrogations involving threats, lies, and relentless pressure to confess to involvement in the murder of another child).

approach. We see that the flawed BAI is used to make the decision of whether to employ the highly persuasive nine steps. The Reid users claim that because they employ the BAI, they do not interrogate innocent people.[26] There is plenty of evidence to suggest otherwise.[27]

If the subject "passes" the interview (he is not suspected of the crime), he is released or treated simply as a witness.[28] However, if the result is in the affirmative (deception by the subject is suggested on the BAI), then the subject becomes a suspect.[29] The suspect is to be given a *Miranda* warning and subjected to the intense method of questioning which Inbau and Reid designed to obtain confessions, including less refined methods than those used on the general public (in other words, those not suspected of a crime).[30] Such methods include aggressive and preemptive questioning, which encourages detectives to isolate the suspect, express false sympathy, minimize the crime, and, if all else fails, the use of false statements about the evidence and the strength of the case.[31]

A. The Behavioral Analysis Interview (BAI)

While the Nine Steps have received some critical analysis,[32] the BAI has been relatively unexamined. To complete the BAI, the Fourth and Fifth Editions of the Reid Manual instruct investigators to use a series of fifteen very pointed questions to make the assessment as to whether they are likely dealing with a guilty suspect.[33] These questions are known as "behavior-provoking questions." I will set these out without commentary and then analyze them as a whole.

1. Background Questions.

The BAI begins with the investigator asking the subject[34] background questions. These questions serve to evaluate the subject's normal response system, both verbal

26. Saul M. Kassin, *On the Psychology of Confessions: Does Innocence Put Innocents at Risk?*, 60 AM. PSYCHOLOGIST 215, 216 (2005).

27. *See, e.g.*, Kassin et al., *supra* note 9, at 6 (explaining that research conducted in laboratories all over the world consistently has shown that body language indicators are not diagnostic of suspect truth or deception).

28. INBAU ET AL., *supra* note 5, at 168–69.

29. *See id.*

30. *Id.* at 155.

31. *Id.* at 188–91.

32. *See* Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. CRIM. L. & CRIMINOLOGY 219, 243–44 (2006) (highlighting that the Reid Nine Step method dramatically increases instances of false confessions, particularly when used unscrupulously against youth suspected of a particular crime); Saul M. Kassin, *The Psychology of Confession Evidence*, 52 AM. PSYCHOL. 221, 230 (1997) (finding that police tactics such as deception and psychological coercion are responsible for many false confessions, and that juries do not take these tactics sufficiently into account at subsequent trial); Richard A. Leo, *Inside The Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 302 (1996) (explaining that many instances of police conduct which *Miranda* lamented are still frequently employed in contemporary police interrogations).

33. INBAU ET AL., *supra* note 5, at 154

34. Reid Manual uses the term "subject" during the BAI and "suspect" after the BAI and during the Nine Steps when referring to the individual being interviewed and investigated.

and nonverbal, in order to have some baseline to evaluate later behavioral responses. These background questions consist of demographic and personal questions about work, family, and other related inquiries.[35] Thus it resembles the polygraph in the need to have a baseline against which to judge responses.[36]

2. Behavior Assessment Questions

From the baseline, the investigator proceeds to ask the subject if he understands the purpose of the interview.[37] Direct responses are indicative of innocence while statements denying knowledge are considered evasive.[38]

3. Investigative Information

From this point the investigator is directed to move to eliciting "general investigative information"[39] to learn an alibi or the subject's relationship to a victim. The authors emphasize that the subject should be asked a broad question to explain a whole range of time rather than just asking about alibi for the time of the crime.[40] The Reid Method instructs that guilty subjects will have a rehearsed alibi that may not reveal "specific symptoms of deception."[41] Asking the broad question has the additional advantage of offering an innocent suspect the opportunity to provide helpful information which might not have been produced through more specific questioning.[42]

4. Mix Questions

The investigator is then instructed to mix investigative questions with what are called "behavior-provoking questions."[43] These questions include directly asking the subject if she has committed the crime.[44] The direct question, the Reid Manual states, "often catches the deceptive subject off guard."[45] Deceptive responses may be "bolstered, delayed, or evasive."[46] In addition to verbal responses, the questioner is advised that a deceptive subject will also engage in revealing nonverbal conduct such as crossing her legs, shifting in her chair, or "grooming behavior."[47] The truthful subject will, on the other hand, respond with an "emphatic and immediate denial," often leaning forward in the chair and making direct eye contact.[48]

35. INBAU ET AL., *supra* note 5, at 155.

36. See *infra* Part III.B for how the "bait question" compares to inadmissible polygraph evidence under the Federal Rules of Evidence.

37. INBAU ET AL., *supra* note 5, at 155–56.

38. *Id.*

39. *Id.* at 156.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 157.

5. Who Committed the Crime?

After receiving the denial the subject should be asked if he knows who committed the crime.[49] Investigators are instructed that evasive subjects will distance themselves "geographically and emotionally," and will answer without giving the question much thought.[50] By contrast, "the truthful subject will have spent time thinking about who may be guilty."[51] The innocent subject supposedly "will sound sincere in his response and often indicate that he has given previous thought as to who might be guilty."[52]

6. Who Do You Suspect?

The next line of inquiry is to ask the subject whom she might suspect of committing the crime.[53] The authors explain that truthful subjects will provide names of suspects, while the deceptive subject will generally deny having any suspicions about who might be guilty.[54]

7. Voucher Question

After developing this line of inquiry, the Reid manual directs that subjects are asked who they can vouch for as innocent. This is said to be an "implied invitation . . . to assist in the investigation."[55] The innocent will "readily" clear subjects while the guilty individual's response "might be noncommittal" because guilty subjects usually do not want to eliminate others from suspicion.[56]

8. Evidence of a Crime

This series of pointed questions should then shift to whether there was credible evidence of a crime. Investigators are instructed that innocent subjects will "generally" agree that there was a crime while the guilty will often seize the chance to "confuse the investigation."[57]

9. Who Had the Opportunity?

A similar question, also offered as a fruitful way to detect deception, is to ask who had the opportunity to commit the crime.[58] Truthful persons, the Reid Manual instructs, will include themselves as ones having an opportunity, but a deceptive subject "does not like to point the finger at himself" and will take an opportunity to name unrealistic

49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.* at 157–58.
55. *Id.* at 158.
56. *Id.*
57. *Id.*
58. *Id.* at 159.

suspects.[59]

10. Attitude Towards Questioning

The Manual next instructs that innocent subjects typically welcome the questioning while the guilty are likely to voice negative feelings about being a suspect.[60] The guilty subject sees questioning as a threat, while the innocent subject "perceives the interview as an opportunity to be cleared from suspicion."[61] These negative feelings toward questioning can come in various forms, and often arise even when "the subject has been treated with full respect and has not been accused in any way of being guilty."[62]

11. Criminal Thoughts

Another line of "beneficial" questions is to ask a suspect whether he has ever thought about doing something similar.[63] The Manual instructs that guilty subjects will need to talk about their crime, and this gambit provides a way to relieve the anxiety associated with their guilt.[64] The subject who readily admits thinking about the crime "should be considered more guilty than the suspect who adamantly denies such thoughts or ideas."[65] Those who give qualified responses of "not really" or "not seriously" should also be considered more likely guilty.[66] The Manual instructs that the "typical truthful response" rejects any possibility of thinking about the crime.[67] A derivative of this question is to ask about whether the subject ever dreamed or fantasized about the crime.[68]

12. Motive

The order of questioning next directs investigators to ask about motive.[69] An innocent subject will be expected to offer "reasonable" motives or explanations while the guilty, who knows why he committed the crime, will refuse to speculate as to motive. The authors instruct that the guilty subject will often shift in his chair and engage in other "anxiety-reducing behaviors."[70] But, the Manual reveals that some guilty suspects do discuss motive by offering an "introspective response to this

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 159–60.

66. *Id.* at 160.

67. *Id.*

68. *Id.* Apparently, this question should be used in cases involving "particularly heinous circumstances." *Id.*; *see also* ROBERT MAYER, THE DREAMS OF ADA 60–61 (2006) (describing the true story of an interrogation subject's description of a dream, which would become the foundation of a false confession and erroneous conviction).

69. INBAU ET AL., *supra* note 5, at 160.

70. *Id.*

question," which should put the investigator on guard.[71]

13. Punishment and Second Chances

Investigators are also instructed to ask about appropriate punishments and second chances for the actual perpetrator.[72] The Reid Manual states that the guilty person has difficulty discussing punishment and is likely to agree to a second chance for the true wrongdoer.[73] But an innocent subject will likely call for jail as punishment and reject the idea of a second chance for the true wrongdoer.[74] Another indicator of guilt or innocence is to ask the subject why he would not commit the crime.[75] Reid instructs that innocent persons respond to this question personally and often refer to their responsibilities and accomplishments.[76] On the other hand, the guilty apparently respond in the third person and refer to future consequences.[77] Additionally, the Reid Manual asserts the innocent will express confidence in being cleared while the guilty will answer in one word responses.[78]

14. Communication with Loved Ones

Finally, the Reid Manual instructs the investigator to ask the subject what he has told his loved ones about being questioned as part of the investigation. The Reid Manual explains that it is human nature to tell loved ones about the investigation and to seek solace and comfort.[79] It is thus "very" suspicious if one has not told a loved one about the investigation.[80]

If a subject has told a loved one, the guilty will play down the reaction of family members while the innocent will have discussed the incident at length.[81] A final insight is offered if the subject's family member has asked if he or she committed the crime; this demonstrates that the family member perceives the subject as capable of committing the crime.[82]

15. Bait Questions

The baiting technique is used just before the Nine Steps and may often result in an admission.[83] The Manual recommends that a bait question be used to assess the suspicion or to evaluate an alibi. An example of a bait question is to ask: "Is there any reason why your fingerprints would be on the safe?" Note that the investigator does not

71. *Id.*
72. *Id.* at 160–61.
73. *Id.*
74. *Id.*
75. *Id.* at 161.
76. *Id.*
77. *Id.* at 161–62.
78. *Id.* at 162.
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.* at 162–63.
83. *Id.* at 171–72.

say the fingerprints are on the safe. But the question certainly suggests to the ignorant subject that such evidence may exist. This is a very clever technique in that the investigator does not make an explicitly false statement about the existence of the evidence. He does falsely assert, however, that there are fingerprints, a hair sample, or other types of real evidence when he knows this to be untrue.[84]

This technique is very persuasive and is often coupled with a gambit which explains that the evidence is about to come to the police, and that this is the time to come clean before it is too late.[85] This technique was used adroitly in the Michael Crowe interrogation.[86] First, Crowe was told that tests were being done, and that when the results came in he would be "buried." Crowe was then asked if there was any reason why his hair would be found in the dead victim's hands or room. When Crowe hears this he doubles over in agony and emits a feral cry.[87]

There is no indication as to when to employ the bait question or how many other indications of deception should be evident before it is used. The Reid manual provides no guidance for use of such a powerful technique. "The Reid Manual fails to provide clear limits for when such a powerful technique ought to be employed. Its use is not dependent on any particular circumstances and may be employed "in almost any type of case situation." As the Crowe situation shows, the bait question can work to induce a false confession.[88] It is not clear whether Crowe confessed in order to stop the questioning or because Crowe came to believe he was guilty. Thus, it is unclear whether it is a "compliant false confession" or an "internalized false confession."[89]

* * *

The decision to subject someone to the intensive Reid method, often approved by the courts, should be based on a firmer foundation than the set of hunches, old wives' tales, and police lore that currently support it. But it is not. As longtime critic of the Reid Method, Professor Richard A. Leo, states, Reid method proponents claim that innocent individuals are not subjected to the Reid method.[90] Instead, innocents are weeded out by the BAI.[91] The use of subjective intuitions and gut feelings over

84. *Id.* at 172.

85. *Id.* at 171–76; *see also* CentreDivide, *Miscarriages/Travesty of Justice ~ Michael Crowe Case ~ Coerced Confession - Part 2 of (3)*, YOUTUBE (Aug. 23, 2010), http://www.youtube.com /watch?v=yJcqjPxtIXc (showing an interrogation in which investigators falsely claimed that they found the victim's blood in the suspect's room).

86. *See generally* CentreDivide, *supra* note 5.

87. *Id.*

88. Jessica Swanner et al., *Snitching, Lies, and Computer Crashes*, 34 L. HUM. BEHAV. 53, 63 (2010); *see also* Joseph A. Slobodzian, *False Confessions Taint Many Cases, Temple Law Forum Told*, PHILA. INQUIRER, Nov. 10, 2012, at A1 (describing Saul Kassin's keynote speech emphasizing the power of coercive tactics to obtain a false confessions).

89. *See* Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 986 (1997) (explaining that investigators elicit false confessions from the innocent either by (1) leading them to believe that their situation is hopeless and will only be improved by confessing or (2) persuading them they committed the crime and confession is proper even though they may have no memory of the event at all).

90. Leo, *supra* note 16, at 65–66.

91. *See* INBAU ET AL., *supra* note 5, at 154 (declaring that the BAI is designed to elicit different responses from the guilty and the innocent).

objective factors is reminiscent of the process used by baseball scouts in making draft decisions.[92]

III. ABSENCE OF SCIENTIFIC OR RESEARCH FOUNDATION

As critics have demonstrated, the BAI uses control questions lifted from Reid's "experimentation" with the polygraph.[93] However, while the results of a polygraph test are typically inadmissible as evidence in court,[94] a confession resulting from a Reid-based interrogation is often admissible.

The assumptions underlying the BAI are scientifically untested and unverifiable. Accordingly, the conclusions drawn from the BAI—that a subject is either telling the truth or lying—would never be admissible under Federal Rule of Evidence 702,[95] or the old *Frye* test.[96] There is no general acceptance, peer review, rate of error, nor any notion of testability or verification.[97]

There is great risk in assigning presumptions of guilt and innocence to how one sits and speaks. The innocent individual may use poor posture, he or she may fail to make eye contact with the investigator and reply in monosyllables, or he or she may not be able to explain a wrongdoer's motives or their feelings about punishment or second chances. The converse is also likely to be true of the guilty individual. The guilty may be articulate and confident and able to speak for hours about crime and punishment. It was only after many days and hours of taped interviews that a trained psychologist was able to find a fatal contradiction in the lengthy insanity excuse of the L.A. Hillside strangler.[98] Ultimately, this Section will demonstrate that the results of the BAI should be excluded from criminal proceedings, as the methods and techniques fail to satisfy

92. The collective intuitions and incantations used by baseball scouts to make senseless draft choices is ridiculed in the book—and later movie—*Moneyball*. In the book, a group of Oakland A's scouts discuss inconclusive factors like mental makeup, relationship status, and body type in making their draft recommendations. *See* MICHAEL LEWIS, MONEYBALL 14–43 (2003).

93. Leo, *supra* note 16, at 66 (positing that the Reid Manual instructs interrogators to treat behavioral responses to the BAI as proxies to truth much like the polygraph test considers heart rate and blood pressure).

94. *See* Adam B. Shniderman, Comment, *You Can't Handle the Truth: Lies, Damn Lies, and the Exclusion of Polygraph Evidence* 22 ALB. L.J. SCI. & TECH. 433, 442 (2012) ("Twenty-nine states bar the admission of polygraph evidence under any circumstance (per se). Currently, fifteen states admit polygraph results at trial if both the prosecution and defense stipulate to its use prior to the administration of the test. Only New Mexico allows for the routine admission of polygraph evidence." (footnotes omitted)); *cf.* United States v. Scheffer, 523 U.S. 303, 317 (1998) (holding that Military Rule of Evidence 707, which makes polygraph evidence inadmissible in court-martial proceedings, is not unconstitutional).

95. FED. R. EVID. 702; *see also* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 592–95 (1993) (establishing the standard for the admissibility of expert testimony later incorporated Rule 702).

96. Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923) (holding that expert testimony is admissible only when it has gained "general acceptance" in its respective scientific field).

97. *See Daubert*, 509 U.S. at 593–94 (noting that courts conducting an analysis under Rule 702 should consider these factors); Leo, *supra* note 16, at 67 (stating that any data used to support the BAI's value has never been made subject to peer review, or, in fact, published at all).

98. TED SCHWARZ, THE HILLSIDE STRANGLER: A MURDER'S MIND (1981); *see also* Sarah K. Fields, Note, *Multiple Personality Disorder and the Legal System*, 46 WASH. U.J. URB. & CONTEMP. L. 261, 285 n. 159 (1994) (noting that six experts testified regarding Kenneth Bianchi's (the "Hillside Strangler") sanity at trial, with each reaching different conclusions).

Daubert and Federal Rule of Evidence 702 standards for admissibility.

A. Examining the BAI Endnotes

Nowhere in the Reid Manual in general, or in the section on the BAI in particular, are there citations supporting any independent research or study to support the many statements about how the guilty or the innocent will react under the pressure of an interview or interrogation. While the Fifth Edition of the Reid Manual uses several endnotes in an attempt to support its broad statements about evaluating behavior during the BAI,[99] a closer analysis of these endnotes reveals several reasons why this is not support at all. First, the endnotes that claim to support the use of the BAI with scientific research are extremely self-serving, as they cite to studies written by the authors of the Reid Manual or their allies. In another endnote, the authors of the Manual acknowledge authority that actually criticizes the Reid Method. Finally, some of the endnotes provide general background information about the BAI, or interrogation in general, and accordingly do not purport to support the conclusions drawn from the BAI with objective, nonbiased scientific research.

A closer analysis of the cited endnotes reveals that the notes fail to support the assertions of the Reid Manual's authors.

The first endnote that appears in the BAI section cites a book titled: *Memory-Enhancing Techniques for Investigative Interviewing: The Cognitive Interview*.[100] The first endnote provides little substantive support that the BAI comports with principles of the cognitive interview, and instead simply declares that cognitive interviewing exists. The second scholarly work cited by the authors fails to support the BAI, as the study stands for the proposition that cognitive interviewing may be more effective with eyewitnesses and victims in developing countries, and does not address the reliability and truthfulness of perpetrators' interview answers.[101]

The third endnote is interesting because it cites to an article that contradicts Reid's conclusions about the BAI.[102] This citation is to Aldert Vrij, who completely undermines the utility of the Reid method to achieve the result it seeks as its goal.[103] The Reid Manual, in response, acknowledges that the BAI is not a test for separating the truthful from the untruthful, stating that the BAI is not "a clinical psychometric assessment of truth or deception."[104] Vrij's article proves this point and "illustrates [the] fallacy" of using the BAI to separate the truth tellers from the liars.[105] The article compares truth tellers and liars—both designated in advance—and concludes that, contrary to the Reid Manual's assumptions, truth tellers are more naive and evasive

99. INBAU ET AL., *supra* note 5, at 169.

100. *Id.* at 169 n.1 (citing RONALD P. FISHER & R. EDWARD GEISELMAN, MEMORY-ENHANCING TECHNIQUES FOR INVESTIGATIVE INTERVIEWING: THE COGNITIVE INTERVIEW (1992)).

101. *Id.* at 169 n.2 (citing Lilian Milnitsky Stein & Amina Memon, *Testing the Efficacy of the Cognitive Interview in a Developing Country*, 20 APPLIED COGNITIVE PSYCHOL. 597 (2006)).

102. *Id.* at 169 n.3.

103. Aldert Vrij et al., *An Empirical Test of the Behavioral Analysis Interview*, 30 L. & HUM. BEHAV. 329, 342 (2006).

104. INBAU ET AL., *supra* note 5, at 169 n.3.

105. *Id.*

when explaining the purpose of the interview.[106] In addition, they were also less likely to implicate a person who they believed did not commit the crime.[107] According to Vrij, truth tellers were also more nervous.[108] The results, the authors note, "were consistent with the predictions of the deceptive literature and directly opposed to the predictions of BAI."[109]

The fourth endnote attempts to provide scientific support for the BAI by citing to an article coauthored in part by Joseph Buckley and Brian Jayne, both coauthors of the Reid Manual.[110] This article employed the use of sixty videotaped interviews; thirty of the interviewees were truthful and the other half deceptive.[111] Four evaluators were asked to independently score behaviors and attitudes and then judge the subjects' truthfulness.[112] The results, as reported in Reid Fifth Edition, were that the evaluators accurately found truthfulness in ninety-one percent of the truthful cases and deception in eighty percent of the deception cases.[113] They also claim that deceptive suspects manifested "'theoretically' predict[able] behaviors and attitudes of 'deceptiveness' to a significantly greater degree than did truthful suspects."[114]

This lack of objectivity is also reflected in endnote six, which directs readers to another article coauthored by Buckley.[115] This source is a general reference to use of the BAI in determining the existence of an alibi. The article's purpose, as reflected in its subtitle, is to clarify the practice, theory, use, and effectiveness of the BAI.[116] The article initially makes the claim that when assessing "high stakes" lies by experienced police officers there is an accuracy rate of about sixty-five percent.[117] The authors concede that it is a truism in the scientific literature that detecting lies is "quite difficult and not done, even in the best of circumstances, with a high degree of accuracy."[118] The authors claim that investigators, using the BAI, have raised the accuracy level to eighty percent for innocent subjects and from fifty-three to seventy-six percent for guilty subjects.[119]

However, the study is tainted for at least two reasons. First, the Reid investigators who participated in the study were "all highly trained and experienced in the analysis of

106. Vrij et al., *supra* note 103, at 342.

107. *Id.* at 329.

108. *Id.* at 342.

109. *Id.* at 329.

110. INBAU ET AL., *supra* note 5, at 169 n.4 (citing Frank Horvath et al., *Differentiation of Truthful and Deceptive Criminal Suspects in Behavioral Analysis Interviews*, 39 J. FORENSIC SCI. 793 (1994)).

111. Horvath et al., *supra* note 110, at 793.

112. *Id.*

113. *Id.*

114. *Id.*

115. INBAU ET AL., *supra* note 5, at 169 n.6 (citing Frank Horvath et al., *The Behavioural Analysis Interview: Clarifying the Practice, Theory and Understanding of Its Use and Effectiveness*, 10 INT'L J. OF POLICE SCI. & MGMT. 101 (2008)).

116. Horvath et al., *supra* note 115, at 101.

117. *Id.* at 102.

118. *Id.*

119. *Id.* at 109.

behavioural information using the BAI."[120] The authors do not comparatively establish how well trained the average interrogator is with respect to the Reid technique.[121] Presumably, the average interrogator is not as well trained, thus skewing the accuracy in common practice. Second, the authors exclude all inconclusive judgments from the study without indicating the number of inconclusive judgments.[122] The lack of data on the judgments undermines the validity of the conclusions. If the study revealed a significant number of inconclusive judgments, the accuracy rate would be lower than reported.

Endnotes five and seven are not citations to authorities.[123] Nothing in these notes attempts to ground the BAI in any objective scientific literature. Endnote five advises readers to go online to view taped examples of the BAI in action.[124] Endnote seven contains recommendations on how to present the findings from the BAI in court.[125]

Finally, it is the last gambit involving false statements about evidence and witnesses that this Essay will address in detail, as it is even more troubling than the pseudoscience that fails to support the BAI questions described previously.

B. The Bait Question Equivalent to Polygraph

The ultimate ploy in the BAI is to use a bait question, which is a deliberate deceptive statement to determine the subject's reaction. The Reid Manual advises that the investigator should know enough about the case and the physical facts to be able to develop an effective bait question.[126] The opinion an investigator draws from the BAI evaluation is similar to the opinion an expert may draw from the results of a polygraph test.

1. Similarities Between BAI and Polygraph

The theory behind the Reid Manual assumptions is similar to polygraph theory. The control question central to the polygraph analysis assumes an act of wrongdoing of the same general nature.[127] The question is an attempt to elicit a known lie.[128] The results of the control question thus establish a baseline for deception.[129] When the polygraphs show a more significant response, deception is present.[130] Gallini proves that neither Inbau nor Reid ever provided empirical support for these conclusions.[131]

120. *Id.* at 108.

121. *Id.*

122. *Id.* at 109.

123. INBAU ET AL., *supra* note 5, at 169 nn.5 & 7.

124. *Id.* at 169 n.5.

125. *Id.* at 169 n.7.

126. *Id.* at 172.

127. Gallini, *supra* note 21, at 553 n.196.

128. *Id.* at 559–60.

129. *Id.* at 556.

130. *Id.* at 559–60.

131. *Id.* at 557–58. The polygraph was similarly based on untested assumptions by Reid, Inbau and even Professor Horvath, who at one time was employed by Reid & Associates. *Id.* at 563.

2. Reid, *Daubert*, and the Federal Rules of Evidence

The related and fatal shortcoming for the BAI's deceptive bait question, similar to polygraph, is that Reid's method does not meet the *Daubert* and Federal Rule of Evidence 702 tests for admissibility. *Daubert* provides a series of evidentiary benchmarks which, interpreting Rule 702, must be met before scientific or technical evidence is admissible in court: (1) the theory must be testable and tested, (2) it should be capable of peer review and publication in the relevant scientific or technical world, (3) there must be a rate of error provided in order to assess reliability, and (4) it must be generally accepted in the relevant scientific community.[132] The last criterion represents the older *Frye* test—it must meet general acceptance in the relevant scientific or technical community.[133] As we have already seen, Reid's method is not based on scientific or technical theory. It is based, rather, on untested psychological assumptions about human nature.

There is a paucity of literature discussing the Reid methodology. Virtually no peer review exists. Without a comprehensive theory of the Reid Manual, testing its methodology is exceedingly difficult. There has been some testing done by Reid workers and by Buckley and Jayne, coauthors of the 1994 article, along with Professor Horvath.[134] The potential rate of error for these assumptions is unknown. Buckley has revealed that there is an approximately twenty five percent error rate with respect to those who deny involvement. Other authorities claim that it is a coin toss as to whether anyone can detect truthfulness in another.[135] Even under Reid Manual controls there was a twenty percent error rate in determining falsehoods. There appear to be no standards controlling the techniques' operation. Despite warnings to the contrary, we know that the method is used on the developmentally disabled and emotionally disturbed.[136] Finally, there is no general rate of acceptance in the scientific community. In fact, the scientific community has largely rejected such methods.[137]

Research should be conducted by the authors of the Reid Manual to support each of the fifteen behavior-provoking questions. The authors of the Reid Manual should conduct research to support each of the fifteen behavior-provoking questions. Such research should start by addressing the following key questions and issues: Why is a

132. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 593–95 (1993); *see also* Kumho Tire Co., Ltd. v. Carmichael, 526 U.S 137, 141 (1999) (applying the *Daubert* factors to nonscientific experts).

133. Frye v. United States, 293 F. 1012, 1014 (D.C. Cir. 1923).

134. Gallini, *supra* note 21, at 563 n.279.

135. Saul M. Kassin & Christina T. Fong, *"I'm Innocent!": Effects of Training on Judgments of Truth and Deception in the Interrogation Room*, 23 L. & HUM. BEHAV. 499, 511–12 (1999).

136. *See* Morgan Cloud et al., *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495, 514–15 (2002) (discussing how manual-based interrogation methods are commonly used on mentally ill suspects); Michael J. O'Connell et al., Miranda *Comprehension in Adults with Mental Retardation and the Effects of Feedback Style on Suggestibility*, 29 L. & HUM. BEHAV. 359, 367 (2005) (discussing a study that found that people with mental retardation are more susceptible to "suggestibility" tactics used in interrogation manuals such as Reid's).

137. *See* Gallini, *supra* note 21, at 573 (observing that the absence of research supporting the Reid technique "confirms what seems uniformly obvious to professors, social scientists, and psychologists alike: there exists no physiological or psychological response unique to lying"); Kassin & Fong, *supra* note 135, at 500–01 (suggesting that reliance on an interrogator's diagnostic ability is misplaced).

person who does not understand the purpose of the investigation deceptive? Why are short answers more indicative of suspicion than longer answers? All of these evaluations of responses do not take account of the personality, intelligence, level of education, state of mind, and physical condition of the subject responding to the behavior-provoking question. For those reasons, the assumptions underlying the evaluation of the responses seem flawed.

3. The BAI Should be Excluded Just as the Polygraph

Just as the polygraph has been excluded from evidence, so should the results of the BAI. The polygraph was rejected by courts beginning in 1923.[138] In 1998, in *United States v. Scheffer*,[139] the U.S. Supreme Court upheld a Military Rule of Evidence, definitively prohibiting the use of polygraph evidence. "[C]ertain doubts and uncertainties plague even the best polygraph exams."[140] There is also a lack of consensus reflected in disagreement between state and federal courts concerning both admissibility and reliability.[141] The court noted that the "control question technique" polygraph was found by peers to be "'little better than could be obtained by the toss of a coin,' that is, fifty percent."[142]

The Reid method is in a more primitive stage of development than the polygraph. As both Gallini and Leo indicate, there is scant or no publication of error rates or research into the validity of the methodology.[143] As Leo indicates, there has been no peer review.[144] Indeed, the only research done has been by Reid and the coauthors of the Reid Manual, some of whom are, or were, partners or employees of Reid & Associates.[145] By definition, this is not peer review, and thus a fatal shortcoming for admissibility under *Daubert* and Federal Rule of Evidence 702.

It should also be noted that the *Scheffer* decision upheld the exclusion of polygraph evidence despite some studies finding an eighty-seven percent accuracy rate.[146] Gallini and Leo properly criticize Reid & Associates for never making the data available in support of the BAI's accuracy.[147] With the publication of the Fifth Edition, the Reid manual authors have made an attempt to prove validity through the addition of endnotes to the book and the publication of a monthly newsletter. However, the Reid methodology is still a long way from satisfying *Daubert*. As described above, the research is not independent or peer reviewed. Moreover, it is limited in scope to theft

138. *Frye*, 293 F. at 1014.

139. 523 U.S. 303 (1998).

140. *Scheffer*, 523 U.S. at 312.

141. *Id.* at 310–11.

142. *Id.* at 310 (quoting William G. Iacono & David T. Lykken, *The Scientific Status of Research on Polygraph Techniques: The Case Against Polygraph Tests*, *in* 1 MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY § 40:45 (Faigman et al. eds.,1997)).

143. Gallini, *supra* note 21, at 578; Leo, *supra* note 16, at 67.

144. Leo, *supra* note 16, at 67.

145. See *supra* Part III.B.2 for an analysis of the lack of scientific support for the Reid method.

146. *Scheffer*, 523 U.S. at 310.

147. Gallini, *supra* note 21, at 571 (citing Leo, *supra* note 16, at 67).

cases and to a small sample size of sixty.[148]

Much more work needs to be done to create a peer review process that will allow broader sampling in more serious cases. The peer review work done so far by some opponents of the Reid method points to the method's inaccuracy. The testing done by Professors Kassin and Fong suggests that accuracy rates of the Reid method were comparable to chance.[149] Training in the use of the verbal and nonverbal cues did not improve accuracy.[150] Kassin and Fong also found that training made the user more confident and, paradoxically, less accurate.[151] Gallini concludes that since the polygraph has been rejected for a lack of general acceptance and *Daubert* grounds, confessions obtained via the Reid method should similarly be rejected; however, the courts have generally admitted confessions taken by interrogators using the Reid method.[152]

The problem that Gallini does not elaborate upon is that the confession obtained via the Reid method is currently treated as a piece of physical evidence provided by the suspect. Unlike polygraph evidence, which is an opinion by an "expert," Reid-trained police can simply relate to the court and jury what the suspect said as an admission. However, this Essay argues that the opinion that an investigator draws from the BAI evaluation, determining the guilt or innocence of a person, is similar to the opinion an expert may draw from the results of a polygraph test. Therefore, courts should exclude BAI evaluations in the same manner that polygraph results are excluded. If this were to happen, the fruit borne from the more intense interrogation that follows the BAI evaluation should also be excluded.

IV. ARCHITECTURE OF AMERICAN LAW THAT DEMANDS OR ENCOURAGES THE TRUTH

A. The Supreme Court's Decision Allowing Deception to Obtain a Confession

In *Frazier v. Cupp*,[153] the Court was presented with a pre-*Miranda* challenge to the voluntariness of a confession.[154] Petitioner Frazier was falsely advised by police that his cousin and codefendant, Rawls, had confessed to the murder that police were investigating.[155] Shortly thereafter, Frazier was still reluctant to talk, but after police sympathetically suggested that the victim had started a fight by making homosexual advances, Frazier began to confess.[156] Frazier then expressed a desire to obtain a lawyer, but police informed him that he could not possibly get into any more trouble

148. INBAU ET AL., *supra* note 5, at 169 n.2; *see also* Stein & Memon, *supra* note 101, at 599 (describing methodology of study on cognitive interviewing).

149. Kassin & Fong, *supra* note 135, at 511.

150. *Id.*

151. *Id.* at 512.

152. *See* Gallini, *supra* note 21, at 573 n.358 (discussing several cases in which Reid techniques were used to obtain confessions and the confessions were admitted).

153. 394 U.S. 731 (1969).

154. *Frazier*, 394 U.S. at 739.

155. *Id.* at 737.

156. *Id.* at 738.

than he was already in, and obtained a full confession.[157] Before the Supreme Court, Frazier argued that his confession was involuntary due to police deception and the police officers' denial of his request for a lawyer.[158] However, in finding that the confession was in fact voluntary, the Court considered that Frazier received partial warnings of his constitutional rights before his confession, that the questioning was of short duration, and that Frazier was "a mature individual of normal intelligence."[159] The majority, in a single paragraph, held that "[t]he fact that police misrepresented the statement that Rawls had made is, while relevant, insufficient in our view to make this otherwise voluntary confession inadmissible."[160] While the police officer's misrepresentation of the codefendant's statement was a relevant factor to a totality-of-the-circumstances analysis, it did not result in the confession being declared inadmissible.[161] The Reid Manual cites the *Frazier* case to justify its use of deception.[162]

Although the *Frazier* Court refrained from engaging in a more thorough analysis, in other contexts, Justice Marshall noted that falsehoods might affect a confession's admissibility and determination as to whether or not a suspect is in custody. For example, in his dissent to *Oregon v. Mathiason*,[163] Justice Marshall argued that falsehoods to the suspect might affect his perception that his situation was hopeless, and that he was not free to leave.[164] Marshall considered it clear that the suspect could have reasonably believed he was not free to leave after the police told him that they found his fingerprints at the scene of the burglary.[165] The case narrowly decided only the custody issue under *Miranda*.[166] While it may be a long time before the Court reconsiders the deception issue in any other place than a dissenting opinion, we know that, if police officers continue using the Reid Manual, deception will continue.[167]

In *Moran v. Burbine*,[168] police arrested respondent on suspicion of burglary, but also obtained evidence that he was responsible for a murder that occurred earlier that year.[169] Police advised an attorney calling on behalf of a suspect in custody that they would not question the suspect any more that night, and police did not inform the attorney that respondent was also under investigation for murder.[170] Continued questioning followed and led to a confession, which was used in the ensuing murder

157. *Id.*

158. *Id.* at 739.

159. *Id.*

160. *Id.*

161. *Id.*

162. INBAU ET AL., *supra* note 5, at 426.

163. 429 U.S. 492 (1977).

164. *Mathiason*, 429 U.S. at 496–99 (Marshall, J., dissenting).

165. *Id.* at 496–97.

166. *Id.* at 492.

167. INBAU ET AL., *supra* note 5, at 162–63 (describing deceptive methods of questioning as part of the BAI).

168. 475 U.S. 412 (1986).

169. *Moran*, 475 U.S. at 416.

170. *Id.* at 417.

prosecution.[171] The Supreme Court approved the admissibility of the confession because the suspect was given *Miranda* warnings and waived his rights.[172] Justice Stevens, in his testy dissent, condemned the police's "deliberate deception" of an attorney and argued that under agency law, it was a deception of the client as well.[173] Of course, the majority did not agree with Justice Stevens about the effect of police deception on either lawyer or client.[174] The Court reasoned that "[e]vents occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right."[175] For the Court, deception of the lawyer had no impact on the client's decision to speak to the police without his attorney.[176]

B. American Society Encourages Truthfulness

There exists in American law and American culture a vast and quite elaborate structure of statutes, case law, regulations, and ethical rules to encourage citizens and members of learned professions to tell the truth and to deter anyone who, in either their professional or personal dealings, lies in order to profit or gain some other advantage.[177] The very existence of this body of law and cultural mores convincingly proves society's investment in truthfulness.

We are surrounded in our daily interactions with constant reminders of the need to be truthful. However, recall the now famous line from the film, *A Few Good Men*, when in response to the demand for the truth, Jack Nicholson's character exclaims: "You can't handle the truth!"[178] My question is: how much truth is our criminal justice system capable of handling?

Schoolchildren are told homilies to emphasize the importance of the truth in their lives. George Washington's "I cannot tell a lie" is an important building block of our common cultural and ethical education. In Judeo-Christian and Muslim faiths, the Ten Commandments exhort against bearing false witness. There are countless examples in art, history, fiction, and theology from the sublime to the absurd. This Essay sets out a number of these statutes, cases, and rules to support this argument.

C. Law Requiring the Truth in Dealings

1. Illegal False Statements To Law Enforcement

Federal law prohibits false statements to law enforcement officials in a broad

171. *Id.* at 417–18.

172. *Id.* at 434.

173. *Id.* at 462 (Stevens, J., dissenting).

174. *Id.* at 421–22 (majority opinion).

175. *Id.* at 422.

176. *Id.* at 423.

177. *See generally* Richard Lavoie, *Subverting the Rule of Law: The Judiciary's Role in Fostering Unethical Behavior*, 75 U. COLO. L. REV. 115, 136–143 (discussing the relationship between morality and the rule of law).

178. A FEW GOOD MEN (Columbia Pictures 1992).

category of instances. 18 U.S.C. § 1001 reaches anyone within federal jurisdiction (executive, legislative, or judicial branches) who makes a statement or representation that "falsifies [or otherwise] conceals . . . a material fact; . . . makes any materially false, fictitious, or fraudulent statement or representation; or makes or uses any false writing or document knowing [it to] . . . contain any materially false, fictitious, or fraudulent statement or entry." An earlier version of the statute limited its purview to statements made to the military and then to all false claims intended to cheat, swindle or defraud the federal government.[179] It was only in 1948 that Congress separated false claims from false statements.[180]

While the prosecution must prove that the defendant had intent to make the statement, it need not prove intent to defraud or intent to mislead the investigation or federal agency.[181] Nor must the government prove actual knowledge of federal agency jurisdiction.[182] The statute applies to law enforcement personnel who, in the course of their work, make false statements that are not for financial gain but cause disruption or are made to reroute an investigation.[183]

In a decade-old case, *United States v. Pickett*,[184] a defendant left a crudely handwritten note and a white powder on a desk in a police security station.[185] Shortly after the discovery of the powder and note, the defendant, a capitol police officer, admitted leaving them as a practical joke.[186] No disruption followed.[187] The officer argued that a mere joke did not demonstrate an intent to deceive and therefore could not form the basis of a § 1001 charge.[188] The court disagreed, reasoning that a false statement intended to cause fright or confusion can be just as culpable as a statement intended to deceive.[189] Thus, the government need not prove intent to deceive in order to bring a successful § 1001 charge.

The Supreme Court has recognized that § 1001's materiality element will be satisfied if the statement has a "natural tendency to influence" a decision of the decision maker to whom it was addressed. [190] Section 1001 has been interpreted

179. Act of Oct. 23, 1918, ch. 194, 40 Stat. 1015 (1918) (codified as amended at 18 U.S.C. § 1001 (2012)).

180. *Compare* 18 U.S.C. § 287 (2012) (covering false, fictitious, or fraudulent claims), *with* 18 U.S.C. § 1001 (covering statements or entries generally); *see* Act of June 25, 1948, ch. 15, 62 Stat. 698 (codified as amended at 18 U.S.C. § 287 (2006)) (first separating false claims from false statements).

181. United States v. Yermian, 468 U.S. 63, 73–75 (1984).

182. *Id.*

183. United States v. Pickett, 209 F. Supp. 2d 84, 88 (D.D.C. 2002) (reasoning that "[a] false statement may be as disruptive of the orderly functioning of the legislative branch as one of deliberate deception if its purpose or effect is to cause fright or confusion").

184. 209 F. Supp. 2d 84 (D.D.C. 2002).

185. *Pickett*, 209 F. Supp. 2d at 85. This event occurred just one month after the anthrax scare in Washington, D.C. *Id.*

186. *Id.* at 86.

187. *Id.*

188. *Id.* at 87.

189. *Id.* at 88.

190. United States v. Gaudin, 515 U.S. 506, 509 (1995) (quoting Kungys v. United States, 485 U.S. 759, 772 (1988)).

broadly and includes even a simple denial of charges.[191] The statute applies to law enforcement officers' conduct generally, except for statements made as reasonable law enforcement efforts, such as statements of undercover agents. In *United States v. Moyer*,[192] local police officers made false statements to the FBI in order to protect the lover of another officer.[193] Defendant police officers were charged with conspiring to falsify documents with the intent to obstruct the investigation of a matter within the jurisdiction of a federal agency.[194] The court rejected defendants' arguments relating to the charges brought under § 1583 (a statute similar in nature to § 1001), reasoning that "[i]t borders on the ridiculous to assert that the Chief of Police would *not* have a duty to disclose the identity of suspects in his official police reports, or . . . that withholding the names of suspects . . . would be deemed acceptable."[195]

2. State Laws Criminalizing False Statements to Law Enforcement

Another example of society's demand for honesty is the prevalence of statutes that specifically punish false statements made to state and local police. Title 18, section 4906 of the Pennsylvania code is a fair sample of such a statute. This section makes it a crime to make a false statement to police involving the commission of a crime.[196] In *Commonwealth v. Morris*,[197] a bartender was charged with violating section 4906 for allegedly making false statements to police about the circumstances surrounding a robbery at his bar.[198] Finding that the defendant had violated section 4906, the court noted that the defendant's assertion that he was "drunk" was too vague to be considered.[199] The court rejected defendant's argument that his fictitious statements to police should be overlooked because the person he accused of stealing from his club was later convicted of theft in spite of the defendant's falsehoods.[200] The court reasoned that section 4906 was implemented at least in part to conserve time and resources in police investigations.[201]

3. False Statements by Lawyers

A complex set of Ethical Rules, case law, ABA and state rules, and Bar Opinions govern the behavior of lawyers who are charged with preventing client deception, client and witness perjury, and the presentation of false evidence.[202] Rule 3.3 of the

191. *See* Brogan v. United States, 522 U.S. 398, 408 (1998) (holding that even an "exculpatory no" satisfies the materiality element).

192. 674 F.3d 192 (3d Cir. 2012).

193. *Moyer*, 674 F.3d at 200.

194. *Id.* at 201–02.

195. *Id.* at 207.

196. 18 PA. CONS. STAT. ANN. § 4906 (West 2013).

197. 1 Pa. D. & C.3d 568 (Pa. Ct. Com. Pl. 1976).

198. *Morris*, 1 Pa. D. & C.3d at 570–72.

199. *Id.* at 574.

200. *Id.* at 576.

201. *Id.*

202. *See, e.g.*, Nix v. Whiteside, 475 U.S. 157 (1986) (holding that an ineffective assistance of counsel claim cannot be based upon a lawyer's decision not to offer false testimony to the court); MODEL RULES

ABA's Model Rules prohibits the presentation of perjured testimony.[203] The Model Rules also require, without detailing it, that lawyers have a duty to remediate their client's deceptive practices.[204] The Model Rules also make clear that the duty described in Rule 3.3 trumps other obligations an attorney owes to a client, including confidentiality.[205]

Other rules control a lawyer's conduct in requiring honest dealings with other lawyers and with the general public.[206] In short, deceptive practices are forbidden.[207] Case law also serves to guide lawyer conduct. The Supreme Court has made it clear that an attorney's failure or refusal to present false testimony may not ever be considered ineffective assistance of counsel.[208]

So why do courts tolerate lies from law enforcement officials during interrogations? It is one of the only places where it is tolerated; it is not permitted in search warrant applications[209] or in-court testimony.[210]

Courts and scholarly commentators that allow or defend police deception cite necessity as the only justification for employing what Professor Inbau calls "less refined methods" for dealing with those suspected of committing serious crimes.[211]

PROF'L CONDUCT R. 3.3 (2004) (prohibiting a lawyer from presenting in court evidence that he knows to be false and requiring reasonable remedial measures if he learns his client or another of his witnesses has engaged in fraudulent conduct related to the proceeding).

203. MODEL RULES PROF'L CONDUCT R. 3.3 (requiring that, in the courtroom, "[a] lawyer, shall not knowingly: (1) make a false statement of fact or law to a tribunal," or "(3) offer evidence the lawyer knows to be false").

204. *Id.*

205. *See* MODEL RULES PROF'L CONDUCT R. 3.3(c) (stating that an attorney's duties to disclose or prevent falsehoods "apply even if compliance requires disclosure of information otherwise protected" by the attorney/client confidentiality rule).

206. *Id.* at 4.1 (stating that "a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client").

207. *See* Morrissey v. Virginia State Bar, 448 S.E.2d 615, 619 (1994) (holding that an attorney's duty not to practice deceit or misrepresentation extends to those "who may be adversely affected by such conduct"); MODEL RULES OF PROF'L CONDUCT R. 4.1–4.3 (forbidding a lawyer from knowingly making false statements or omissions to a third party).

208. Nix v. Whiteside, 475 U.S 157, 172 (1986) (holding that counsel's refusal to present false testimony as a matter of law did not establish the prejudice required for an ineffective assistance of counsel claim); *see also In re* Freidman, 392 N.E. 2d 1333, 1335 (1979) (applying state statute prohibiting a lawyer from using perjured testimony or false evidence); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 341 (1975) (noting that the tradition of allowing an attorney to keep the information a client gives him confidential "is so important that it should take precedence, in all but the most serious cases"). There are also countless informal opinions saying the same. *See, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1470 (1981) (noting that an attorney cannot undertake representation of a potential client if the representation "might aid the client in perpetrating a fraud or otherwise committing a crime").

209. *See* Franks v. Delaware, 438 U.S. 154, 155–56 (1978) (holding where a defendant makes a "substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included . . . in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request").

210. *See* 18 U.S.C. § 1621 (2012) (prohibiting lying under oath); § 1623 (prohibiting false declarations before a grand jury or court).

211. Fred E. Inbau, *Police Interrogation—A Practical Necessity*, 52 J. CRIM. L. & CRIMINOLOGY 16, 19

Inbau and others argue that such deception may be used for all suspects, including those who may be innocent—as is seen in the bait question during the BAI.[212]

As this Essay argues, there is no way to distinguish between those subjects concealing guilt and those who are innocent and trying to tell the truth when they deny a crime. No one has come up with any "refinement" to get law enforcement any closer to the truly culpable.[213] Polygraphs do not work,[214] nor do other devices or drugs.[215] One can consult the Reid Manual's BAI and emerge with a handful of ephemera and old wives' tales about how guilty subjects will react or look at investigators or make denials without details. However, we should compare this guidance to Detective Jim Trainum's account of how he obtained what turned out to be a false confession.[216] Detective Trainum obtained a false confession from a female suspect in a murder case.[217] Upon realizing that the suspect had an airtight alibi, Detective Trainum went back and looked at the tactics he used to obtain the false confession.[218] The interrogation was videotaped, a rare practice at that time, and revealed that most of the details of her confession were provided by him and his partner and were merely reiterated by the suspect.[219] If it were not for the suspect's alibi that proved her innocence, an innocent person could have gone to jail.[220] Trainum now stresses the great importance of videotaping interrogations and teaches interrogation techniques.[221]

V. FIRST STEP TO SOLUTION: VIDEOTAPING INTERROGATION SESSIONS

Defense lawyers, scholars, and even some police and prosecutors recommend videotaping interrogation sessions.[222] To ensure that law enforcement officials do not

(1961).

212. *See id.* (calling the use of "less refined methods" against innocent subjects a "necessity").

213. See *supra* Section III for a discussion of law enforcement officers' continued use of interrogation methods that do not pass true scientific scrutiny.

214. See *supra* Part III.B.3 for a discussion of the inadmissibility of the polygraph test.

215. *See, e.g.*, John Ip, *Two Narratives of Torture*, 7 NW. U. J. OF INT'L HUM. RTS. 35, 70 (2009) ("Beginning in the 1940s, the CIA tested over one hundred and fifty substances to determine whether they might be effective for use in interrogation. These included substances such as coffee, alcohol, morphine, atrophine, heroin, LSD, cocaine, marijuana, peyote, and so-called 'truth serums' such as sodium amytal and sodium pentothal. Ultimately, the CIA concluded that there was no substance that could consistently cause people to tell the truth." (footnotes omitted)); John M. MacDonald, *Truth Serum*, 46 J. CRIM. L. & CRIMINOLOGY 259, 259 (1955) (noting that while the administration of a truth serum "may appear more scientific than the drinking of large amounts of bourbon in a tavern . . . the end results displayed in the subject's speech may be no more reliable."); Andre A. Moenssens, *Narcoanalyis in Law Enforcement*, 52 J. CRIM. L. & CRIMINOLOGY 453, 458 (1961) (noting that "[b]ecause of its lack of conclusiveness and absolute accuracy, 'truth serums' should be used only as a last resort, by psychiatrists who have had experience with the drugs").

216. Jim Trainum, *Get it on Tape*, L.A. TIMES, Oct. 24, 2008, at 23.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. Mensah M. Dean, *Should Philadelphia Record Interrogations?*, PHILA. DAILY NEWS, April 10, 2013, http://articles.philly.com/2013-04-10/news/38406758_1_detectives -interrogations-police-custody.

coerce suspects into false confessions through the use of deception, video recordings of interrogations provide a definitive record of the interrogation and statements of both law enforcement and the suspect. Indeed, the Reid Manual strongly endorses the practice.[223] Additionally, court decisions and statutes in many states now require the recording of police interrogations in various circumstances.[224] The Uniform Law Commission has developed a Uniform Model Statute, that covers this precise issue.[225] But, in that uniform law, the remedy for failing to record a statement is not suppression.[226] Indeed, in most states and under the Uniform Law, the remedy for failing to record the statement is weak. In only two states, Alaska and Minnesota, is there a per se rule of exclusion for violating the recording requirements.[227] Under the Uniform Law and in the states where recording is required, the failure to record is a factor to be considered in arriving at the admissibility decision.[228] Furthermore, under

223. INBAU ET AL., *supra* note 5, at 49–51.

224. *See* 725 ILL. COMP. STATE. ANN. 5/103-2.1 (West 2013) ("[A]ny statements made by the defendant during or following [a] non-recorded custodial interrogation, even if otherwise in compliance with this Section, are presumed to be inadmissible in any criminal proceeding against the defendant except for the purposes of impeachment."); ME. REV. STAT. ANN. tit. 25, § 2803-B (2013) ("All law enforcement agencies shall adopt written policies regarding . . . digital, electronic, audio, video or other recording of law enforcement interviews of suspects in serious crimes."); TEX. CODE CRIM. PROC. ANN. art. 38.22 (West 2013) ("No oral or sign language statement of an accused made as a result of custodial interrogation shall be admissible against the accused in a criminal proceeding unless . . . an electronic recording, which may include motion picture, video tape, or other visual recording, is made of the statement."); Stephan v. State, 711 P.2d 1156, 1162 (Alaska 1985) (requiring recording of custodial interrogations in places of detention as a matter of due process); Commonwealth v. DiGiambattista, 813 N.E.2d 516, 533 (Mass. 2004) (holding that "a defendant whose interrogation has not been reliably preserved by means of a complete electronic recording should be entitled, on request, to a cautionary instruction concerning the use of such evidence"); State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994) (holding under the court's supervisory power that "all custodial interrogation including any information about rights, any waiver of those rights, and all questioning shall be electronically recorded where feasible"); State v. Barnett, 789 A.2d 629, 632 (N.H. 2001) (finding under the court's supervisory power that even "a tape recorded interrogation will not be admitted into evidence unless the statement is recorded in its entirety").

225. UNIF. ELEC. REC. CUST. INTERR. ACT (2010); *see also* Andrew E. Taslitz, *High Expectations and Some Wounded Hopes: The Policy and Politics of a Uniform Statue on Videotaping Custodial Interrogations*, 7 NW. J. L. & SOC. POL'Y 400, 401 (2012).

226. UNIF. ELEC. REC. CUST. INTERR. ACT § 13(b) (providing that, if a court admits a statement made during custodial interrogation and not electronically recorded into evidence, the court shall give cautionary instruction to the jury upon request of the defendant).

227. *Scales*, 518 N.W.2d at 592 (holding that failure to comply with recording requirement will result in the suppression of the interrogation); *Stephan*, 711 P.2d at 1162 (holding that an unexcused failure to electronically record a custodial interrogation in its entirety will be subject to exclusion).

228. *See, e.g.*, N.C. GEN. STAT. ANN. §15A-211(e) (West 2013) ("If the court finds that the defendant was subjected to a custodial interrogation that was not electronically recorded in its entirety, any statements made by the defendant after that non-electronically recorded custodial interrogation, even if made during an interrogation that is otherwise in compliance with this section, may be questioned with regard to the voluntariness and reliability of the statement."); OHIO REV. CODE ANN. §2933.81(9)(B) (West 2013) ("All statements made by a person who is the suspect of a violation of or possible violation . . . during a custodial interrogation in a place of detention are presumed to be voluntary if the statements made by the person are electronically recorded. The person making the statements during the electronic recording of the custodial interrogation has the burden of proving that the statements made during the custodial interrogation were not voluntary."); UNIF. ELEC. REC. CUST. INTERR. ACT § 13(a) (providing that failure to record statement electronically is a determining factor in whether the statement is admissible).

the Uniform Law, when unrecorded statements are admitted into evidence, the defendant may request a cautionary jury instruction be given at trial to highlight whether a confession was voluntary in the eyes of the fact finder.[229]

The most important use of the videotape is the ability to prove what took place in the interrogation session. No longer is there secrecy, as decried by *Miranda*.[230] No longer is there a gap in our knowledge as to what took place.[231] The suppression court that heard and saw the Michael Crowe video ultimately suppressed Crowe's confession.[232] Following the suppression and the discovery of new DNA evidence, the prosecution dismissed the charges against Crowe; a drifter was later convicted of the murder to which Crowe confessed.[233]

Videotaping will eliminate the swearing contest between police officers and defendants that often takes place during a suppression hearing, and which was a major concern in *Miranda* and many other decisions.[234] There will be no question as to what was said or how it was said.

The other benefits of recording interrogations track the due process analysis and help to establish the totality of the circumstances.[235] A court will be able to determine whether the suspect understood the warnings. The tape recording will contain the actual language used and will show how the suspect reacted to the warning questions. In the world before the use of recording technologies, this entire process was reconstructed with the *Miranda* form and the suspect's response, and often with the help of psychologists and other experts.

The court will be able to determine whether the defendant was tired or overwhelmed.[236] A suspect's body language and actual words will be most helpful in making these determinations. The court will know whether he made requests for food, water, sleep, or a restroom. Such requests can easily be documented and established or refuted. A court can more easily determine whether the suspect wanted to give up his rights. One can determine via actual words, body language, and gestures used whether an implicit waiver has occurred.[237] Genuine questions about invocation of the right to

229. UNIF. ELEC. REC. CUST. INTERR. ACT § 13(a).

230. Miranda v. Arizona, 384 U.S. 436, 445 (1966) ("An understanding of the nature and setting of this in-custody interrogation is essential to our decisions today. The difficulty in depicting what transpires at such interrogations stems from the fact that in this country they have largely taken place incommunicado.").

231. By videotaping interrogation sessions, the events that took place during the interrogation are preserved.

232. Crowe v. County of San Diego, 608 F.3d 406, 425 (9th Cir. 2010); Nashiba F. Boyd, Comment, *"I Didn't Do It, I Was Forced to Say That I Did": The Problem of Coerced Juvenile Confessions, and Proposed Federal Legislation to Prevent Them*, 47 HOW. L.J. 395, 427 (2004).

233. *Crowe*, 608 F.3d at 425–26.

234. *See Miranda*, 384 U.S. at 505 (Harlan, J., dissenting) (observing that the Court's decision does nothing to prevent police from later lying about whether they gave a defendant warnings and waivers).

235. *See* North Carolina v. Butler, 441 U.S. 369, 375–76 (1979) (holding that a waiver of *Miranda* rights need not be explicit, but is determined by the particular facts and circumstances of the case).

236. *See* Spano v. New York, 360 U.S. 315, 322 (1959) (considering a case of an unsophisticated subject that was questioned by many experienced and skillful detectives and lawyers during an interrogation that lasted "for virtually eight straight hours" and did not conclude "until almost sunrise").

237. *See, e.g.*, Berghuis v. Thompson, 130 S. Ct. 2250, 2261 (2010) (finding an implicit wavier of the right to remain silent when defendant was given *Miranda* warnings and made no definitive express statement

silence or the right to counsel can be addressed.[238] The court will be able to see whether the suspect wished to halt the questioning,[239] or if there was truly ambiguity in any request.[240]

The court can address whether there was deception about the evidence or witnesses and whether there was a confession. The tape recording will not only be critical in answering any questions about what events led to the confession—or whether there was a confession at all—but will also allow courts to examine other potential deficiencies in police conduct during interrogations and investigations.[241] The impact of falsehood made to the suspect can be better assessed as one watches and listens to the video.

The benefits that will flow to the court and both sides cannot be overstated. If we are interested in learning the truth about what occurs in an interrogation room, there is no better way currently available. The tape should be started as soon as the suspect is taken to the interrogation room, so courts can focus on the content of and circumstances surrounding an interrogation rather than the presence or absence of *Miranda* warnings.

The crucial issue should be whether or not there was a custodial interrogation.[242] Custodial interrogation as defined by the Court means a police-dominated atmosphere.[243] The Uniform Electronic Recordation of Custodial Interrogations Act uses a similar definition.[244] Section 2(1) defines custodial interrogation as "when reasonable individuals in the same circumstances would consider themselves in custody."[245] Under no circumstance should the taping be delayed to begin at a later time, such as when warnings are given or after an oral admission. There is no good reason for failing to record, as a general matter. Of course, some event might occur to prevent recording, but modern police departments can easily afford the equipment.[246] Much of Reid's own BAI research was done by videotaping and then exhibiting the

about his desire to speak with the police).

238. *See* Davis v. United States, 512 U.S. 452, 459 (1994) (holding that a subject must "unambiguously request" a lawyer for his right to counsel to take effect); Edwards v. Arizona, 451 U.S. 477, 484–85 (1981) (holding that once a defendant invokes his right to counsel, questioning must stop until counsel has been afforded to the defendant); Michigan v. Mosley, 423 U.S. 96, 106–07 (1975) (finding no *Miranda* violation where police stopped an interrogation regarding a robbery as soon as a defendant invoked his right to remain silent but interrogated the same defendant a few hours later about an unrelated murder).

239. *Miranda*, 384 U.S. at 491–92 (demonstrating that the court had limited information about what went on and how the suspect acted behind the closed doors of a police interrogation room).

240. *See Davis*, 512 U.S. at 462 (finding that the defendant's statement—"[m]aybe I should talk to a lawyer"—was not in and of itself an unambiguous request for counsel).

241. *See* Oren Yaniv & Ginger Adams Otis, *A Free Man Innocent in '90 Slay But Jailed 20 Years*, N.Y. DAILY NEWS, March 21, 2013, at 21.

242. *See* Berkemer v McCarty, 468 U.S. 420, 435 (1984) (considering whether a routine traffic stop is restrictive enough to constitute a custodial interrogation).

243. *Id.* at 439.

244. UNIF. ELEC. REC. CUST. INTERR. ACT § 2 (2010).

245. *Id.* § 2(1).

246. *See* Sandra Guerra Thompson, *What Price Justice? The Importance of Costs to Eyewitness Identification Reform*, 41 TEX. TECH L. REV. 33, 59 (2008) (discussing the cost limitations involved in police departments acquiring recording equipment).

tapes to "independent" evaluators.[247] It will likely take time for courts to become comfortable with viewing recorded interrogations and making rulings about the failure to use recordings.

If courts get to see the use of the BAI and the Nine Steps (as they would if recorded interrogations were provided), the questioning methodology should result in more motions to suppress being granted. Under the due process clause, the courts should view the questioning techniques as being based on faulty assumptions as barred by *Daubert* and Federal Rule of Evidence 702.[248] Even using the more lenient "more likely than not" standard, as is used for some due process determinations,[249] would result in exclusion. Unless the government can establish the validity of a technique as based on a testable, peer-reviewed theory, the results it produces ought not to be received in evidence. Faulty techniques which produce admissions should be viewed as unreliable and the results should be rejected as such. This moves into an area marked out by Professors Leo, Drizin, Taslitz, and Neufeld.[250]

VI. CONCLUSION

The use of the Reid Nine Steps, as predicated on the BAI, results in suspects being identified as deceptive without any firm scientific or technical basis. There is a direct nexus between use of the BAI and the Nine Steps. Confessions resulting from such faulty foundations ought to be rejected as violations of the Federal and local rules of evidence, and *Daubert*. Furthermore, use of deceptive practices and falsehoods has no basis in our justice system, which is dedicated to the truth.

247. INBAU ET AL., *supra* note 5, at 169 nn. 4–5 (referencing a study by two of the Reid Manual's own authors to show that innocent and deceptive subjects respond differently in interrogations).

248. See *supra* Part III.B.2 for a discussion of how the Reid Method would not meet the admissibility standards of *Daubert* and Federal Rule of Evidence 702.

249. *E.g.*, Leary v. United States, 395 U.S. 6, 36 (1969).

250. *See generally* Richard A. Leo et al., *Promoting Accuracy in the Use of Confession Evidence: An Argument for Pretrial Reliability Assessments to Prevent Wrongful Convictions*, 85 TEMP. L. REV. 759 (2013).