THE “FOOL’S GOLD” STANDARD OF CONFESSION EVIDENCE: HOW INTERSECTING, DISADVANTAGED IDENTITIES HEIGHTEN THE RISK OF FALSE CONFESSION

Nicole Weis*

TABLE OF CONTENTS

INTRODUCTION ................................................................. 1179
I. BACKGROUND .................................................................. 1181
II. EFFECTS OF IDENTITY ON FALSE CONFESSIONS .... 1184
   A. Age ............................................................................. 1184
   B. Mental Disability or Illness ........................................... 1186
   C. Race .......................................................................... 1188
   D. Women ....................................................................... 1190
   E. Economic Class .......................................................... 1193
   F. Conclusion on Identities ................................................ 1194
III. ANALYSIS: INTERSECTIONAL IDENTITIES AND FALSE CONFESSIONS 1195
IV. PROPOSAL .................................................................. 1203
   A. Existing Proposals ...................................................... 1203
   B. Proposal: Multi-Level Approach .................................. 1205
V. COUNTERARGUMENTS .................................................... 1208
CONCLUSION .................................................................... 1209

INTRODUCTION

The continuation of the American justice system into the twenty-first century brings with it ever-increasing rates of incarceration, along with a continuous stream of exonerations.\(^1\) As science improves, exoneration rates have risen,

* Juris Doctor Candidate, December 2022, William S. Boyd School of Law, University of Nevada, Las Vegas. Thank you to my faculty advisor, Professor Frank Rudy Cooper, who helped to guide my research and pushed me to go further.

\(^1\) Don Stemen, Reconsidering Incarceration: New Directions for Reducing Crime, 19 Fed.
largely due to the use of DNA to conclusively exclude convicted persons as the perpetrators of their crimes. These exonerations have shed light on the phenomenon of false confessions which, while once thought to be near impossible, have been discovered at disturbing rates. To add to the alarm, these exonerations are typically reserved for high-profile, staunchly litigated cases; so the amount of false confessions keeping individuals wrongly imprisoned for lower-level crimes is undetermined and, presumptively, much higher than exoneration data indicates. The question examined here is how the different identities of individuals affect their likelihood to confess falsely. The collective research compiled here will show higher rates of false confessions for juveniles, people with mental illness or disability, Black people, and women.

The identities of race, gender, age, and mental disability or illness and their impact on false confession rates do not exist independently of each other. This research will show that, as a result, the intersection of the vulnerable identities (Black race, female gender, juvenile age, or mental illness or disability) of individuals puts them at a higher risk of falsely confessing and becoming wrongfully convicted. This research will propose that educating justice actors at all levels to examine and consider the intersectional identities of a suspect or defendant in a criminal case can help to prevent prosecution and conviction based upon false confessions or help identify convicted individuals likely to have falsely confessed.

This research will contribute to the conversation about the inequitable effect of the justice system on people with compounding, disadvantaged identities with a particular focus on the solicitation of false confessions and the reliance on this type of evidence. This research can serve to inform members at all levels of the justice system. Specifically, police officers should be informed on how to consider what populations are most at risk for falsely confessing when they conduct their interrogations in order to mitigate the solicitation of false confessions. Prosecuting agencies should adjust the value they place on confessions as evidence, especially if exculpatory evidence exists, when utilizing their prosecutorial discretion with intersectional suspects. Defense attorneys, in the representation of their clients, should utilize this information to attempt to exclude false confessions as evidence and, if necessary, push to inform juries through their arguments, expert witness testimony, and jury instructions. Through judicial education, this information should be provided to judges for consideration when

---

determining the voluntariness of a confession for admission as evidence, when instructing the jury, and when adjudicating guilt if acting as the fact finder.

In Part I, this Article will briefly examine the background of false confessions, including the statistical rate at which false confessions are proven to occur, the “hidden” false confessions that are not recorded, and the causes behind the phenomenon of false confessions. Building upon the initial background, Part II will discuss the effects that identities have on false confession rates by examining these rates through the lenses of age, mental illness and disability, race, and gender. These examinations will identify the disadvantaged identity in each category as juveniles, mentally ill or disabled, Black, and female. Having established these high-risk identities, Part III will use the theory of intersectionality to analyze how identities can compound upon each other, putting someone who possesses more than one disadvantaged identity at a higher risk of falsely confessing. Part IV will examine the existing proposals for reducing or eliminating false confessions and their validity in the context of this research. Following that examination, this Part will present a proposal resulting from this research. Part V will discuss potential counterarguments to this proposal.

I. BACKGROUND

In the current era of psychological interrogation, as opposed to the past in which interrogations were characterized by beatings and physical influence, false confessions seem counterintuitive and make little logical sense to the average person (read: juror) who has not experienced police interrogation firsthand. Yet, false confessions occur far more often than they appear on the surface.

False confessions are difficult to discover, and it is hard to determine the actual rate of false confessions in police interrogations because neither states nor any organization maintains records on false confession rates. The difficulty of establishing innocence further complicates the ability to determine an exact rate of overall false confessions. While data on the issue stems primarily from exoneration data, “most suspects who falsely confess—probably the great majority—are never convicted at all... [i]n most, charges were dismissed before trial or never filed at all because of indisputable proof of innocence.” With no records on false confessions that do not proceed to trial or result in convictions, a large majority of false confessions are consequently hidden from view when attempting to establish the frequency of false confessions in society. Accordingly, when

6 Id.
7 Samuel Gross & Maurice Possley, For 50 Years, You’ve Had “The Right to Remain Silent:” So why do so many suspects confess to crimes they didn’t commit?, THE MARSHALL PROJECT (June 12, 2016), https://www.themarshallproject.org/2016/06/12/for-50-years-you-ve-had-the-right-to-remain-silent.
8 Kassin et al., supra note 5, at 5.
examining false confession data, researchers should clarify that false confessions occur at a higher rate than the established rates suggest.

With the aforementioned caveat in mind, the existing, known rates of false confession are based primarily upon data from exoneration cases, with some researchers obtaining rates through studies in academic settings or through self-reporting surveys. As of 2022, 366 (12%) of the 3,049 exonerations recorded in the National Registry of Exonerations involved false confessions.9 The database includes every person exonerated in the United States since 1989, and the rate of 12% represents the percentage of exonerated individuals who admitted guilt to a crime that they had not committed and were later exonerated of.10 After examining exoneration cases resulting from exculpatory DNA evidence, The Innocence Project found that of the 375 DNA exonerations on record, 29% of them involved false confessions.11 Richard Leo and Steven Drizin, prominent researchers in the field of false confessions, state that studies have shown that false confessions are the leading cause in 14 to 25% of wrongful convictions.12 These statistics highlight the powerful effect that false confessions have as evidence. Any wrongful imprisonment or conviction is a miscarriage of the justice system, and the issue of false confessions contribute to up to a quarter of those injustices.13

Understanding the prevalence of false confessions in society, many are then confronted with the question: why? Why would anyone confess to a crime they did not commit? Most people considering this question do so from a perch of general safety, removed from the pressures, circumstances, and fears of interrogation or police interviews. They could never imagine themselves falsely admitting to a crime. Therefore, in order for the general population to take the issue of false confessions seriously, they must understand what would make someone falsely confess. To understand what would make someone falsely confess, one must understand what occurs during police interrogations. The National Registry of Exonerations explains “[i]nterrogation is different than interviewing: whereas the goal of interviewing is to obtain the truth through non-accusatorial, open-ended questioning . . . the goal of interrogation is to elicit incriminating statements, admissions and/or confessions through the use of psychological methods that are explicitly confrontational, manipulative, and suggestive.”14 The Organization explains that the psychological interrogation techniques are intended to

---

10 Id.
11 The Innocence Project, supra note 2.
13 Id.
14 Id. at 911.
draw out confessions from the guilty but are strong enough to induce them from the innocent as well.  

Leading researchers on false confessions identify the following as factors in interrogations that result in the solicitation of false confessions:

1. Incorrectly classifying a suspect as guilty, resulting in a guilt-presumptive interrogation
2. Coercive techniques designed to counter resistance, gain compliance, and elicit admissions
3. Misunderstanding or ignoring the vulnerabilities of a suspect, and

The Innocence Project also identified several contributing factors to false confessions related to the police interrogation process:

1. Real or perceived intimidation by law enforcement
2. Use of force or perceived threat of force by law enforcement
3. Compromised ability to reason by the suspect due to exhaustion, stress, hunger,
   substance use, mental limitations, limited education, lack of understanding of their
   rights, inclination to please authority figures
4. Devious interrogation techniques such as untrue statements about incriminating
   evidence, and
5. Fear of harsher punishment due to lack of confession.

These factors find support in the Due Process Clause of the Fourteenth Amendment, which invalidates confessions as legally inadmissible unless they are voluntary; however, “under the inherently intimidating and coercive atmosphere of incommunicado police interrogation, it is highly questionable that any resulting confession could be considered the product of the unfettered free will of the suspect.” The Supreme Court stated that the immense pressures and influence of interrogation “can induce a frighteningly high percentage of people to confess to crimes they never committed,” leaving no question that police interrogations can give rise to false confessions.

With a foundation on the overall rate of false confessions and how false confessions are solicited, the next foundation to lay is an understanding of who is most at risk.

---

15 *Id.* at 918.
II. EFFECTS OF IDENTITY ON FALSE CONFESSIONS

Having established the necessary foundational knowledge, the specific identities that are most prominent in false confession cases can be identified and analyzed. Through the examination of existing exoneration data and false confession studies, factors of age, mental illness or disability, race, and gender most prevalently display disparities in false confession rates.

A. Age

Different age groups present drastically different rates of false confession among exonerees. Data on all exonerations from 1989 to 2020 indicates that the percent of exonerees who falsely confessed increased with decreased age.20 As of March 17, 2020, 211 juveniles under the age of eighteen have been exonerated, and seventy-six (more than a third) of them falsely confessed.21 The percentages by age bracket are as follows:22

<table>
<thead>
<tr>
<th>Age Group</th>
<th>Number of Total Exonerees in Age Group</th>
<th>Number of Exonerees who Confessed</th>
<th>Percent of Age Group that Falsely Confessed</th>
</tr>
</thead>
<tbody>
<tr>
<td>18 years or older</td>
<td>2,189</td>
<td>216</td>
<td>10%</td>
</tr>
<tr>
<td>16-17 years old</td>
<td>162</td>
<td>46</td>
<td>28%</td>
</tr>
<tr>
<td>14-15 years old</td>
<td>42</td>
<td>24</td>
<td>57%</td>
</tr>
<tr>
<td>Under 14 years old</td>
<td>7</td>
<td>6</td>
<td>86%</td>
</tr>
</tbody>
</table>

This data clearly presents a drastic increase in the rate of false confessions for juveniles with the rate decreasing in direct correlation with increasing age. In an academic study, researchers Richard Leo and Steven Drizin examined forty juveniles in their study of 125 false confession cases and found that juveniles were overrepresented in false confessions cases.23 Over half of those juveniles (twenty-two) were under the age of sixteen, “suggesting that children of this age group may be especially vulnerable to the pressures of interrogation and the possibility of false confession.”24 They deduced that suspect age is strongly correlated with the likelihood of false confession.25

---

21 Id.
22 Id.
23 Drizin & Leo, supra note 12, at 944.
24 Id.
25 Id.
exoneration data concur that children and juveniles are a vulnerable population for false confessions and failures of the justice system.

Perhaps one of the most well-known instances of juvenile false confession resulting in wrongful conviction is the case commonly and unaffectionately known as “The Central Park Five,” in which five juveniles were accused, tried, and convicted of the sexual assault of a jogger in New York City Central Park in April 1989.26 Kevin Richardson, age fourteen; Antron McCray, age fifteen; Raymond Santana, age fourteen; Yusef Salaam, age fifteen; and Kharey Wise, age sixteen, were all interrogated by police until each of them provided a false confession.27 While none of the children admitted to the actual sexual assault, all of them implicated themselves and the others in the crime.28 These confessions, all of which contradictorily and inaccurately described the crime, were the “crucial” source of evidence that led to their convictions.29 It was not until 2002 that the actual perpetrator of the crime, Matias Reyes, came forward as the sole committer of the crime.30 Upon testing Reyes’s DNA against the DNA on the victim’s sock, Reyes was confirmed as the sole perpetrator.31 Their convictions were overturned in December of 2002 by the New York Supreme Court.32 These innocent children, disadvantaged by their age and facing the pressures of interrogation, were failed by the justice system.

It is not difficult to understand why children and juveniles would be more likely to confess. The Supreme Court stated that the risk of false confessions is, “all the more troubling—and recent studies suggest, all the more acute—when the subject of custodial interrogation is a juvenile.”33 Examining the potential psychological and sociological explanations for the increased rate of false confessions in youths, researchers Emily Haney-Caron, Naomi E.S. Goldstein, and Constance Mesariak identify several factors that contribute to the increased likelihood of juveniles’ false confessions.34 These factors include the higher suggestibility of juveniles as compared to adults, a potentially limited (or lack of)

28 Id.
29 Id. at 847, 850.
30 Id. at 843.
31 Id. at 847.
32 Id. at 850.
understanding of their Miranda rights, and a higher susceptibility to interrogation tactics, such as being told they will get to go home if they confess.\textsuperscript{35}

The Supreme Court held the same throughout several cases, finding juveniles “generally are less mature and responsible than adults,” that they “often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them,” and that they “are more vulnerable or susceptible to . . . outside pressures [than adults].”\textsuperscript{36} In \emph{Roper v. Simmons}, the Supreme Court abolished the death penalty for juveniles, reasoning that they are more vulnerable, more susceptible to influence and pressure, that they have less experience with control of their own environment, and that they are not as well formed as adults.\textsuperscript{37} The Court’s holding on the immature nature of juveniles is not only applicable when facing the death penalty. This nature inherently places them at a higher risk to provide a false confession as well. This disadvantaged identity is likely the easiest to accept and understand: children simply lack the general cognitive abilities, education, and defenses needed to withstand interrogation.\textsuperscript{38}

\textbf{B. Mental Disability or Illness}

Another factor presenting vastly different rates of false confession is mental status. Specifically, the rates of false confessions amongst people with mental illness or intellectual disability is significantly higher than the rates of false confession for neurotypical people.\textsuperscript{39} The legal definitions of mental illness vary from state to state. In Nevada, for example, mental illness is defined as a “clinically significant disorder of thought, mood, perception, orientation, memory or behavior which seriously limits the capacity of a person to function in the primary aspects of daily living.”\textsuperscript{40} Mental illnesses can range from depression to schizophrenia, and the level of severity may be more or less severe in an affected person. Intellectual Disability is defined by Nevada as “significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.”\textsuperscript{41} While these terms are different from each other and each is broadly encompassing in its own right, the two are aggregated in the recording of data. As a result, they are unfortunately inseparable for the purposes of this research.

The National Registry of Exonervations collects, organizes, and maintains a database on every known exoneration since 1989, recording details attained through empirical research to categorize cases by dozens of factors, including

\begin{footnotes}
\item Id.
\item \textit{Roper}, 543 U.S. at 569–70, 578.
\item See id. at 570.
\item Gross & Possley, \textit{supra} note 7.
\item \textsc{Nev. Rev. Stat.} \S 433.164 (2017).
\item \textsc{Nev. Rev. Stat.} \S 433.099 (2013).
\end{footnotes}
whether the defendant had a mental illness or disability.\textsuperscript{42} They found that as of 2016, of the 1,707 exonereees with no known mental or intellectual disability, only nine (or about 9\%) of them falsely confessed.\textsuperscript{43} In comparison, of the 103 mentally ill or disabled exonereees, 74 (or about 72\%) of them falsely confessed.\textsuperscript{44} This data indicates that mentally or intellectually disabled or ill individuals have a risk of falsely confessing that is nearly nine times that of those without a mental illness or disability.

These heightened rates of mental illness and disability are to be expected, to a point, because the mentally ill and disabled populations make up a larger percentage of imprisoned persons.\textsuperscript{45} The Bureau of Justice reported that 37\% of prisoners and 44\% of jail inmates reported mental health disorders.\textsuperscript{46} People with mental illness or disability are nearly five times more likely to come into contact with the justice system, and “as such, those with mental illness are over-represented among true and false confessors, as they have more opportunities to do so.”\textsuperscript{47} In addition to overrepresentation, those with mental illness or disability can also struggle with understanding their Miranda rights, understanding the context of the interrogation, falling victim to intimidation and deception by police officers, lack of cognitive capacity or assertiveness, confusion, or disorganized thoughts.\textsuperscript{48} These struggles, similar to the vulnerabilities of children, heighten their risk and susceptibility to the solicitation of confessions, making them more likely to falsely confess.\textsuperscript{49} While insufficient, children have been given safeguards such as requiring the presence of a parent or guardian during interrogation.\textsuperscript{50} Unlike children, however, those with mental illness or intellectual disability are not always provided with the same safeguards afforded to children in interrogation or police encounters.\textsuperscript{51} Despite the Supreme Court establishing these \textit{Miranda} expansions in \textit{J.D.B.}, they did not afford the same protections twenty-five years prior to those who are mentally ill or intellectually disabled when they considered this issue in \textit{Colorado v. Connelly}.\textsuperscript{52} With no court-mandated protections, the mentally ill or disabled are left to encounter the system five times more often than neurotypical people with no consideration for their

\textsuperscript{43} Gross & Possley, \textit{supra} note 7.
\textsuperscript{44} \textit{Id}.
\textsuperscript{46} \textit{Id}. at 1.
\textsuperscript{47} Melanie Clark Mogavero, \textit{An Exploratory Examination of Intellectual Disability and mental Illness Associated with Alleged False Confessions}, 38 \textit{Behav. Sci. & L.}, 299, 302 (2020).
\textsuperscript{48} Kassin et al., \textit{supra} note 5, at 21.
\textsuperscript{49} Drizin & Leo, \textit{supra} note 12, at 1001.
\textsuperscript{50} Mogavero, \textit{supra} note 47, at 304.
\textsuperscript{51} \textit{Colorado}, 479 U.S. at 164.
\textsuperscript{52} \textit{Id}. at 166.
vulnerabilities.\textsuperscript{53} As a result of their vulnerabilities and heightened risk, they will falsely confess at an extreme rate, nine times more often than those without mental illness or disability, which means that 72% of the wrongful convictions will come from those who are mentally ill or disabled.\textsuperscript{54}

C. Race

The next prominent identity to show clear disparity in false confession rates is race. Of the false-confession convictions resulting in exoneration, 69% of them are racial-ethnic minorities.\textsuperscript{55} Composing more than two-thirds of proven false confession cases, it is clear that racial-ethnic minority strongly correlates to the risk of false confession. The Innocence Project, examining 375 DNA exonerees, broke down the racial profiles further, finding that 60% of the DNA exonerees were Black, 31% of the DNA exonerees were White, and 8% of the DNA exonerees were Latinx.\textsuperscript{56} Racial minorities in general are overrepresented in the justice system, but Black people are even more overrepresented, constituting 32% of the state and federal prisoner population in 2019.\textsuperscript{57} Due to systemic racism and the over-policing of Black communities, Black people already come into contact with the police and justice system at much higher rates than other races.\textsuperscript{58} But while Black people compose a disproportionate number of incarcerated people at 32%, their representation as false confessors is nearly double, at 60%.\textsuperscript{59} Representing the highest percentage of false confessors, Black people face the highest risk of falsely confessing.

Not ignoring, but setting aside the fact that Black people are already more likely to be arrested, why are they even more likely to falsely confess? The answer, unsurprisingly, is systemic racism and the individual biases of justice system actors. In her study, Sara Appleby found that “police participants incorrectly judged innocent Black suspects guilty 65% of the time, compared to only 30% of the time when judging innocent White suspects. Stated differently, for innocent Black suspects the odds of being mistakenly judged as guilty were four times higher than that of innocent White suspects.”\textsuperscript{60} Both verbal and non-verbal communication and cues that are “typical” of “Black behavior” are judged more

\textsuperscript{53} Mogavero, \textit{supra} note 47, at 302.
\textsuperscript{54} Gross &Possley, \textit{supra} note 7.
\textsuperscript{56} THE INNOCENCE PROJECT, \textit{supra} note 2.
\textsuperscript{58} Bryan Warde, \textit{Black Male Disproportionality in the Criminal Justice Systems of the USA, Canada, and England: A Comparative Analysis of Incarceration}, 17, 4 J. AFRICAN AM. STUD. 461, 462 (2013).
\textsuperscript{59} THE INNOCENCE PROJECT, \textit{supra} note 2.
\textsuperscript{60} Appleby, \textit{supra} note 55, at 108.
negatively and interpreted as more suspicious. Police officers perceive aspects of Black identity as implicating guilt, regardless of innocence. Specifically, “Black[] [people] engaged in less eye contact and smiled more than Whites, regardless of whether they were innocent or suspected of a crime. In addition, Black nonsuspects moved their hands more than Black suspects or Whites in either condition, and Black suspects had fewer speech disturbances than Black nonsuspects or Whites in either condition.” Here, “nonsuspects” refers to individuals not suspected of a crime. These behaviors, often read as indicators of guilt by police officers, occurred even more often when a Black suspect was interviewed by a White officer. These behaviors are a result of (1) anxiety and psychological arousal in response to threat, (2) self-regulatory efforts in response to expected stereotyping, and (3) cognitive load.

Black people are exposed to other vulnerabilities as a result of their communicatory tendencies. Black people are “more likely than others to adopt an indirect speech pattern” that is often used by other vulnerable populations. Directness in speech became essential to the preservation of rights. For example, in 1994, the Supreme Court ruled on the standard for invoking Miranda rights in Davis v. United States. There, the Court held that the invocation of the Miranda right to counsel must be unambiguous and unequivocal. As a result of their powerless status as a class throughout most of history, Black people speak more indirectly and are less likely to make unambiguous, unequivocal invocations of their rights. As a result, despite indirect attempts to request a lawyer or invoke their right to silence, police officers can press on with interrogation.

If the police mistakenly determine that someone is guilty, they will employ their interrogation tactics to their fullest extent in order to solicit a confession. Because Black people are more likely to be mistaken as guilty, they are more likely to undergo the intensities and pressures of guilt-pretended interrogation while innocent. Likewise, when undergoing interrogation, “indirect” requests

---

62 See Id. at 1547.
64 Id.
65 Id.
68 Id.
70 Id.
71 Drizin & Leo, supra note 12, at 918.
72 Najdowski, supra note 63, 574–576.
to invoke Miranda rights are likely to be ignored. As a result of these factors, Black people are at a significantly high risk for the solicitation of false confessions.

D. Women

Gender is another factor that can affect one’s risk of giving a false confession. Whereas men constitute the large majority of incarcerated people and the even larger majority of falsely confessed exonerees, women make up a small fraction of proven false confessors. Being male, however, rarely constitutes a “disadvantaged” identity through the lens of criminal justice system. Where male crime or violence is considered rational and normal aspects of the “male warrior” archetype aligned with expectations of masculinity, female crime or violence is perceived as emotional, irrational, and contradictory to social expectations. As a result, women suspected of crime are placed into a “female monster” archetype that contradicts expectations of femininity, putting them at a disadvantage. This female disadvantage in the criminal justice system extends to their disadvantage as an identity at risk to falsely confess.

Of the 365 false confession exoneration recorded in the last thirty-one years, only thirty of those exonerees are women. This misleading statistic does not mean that women are less likely to falsely confess; in fact, a collection of academic studies and controlled research amply support the conclusion that women are at a higher risk of falsely confessing than men. The lack of statistics to support this is a result of the general invisibility of women in the innocence

---

73 Strauss, supra note 69, at 805.
76 Id. at 6.
77 Id. at 5.
80 See id. Data and records for exonerated women do not include differentiation between cisgender women and transgender women. For the purposes of this research, it is assumed that women include cisgender and transgender women. There is no data currently to identify vulnerabilities that may be unique to transgender women and their risk to falsely confess as compared to cisgender women’s risk to falsely confess. Further research and extensive data collection would be needed to make this distinction and illuminate any potential vulnerabilities for the transgender identity.
movement. Elizabeth Webster and Jody Miller, researchers on wrongful convictions and intersectionality, argue that the innocence movement has been slow to recognize the wrongful convictions of women, and as a result of this lack of attention, the movement is missing the key factor of gender and how it affects wrongful convictions. This oversight is a result of paying disproportionate attention to crimes that are considered serious and violent and that are committed against strangers—crimes primarily committed by men.

Women are more likely to falsely confess than men, with Black females being more likely than White females to falsely confess. The currently identified rate of wrongfully convicted and exonerated women is not representative of what is likely a much higher rate of false convictions for women; this is because women are often convicted for “less serious” crimes that often do not involve the death penalty. As a result, women do not retain legal counsel following their conviction at the same rates that men on death row do. Without continued legal counsel secured for appeals, wrongful convictions and false confessions are not likely to be identified. Additionally, because of the higher rate of no-crime convictions for women, it is more difficult to prove their innocence because in “no-crime” cases, there is rarely DNA evidence, which is the most common and direct method to overturn a wrongful conviction. Here, “no-crime” cases refer to criminal cases for which no actual crime occurred, best depicted by the child abuse cases or murder cases involving Sudden Infant Death Syndrome (SIDS) or Shaken Baby Syndrome (SBS). Where medical science was not advanced enough to provide clarity on these issues, mothers were often held criminally responsible for actions they never committed. This invisibility only further the vulnerability of women as false confessors.

Why, despite the lower rate in false confession exonerations, are women more likely than men to falsely confess? Researchers identify several psychological and social factors that heighten women’s risk, including stereotypes imposed upon women, motherhood, and increased emotional awareness.

Female stereotypes contribute to women’s increased likelihood to confess to crimes they did not commit. The stereotypes of women as nurturers and

---

83 *Id.*
84 *Id.*
85 *Id.* at 993, fig. 6.
86 See Lewis & Sommervold, *supra* note 78, at 1045.
87 See id. at 1057.
88 See id.
89 *Id.* at 1056.
90 *Id.* at 1050, 1052, 1054, 1056.
91 *Id.* at 1056.
92 *Id.* at 1040, 1050; Webster & Miller, *supra* note 82, at 1030.
caregivers lead to expectations that women are passive. Women who do not fit within these socially imposed categories are more likely to conflict with societal expectations and be incorrectly judged as guilty of crime. Likewise, “emotional displays” by women that are misaligned with a police officer’s expectations of an innocent person (such as anger or frustration) are read as indications of guilt. The overall disposition of a woman, if not feminine enough to meet the societal expectations of the police officer interrogating them, leads that officer to misjudge them as guilty (similar to the way police officers are more likely to misjudge Black people as guilty). The “female monster” archetype clouds the perception of the interrogating police officer. As discussed in the context of race, if a police officer believes a suspect is guilty, they will subject that suspect to all of the interrogation tactics designed to solicit a confession—even if that person is in fact innocent. Under the intense pressure of a guilt-presumed interrogation, a false confession is more likely to be solicited.

In addition to sexist stereotypes, motherhood is a significant factor in women’s disadvantage in the criminal justice context. For women with children, the self-blame and grief of a mother paired with their concern for their children’s well-being were manipulated to produce false confessions. Stephen Jones, who researched women’s false confessions, discusses how family responsibilities weigh upon women and can pressure women to falsely confess; the data indicates that 66% of imprisoned women had dependent children under the age of eighteen at home. This serves as a strong incentive for women to attempt to avoid or minimize time spent in prison and away from their children. As a result, women are more likely to falsely confess and accept guilty plea agreements for crimes they did not commit, in exchange for reduced sentences and to avoid the risk of the maximum sentence if a trial went wrong.

Lastly, research identifies the emotional awareness of women as another contributing factor to their increased risk of falsely confessing. Psychologists reference women’s heightened awareness of emotional needs, stronger desire to cooperate, and tendency to acquiesce in the face of conflict, especially when in a position where they lack power, as contributing factors to the higher rates of female false confessions. As a result of these characteristics, women, when

93 Id. at 1040.
94 Id. at 1050.
95 Webster & Miller, supra note 82, at 1030.
96 Id. at 1029–30.
97 Sternadori, supra note 75, at 310–11.
98 Drizin & Leo, supra note 12, at 918.
99 Id.
100 Webster & Miller, supra note 82, at 1030.
101 Jones, supra note 81, at 82 (citing Prison Reform Tr., Bromley Fact File http://www.prisonreformtrust.org.uk/ (2009)).
102 Id.
103 Id. at 81.
under interrogation, are more likely to fold in the face of police authorities and submit to police tactics in an attempt to comply with what they interpret the police officer as wanting. 104 Tied to their emotional awareness, women are often more passive, and as a result, “more likely than others to adopt an indirect speech pattern” that is often used by powerless populations. 105 As already discussed, the Supreme Court’s ruling in Davis v. United States exacerbates this issue for women facing interrogations. 106 Women are more likely to speak indirectly, are more likely to fail to meet the standard of the unambiguous, unequivocal use of language to invoke their Miranda rights, and are, therefore, less likely to obtain the assistance of counsel or invoke the right to remain silent. 107 These tendencies, coupled with the aforementioned stereotypes and the pressures of motherhood, put women at a heightened risk for giving a false confession.

E. Economic Class

Economic class is suspected to be another contributing factor in the likelihood to falsely confess. Yet, there is insufficient data to determine the rates of false confessions by economic class. However, a brief discussion of this category as a potential, but currently unsubstantiated, disadvantaged identity is warranted. While no economic data exists specific to false confessions, it does exist for the overall population of incarcerated people in jails and prisons.

As of 2019, 80% of incarcerated people identify as low income. 108 In 2014, a study conducted by the Prison Policy Initiative found that incarcerated people had a median annual income of $19,185, which is 41% less than people of similar ages who are not incarcerated. 109 They go on to explain that “[t]he gap in income is not solely the product of the well-documented disproportionate incarceration of Blacks and Hispanics, who generally earn less than Whites... incarcerated people in all gender, race, and ethnicity groups earned substantially less prior to their incarceration than their non-incarcerated counterparts.” 110 These studies are further substantiated by the Bureau of Justice, which in 2000, reported that roughly 66% of federal felony defendants and 82% of state felony defendants were assigned a public defender or other court appointed or contracted

105 Ainsworth, supra note 66, at 261.
106 Strauss, supra note 69, at 805.
107 See Id.
110 Id.
counsel. Public defenders or assigned counsel are appointed by courts to represent defendants who are indigent, meaning they are not financially capable of retaining counsel due to their financial status. By definition, the rate of indigent defendants with court-appointed counsel is representative of the rate of impoverished defendants in the system.

Because the majority of individuals who come into contact with police and the prison system are low-income, it would logically follow that they would have higher rates of false confessions than their higher-income counterparts. But there is no data yet to confirm this. In addition to their higher rates of contact with the justice system, lower income individuals often have less access to legal counsel. While they have a right to an attorney, many jurisdictions do not provide public assigned defense for hours, days, or until a case has reached the courts, meaning low-income individuals do not always have access to an attorney during their interrogation. With no counsel, the option to talk in order to “help get you out” can seem more likely to succeed than saying nothing at all. While there is not enough evidence or data to support a conclusion on the direct impact of economic class on false confession rates, all of this information lends to the likelihood that poverty or low economic class is a disadvantaged identity that increases an individual’s likelihood to falsely confess.

F. Conclusion on Identities

Each of the identity categories established (age, mental disability or illness, race, and gender) provide clear insight as to which members face the most risk of confessing falsely under police interrogation. Young people, and especially juveniles under the age of eighteen, are at a significantly higher risk than the adult population. Individuals with mental disabilities or illness have an indisputably higher rate of false confession compared to neurotypical individuals possessing no mental illnesses or disabilities. Racial minorities, and specifically Black people, confess falsely at a rate much higher than White people. Finally, while women make up a smaller portion of exoneration data, research has established them as more vulnerable than men to give false confessions. These identities are disadvantaged under the lens of false confessions.

112 Id.
114 Id. at 1828–29.
115 Id. at 1828.
116 See supra discussion in Part II.
117 Id.
118 Id.
119 Id.
III. ANALYSIS: INTERSECTIONAL IDENTITIES AND FALSE CONFESSIONS

Each identity does not exist in a vacuum. Intersectionality is a sociological approach to analyze the “complexity in the world, in people, and in human experiences.”120 Approaching false confessions with a focus on intersectional identities allows for an in-depth examination of how the different identities discussed compound upon each other and influence the false-confession risk of individuals. Kimberle Crenshaw coined the term “intersectionality” in her article, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, where she discussed the intersection of race and gender for Black women.121 Crenshaw explained how identities intersect, stating “discrimination, like traffic through an intersection, may flow in one direction, and it may flow in another. If an accident happens in an intersection, it can be caused by cars traveling from any number of directions and, sometimes, from all of them.”122 Applying identities to this depiction, a person can be an intersection of two or more roads of identity, including race, gender, age, and mental condition.123

Crenshaw explains how discrimination cannot be fully understood without taking every disadvantaged identity of an individual into consideration.124 She established that focusing on a single axis of discrimination, such as just racism, “marginalizes those who are multiply-burdened and obscures claims that cannot be understood as resulting from discrete sources of discrimination.”125 An intersectional approach will allow for the identification of the most disadvantaged, multiply-burdened populations affected by the discrete sources of discrimination that culminate in the injustice of wrongful convictions through false confessions. Through an interdisciplinary approach, a solution focused on rectifying the issue of false confessions amongst these disadvantaged populations can be proposed.

With the disadvantaged identities of age, mental disability or illness, race, and gender established, an intersectional analysis is necessary to understand how these identities interact. What is intersectional analysis? As previously mentioned, Kimberle Crenshaw described intersectionality with a focus on Black women, whose intersectional identities of race and gender intersected, resulting in simultaneous racist and sexist discrimination.126 Crenshaw explains how discrimination of a class is defined by the experiences of the most privileged member of that class, stating,

---

120 *Patricia Hill Collins & Sirma Bilge, Intersectionality* 11 (2016).
122 *Id.* at 149.
123 *Id.*
124 *Id.*
125 *Id.* at 140.
126 Crenshaw, *supra* note 121, at 140.
Sex and race discrimination have come to be defined in terms of the experiences of those who are privileged but for their racial or sexual characteristics. Put differently, the paradigm of sex discrimination tends to be based on the experiences of White women; the model of race discrimination tends to be based on the experiences of the most privileged Blacks.127

As a result of the narrowly tailored notions of what constitutes discrimination of these classes, the least privileged, multiply burdened members of those classes (the people possessing more than one disadvantaged identity) face compounded discrimination.128

What does compounded discrimination look like? The wage gap in the United States provides a straightforward example of disadvantage resulting from compounded discrimination. In 2019, men earned an average hourly wage of $29.77.129 Women earned an average hourly wage of $23.74.130 Looking at these statistics, women are disadvantaged through the lens of the wage gap. Controlling for race, White people earned an average hourly wage of $29.01, where Black people only earned an average hourly wage of $21.31.131 Looking at these statistics, Black people are disadvantaged through the lens of the wage gap. Black women, possessing the intersecting wage disadvantages of race and gender, have compounded disadvantage, exemplified by their average hourly wage of $20.50, lower than both the average wage for women and the average wage for Black people.132 This numerical depiction of intersectional identities demonstrates how, when more than one disadvantaged identity is present in an individual, his or her disadvantage increases. Where with wages the compounding disadvantage is concrete and identifiable to the eye, compounding disadvantage of identities is more abstract and less visible. But the intersectional concept applies just the same. Individuals simultaneously occupy multiple identity categories, and individuals who fall into multiple disadvantaged identity categories are at a greater disadvantage.133 In addition to the compounded disadvantage, their lack of access to laws, protection, or redress for issues are often overlooked or invisible due to the intersectional discrimination at play.134

Researchers Elizabeth Webster and Jody Miller conducted a study in which they examined how two of the disadvantaged identities of race and gender intersect to result in a wrongful conviction.135 In this study, they explain that intersectional analysis concentrated on the production, reproduction, and resistance

---

127 Id. at 151 (emphasis in original).
128 Id.
130 Id.
132 Id.
134 Id. at x.
135 Webster & Miller, supra note 82, at 982.
of structural inequalities through social action requires understanding on the “micro” level and the “macro” level. They describe the micro level processes as “how each individual and group occupies a social position within interlocking structures of oppression.” They go on to explain how these micro level processes must be framed “in relation to the macro level connections linking systems of oppression such as race, class, and gender.” In their extensive case study, Webster and Miller found that both White and Black women were more likely than men of their corresponding race to be wrongfully convicted on the basis of misleading forensic evidence, inadequate legal defense, or false confessions. For false confessions specifically, Black women falsely confessed 24% more than White women. They identify how women, both Black and White, are wrongfully convicted at heightened rates for domestic crimes (such as abuse or death of a child or intimate partner), whereas Black women face an additional heightened rate of wrongful incarceration for “violent street crimes” such as murders, robberies, or home invasions. They discuss how the “violent street crimes” which Black women were convicted of were “very similar to those of African American men wrongfully convicted in street crime scenarios.” They conclude that the large proportion of Black female exonerees were at heightened risk due to the intersection of their gender and racial inequalities. How can the same analysis be applied to the intersections of age, mental condition, race, and gender with respect to false confessions?

On the micro level, consider a Black woman with two toddlers at home or a sixteen-year-old boy with bipolar disorder. The macro level systems of oppression that come into play here include racism, sexism, and the discrimination, indifference, or lack of care for the mentally ill or disabled and for juveniles. All of these biases are present and interlocking in the criminal justice system, as established in this research. When disadvantaged individuals come into contact with the criminal justice system and face interrogation for a crime, they encounter it not as the average person in a perfect world of equality, but as a person possessing one or more disadvantaged identities in a system that is inherently biased by these connecting, interlocking, oppressive structures.

With age, juveniles were proven to have higher suggestibility, limited (or lack of) understanding of their Miranda rights, and higher susceptibility to interrogation tactics, such as believing a police officer when they are being told they

---

136 Id.
137 Id.
138 Id.
139 Id. at 994.
140 Id. at 993.
141 Webster & Miller, supra note 82, at 997–98.
142 Id. at 1020.
143 Id. at 1025.
144 See id.
145 Id.
will get to go home if they just confess.146 As a result, children facing interrogation tactics intended for adults are at a higher danger of confessing to a crime for which they are innocent.147

For individuals with mental illness or disability, the risk factors established for them include their overrepresentation in the justice system, reduced understanding of Miranda warning, and lack of cognitive capacity, confusion, and disorganized thoughts.148 As a result of these factors, police are more likely to perceive them as guilty resulting in those with mental illness or disability having an increased likelihood to admit guilt to a crime they did not commit.149

Systemic racism results in police officers incorrectly judging Black people as guilty at a rate four times higher than they misjudge White people as guilty.150 Because Black people are more likely to be mistakenly presumed guilty by police, they, therefore, are more often interrogated under the presumption of guilt.151 Black people are also less likely to speak unequivocally and unambiguously enough to meet the standard necessary to invoke their Miranda rights.152 This, in addition to the over-policing and over-incarceration of Black communities as a whole, results in an increased likelihood of soliciting false confessions from a Black person.153

Finally, for women, several factors can play into their confessions. Deviation from sexist stereotypes of how women “should” be (nurturing, passive, caregivers) increases police perception of guilt.154 Women possess higher emotional awareness and are more likely to acquiesce in the face of conflict or in response to figures of authority.155 Additionally, women who are mothers are more easily manipulated into false confession due to their familial responsibilities.156 Women, like Black people, are also less likely to speak unequivocally and unambiguously enough to meet the standard necessary to invoke their Miranda rights.157 These factors that increase the risk of false confessions for women can exist independently or compound upon each other, depending on the individual.

In the 1970s, researchers began to explore the idea of “Double Jeopardy,” in which they considered the dual discrimination of sexism and racism that Black women face.158 As the research developed, other “Jeopardies” were suggested to

---

146 Haney-Caron et al., supra note 34, at 1969.
147 Id.
148 Mogavero, supra note 47, at 302–03.
149 Kassin et al., supra note 5, at 21–22.
150 Appleby, supra note 55, at 108.
151 Id.
152 Strauss, supra note 69, at 805.
153 See Najdowski, supra note 63, at 572.
154 Lewis & Sommervold, supra note 78, at 1046.
155 Jones, supra note 81, at 81.
156 Webster & Miller, supra note 82, at 980.
157 Strauss, supra note 69, at 805.
158 Valerie Purdie-Vaughns & Richard P. Eibach, Intersectional Invisibility: The Distinctive
characterize the other discriminatory factors warranting consideration. This area of study existed for the purpose of explaining how disadvantage accumulates for individuals with multiple disadvantaged identities and how this shapes the discrimination they face. Double and multiple jeopardy explains how individuals with multiple intersecting identities “will be subjected to more prejudice and discrimination than those with a single subordinate identity.”

Each discussed identity’s vulnerability is derived from a different social or psychological factor—no two identities share their explanation for heightened risk to falsely confess. As discussed in the wage example previously, the disadvantage, or “jeopardies” compounds. Structural racism results in the lower wage of Black people compared to White people, just as structural sexism results in the lower wage of women compared to men. For Black women, the double jeopardy of adding racism to sexism results in a wage even lower than that of an individual component, the result of subjecting her to “more prejudice and discrimination than those with a single subordinate identity.” This tangible, concrete depiction allows for the understanding of compounding disadvantage before applying it to less tangible concepts of identity. In the same way, the factors that make a woman more likely to falsely confess add to the factors that make a Black person more likely to falsely confess, which adds to the factors that make a mentally ill person falsely confess, which adds to the factors that make a juvenile falsely confess. As a result, multiple (or all) factors or “jeopardies” can be present in one individual. While this does not mean that a young, Black woman with a mental disability or illness will definitely falsely confess, she would be most at risk to do so.

Academia and scholarly research have yet to quantify the data on disadvantages, their intersections, and how they impact aspects of the criminal justice system such as false confessions. This research examined the database of the National Registry of Exonerations to quantify the data on the impact of the intersection of disadvantaged identities on false confessions. Using the case data accumulated there, this research isolated the 336 false confession exonerations. Upon isolating cases with false confessions, this data populates Tables 2 and 3. Worth repeating, the existing data on false confession rates is drawn from

---


159 Id.

160 Id.

161 Id.

162 Economic Policy Institute, supra note 129; Economic Policy Institute, supra note 131; Crenshaw, supra note 121, at 149.


164 Crenshaw, supra note 121, at 140.

165 Id.

166 Webster & Miller, supra note 82, at 981–982.
exonereations which, while providing the only reliable data for insight to false confessions rates, is not accurately representative of the rate of false confessions that largely go unrecorded or undiscovered.\textsuperscript{167} Additionally, understanding that women are significantly underrepresented in the innocence movement and, as a result, the false confession data, it must be understood that the rate of multiple disadvantages would increase significantly if women were proportionally represented in the data.\textsuperscript{168} The existence of data to conclusively establish low economic class as a disadvantaged identity, as previously discussed, would also be likely to significantly increase rates of compounded disadvantage.\textsuperscript{169} With these caveats in mind, Table 2 presents data on the rates of false confession of exonerees, showing those with and without reported disadvantaged identities. Table 3 presents data on the rates of compounding disadvantage amongst falsely confessed exonerees.

\begin{center}
\begin{tabular}{|c|c|c|}
\hline
Identity & \# of Falsely Confessed Exonerees & \% of Falsely Confessed Exonerees \\
\hline
No Disadvantaged Identities & 71 / 336 & 21.13\% \\
One or more Disadvantaged Identities & 265 / 336 & 78.87\% \\
\hline
\end{tabular}
\end{center}

\textsuperscript{170} See generally NAT’L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx (last visited Mar. 2021). Data was exported into a spreadsheet on March 28, 2021, in order to filter by the relevant categories of age, mental illness or disability, race, and gender. Each of the 336 falsely confessed exonerees were assigned a number of disadvantaged identities based upon these categories. All individuals over the age of eighteen, non-Black, male, and without mental illness or disability were assigned a number of zero. All individuals who were either under eighteen, Black, female, or with mental illness or disability, but with not combination of any other identity, were assigned the number 1. All individuals who possessed exactly two disadvantaged identities (female and Black; female and mentally ill or disabled; female and juvenile; juvenile and Black; juvenile and mentally ill or disabled; Black and mentally ill or disabled) were assigned the number 2. All individuals who possessed exactly three of the disadvantaged identities (female, Black, and juvenile; female, Black, and mentally ill or disabled; Black, mentally ill or disabled, and female; mentally ill or disabled, Black, and juvenile) were assigned the number 3. All individuals possessing all four disadvantaged identities (juvenile, mentally ill or disabled, Black, and female) were assigned

\textsuperscript{167} Kassin et al., \textit{supra} note 5, at 5.
\textsuperscript{168} Webster & Miller, \textit{supra} note 82, at 978.
\textsuperscript{169} Rabuy et al., \textit{supra} note 109.
TABLE 3

<table>
<thead>
<tr>
<th>Identity</th>
<th># of Falsely Confessed Exonerees</th>
<th>% of Falsely Confessed Exonerees</th>
</tr>
</thead>
<tbody>
<tr>
<td>One Disadvantaged Identity</td>
<td>149 / 336</td>
<td>44.35%</td>
</tr>
<tr>
<td>More than One Disadvantaged Identity</td>
<td>116 / 336</td>
<td>34.52%</td>
</tr>
</tbody>
</table>

Upon quantifying the data, it is clear that the massive majority, nearly 80%, of falsely confessed exonerees possessed one or more disadvantaged identities associated with a heightened risk for false confession. Where only 21% of false confessor possessed zero disadvantaged identities researched here, over one third of all falsely confessed exonerees possessed intersecting disadvantaged identities. While these numbers are striking, they are limited to the data available from exoneration cases, and as such, are not representative of the real-world risk to falsely confess, as previously discussed. If not for the general invisibility of women to the innocence movement, for example, or the lack of data to establish poverty as a disadvantaged identity, the rate of intersecting disadvantaged identities amongst false confessing exonerees would likely be much higher. However, as the most comprehensive dataset of false confession information, the quantified rates of false confession amongst intersecting identities is illuminating and corroborative of the conclusions drawn in this research. Over a third of falsely confessed exonerees had compounding disadvantages that resulted in their false confessions, and ultimately their wrongful convictions.

---

the number 4. Upon sorting by the number of disadvantaged identities, the values of the table were populated accordingly to quantify the number of falsely confessed exonerees without any disadvantaged identities and the number of falsely confessed exonerees with one or more disadvantaged identities. Percentages were rounded to the nearest hundredth of a percent.

---

171 See generally N.A.T.’L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View={FA66FDD5-5A68-4F8F-8A52-2C61F5BF9EA7}&FilterField1=FC&FilterValue1=8%5FFC&FilterField2=Group&FilterValue2=F (last visited Mar. 2021). Using the data from the methods detailed in Footnote 152, the values of the table were populated accordingly to quantify the number of falsely confessed exonerees with one identified disadvantaged identity and the number of falsely confessed exonerees with more than one disadvantaged identity. Percentages were rounded to the nearest hundredth of a percent.

172 See N.A.T.’L REGISTRY OF EXONERATIONS, supra note 170.

173 Id.; see also N.A.T.’L REGISTRY OF EXONERATIONS, supra note 160.

174 See Gross & Possley, supra note 7.

175 Webster & Miller, supra note 82, at 978.

176 See N.A.T.’L REGISTRY OF EXONERATIONS, supra note 171.
Paula Gray is a falsely confessed exoneree possessing all four disadvantaged identities. The 1978 case known as the “Ford Heights Four” involved the conviction of four men for abduction, rape, and two murders, with Paula Gray as their accomplice. Gray, a seventeen-year-old Black woman who was mentally disabled, was interrogated continuously over a two day period before she confessed to involvement in the crime. After confessing, she testified before a grand jury, but soon after, Paula recanted her confession. Upon recantation, the police charged Gray with the rape, murders, and perjury. Gray was sentenced to fifty years in prison, but secured her release in 1982 by agreeing to testify against her codefendants at their new trial. In 2001, Gray’s conviction was finally overturned, and in 2002, Illinois Governor George H. Ryan pardoned Paula based upon her innocence.

Paula Gray, being a juvenile Black woman with a mental disability, faced the most extensively compounded disadvantage in interrogation. At the age of seventeen, Paula Gray was highly susceptible to interrogation tactics and was not likely to have had an understanding of her rights. To compound upon that, Paula’s mental disability likely further reduced her understanding of Miranda warnings and the context of the interrogation, as well as hindered her with a lack of cognitive capacity, confusion, and disorganized thoughts. As a Black person, Paula was four times more likely to be mistakenly presumed guilty by police and subjected to interrogation under the presumption of guilt. Additionally, being both Black and a woman meant that Paula was not likely to speak unequivocally or unambiguously enough to meet the standard necessary to invoke her Miranda rights. Furthermore, as a woman, Paula was more likely to acquiesce in response to the authority of the police. Considering the findings of this research, her false confession was practically inevitable, as well as easily preventable. Preventing or identifying Paula’s false confession could have prevented the wrongful incarceration of both Paula and the other four innocent menwrongfully implicated in this crime.

---

177 Id.
179 Id.
180 Id.
181 Id.
182 Id.
183 Id.
184 Id.
185 See id.
186 See Mogavero, supra note 47, at 302.
187 Id. at 303–04.
188 Strauss, supra note 69, at 805.
189 Jones, supra note 81, at 81.
Intersectionality is an accepted sociological theory which states, in the context of social systems, that individuals possess multiple identities, and that those with multiple “disadvantaged” identities face compounded disadvantage.\(^{190}\) Through the lens of the justice system, the most prominent disadvantaged identities include race, age, mental illness or disability, gender, and arguably, economic class, as accumulated and discussed in Part II.\(^{191}\) When these identities are analyzed with a specific focus, in this case on false confessions, this research illuminates the heightened risk for each disadvantaged identity. Because these identities do not exist in a vacuum, individuals who possess more than one disadvantaged identity accumulate a higher risk of confessing falsely, thereby, amplifying their vulnerability to becoming a victim of the justice system.

IV. PROPOSAL

False confessions from people with disadvantaged identities is a clear and substantial issue of injustice. Several existing proposals for the mitigation or prevention of false confessions exist. Here, we will discuss proposals to mitigate false confessions by The Innocence project, leading researchers on false confessions, and the United States Supreme Court. We will examine how, while these proposals address strategies for mitigating false confessions generally, none address the disproportionate rate of false confessions coming from disadvantaged populations, the intersectionality of disadvantaged identities, or the discrimination occurring. After discussing the existing proposals, this research will propose the education of justice system actors at all levels, including police, prosecuting attorneys, defense attorneys, and judges, on the discrimination against disadvantaged identities that results in heightened vulnerability to falsely confess. Education at every level of the justice system would create four levels of filters through which false confessions should be identified and resolved prior to wrongful conviction, if not entirely prevented.

A. Existing Proposals

The Innocence Project is one of the leading organizations in the country seeking to identify, advocate for, and exonerate wrongfully convicted individuals.\(^{192}\) On the issue of false confessions, The Innocence Project advocates for the recording of interrogations in order to prevent wrongful convictions resulting from false confessions by increasing transparency and creating an indisputable account of the details of the interrogation.\(^{193}\) While the proposal to record interrogations could be useful for proving false confessions after the fact, it does not address the issue specifically for disadvantaged classes.\(^{194}\) Without addressing

\(^{190}\) See supra note 133.

\(^{191}\) See discussion in Section III, supra.

\(^{192}\) See THE INNOCENCE PROJECT, supra note 17.

\(^{193}\) Id.

\(^{194}\) See id.
the underlying systemic bias and discrimination at hand, the confessor will still be viewed with the same discriminatory bias resulting from their disadvantaged identity, with or without a recording. While the proposal to record would not resolve the issue at hand in its entirety, it could be used in conjunction with the reeducation proposed by this research.

Respected and well-published researcher on wrongful convictions, Richard Leo, and his co-researcher, Deborah Davis, studied false confessions extensively. They highlight several strategies for reducing and preventing false confessions, which include interrogation only when there is probable cause, educating law enforcement on the causes of false confessions, avoiding practices known to solicit false confession, and sensitivity training for those who are “psychologically vulnerable.” Their proposal is strong, and similarly can work in conjunction with the proposal of this research. While these overarching strategies would help to reduce the number of false confessions overall, outside of those deemed “psychologically vulnerable,” it does not address the disparity of false confessions rates for disadvantaged populations. Overlooking the specific risk of false confessions for people of color, women, children, the mentally ill or disabled, and those possessing more than one of these disadvantaged identities, allows the injustice of their heightened wrongful convictions to continue. Likewise, Leo and Davis concede that police have historically been unreceptive to procedure changes that reduce or limit their ability to interrogate as they seem fit, arguing that freedom to interrogate is necessary in their pursuit of suspects in a crime. Therefore, policy changes that limit a police officer’s ability to freely interrogate would be strongly opposed and difficult to achieve.

The Supreme Court of the United States has also contributed to the conversation around proposals to prevent false confession. While not so powerful today, in the famous *Miranda v. Arizona* case, the Supreme Court of the United States discusses the need for availability of attorneys for individuals subjected to interrogation. They suggest that the presence of attorneys at interrogation would help prevent false confessions, citing cases involving interrogations without attorneys present that resulted in the solicitation of false confessions. While the Supreme Court suggested that attorney presence at interrogations could help to prevent false confessions (along with citing several other needs for attorney presence and availability in the pre-arrest process), they stopped short of mandating defense attorney presence for all individuals undergoing interrogation. The Supreme Court instead opted for the existing *Miranda* warning system, in which


196 *Id.*

197 *Id.*


199 *Id.* at 455 n.24.

200 *Id.* at 457–458.
police officers must inform individuals of their “Miranda rights,” including their right to an attorney, and the individual must then invoke that right. The Court chose to forego mandatory attorney presence, most likely considering this more of a policy issue for the legislature, and instead chose the bare minimum of informing arrestees of their rights.

This system has long been undermined and proved ineffective, at least so far as preventing false confessions and other police abuses during interrogation. Several tactics have been created to undermine the purpose of Miranda warning, including “pre-interrogation interviews” (in which individuals are subjected to interrogation, but because they are not officially a suspect or under arrest, they are not yet given their Miranda rights) and the use of suggestions and lies such as “if you confess you can go home,” or “if you call an attorney, we won’t be able to help you anymore” by the police have undermined the purpose of the Miranda warnings. Additionally, several Supreme Court decisions followed in the years to come that severely weakened the Miranda v. Arizona decision, including Harris v. New York, Rhode Island v. Innis, and an unnamable amount of cases in which the Court held that requests for attorneys did not adequately verbalize their request to meet the Miranda standard and that suspects therefore did not invoke their rights.

While an attorney present to represent individuals subjected to interrogation is a valid and strong proposal to prevent false confessions, its implementation is complicated and unlikely to succeed any time soon. It would require widespread, bipartisan legislation or a landmark decision by the Supreme Court. The Supreme Court already declined to mandate attorney presence for interrogation in Miranda v. Arizona, a time when this type of decision would have been most likely to occur. In the 55 years since Miranda v. Arizona, the Court has moved further away from, rather than closer to, implementing this proposal. This proposal should be pursued, but a more immediate solution must be implemented now.

B. Proposal: Multi-Level Approach

False confessions continue to be solicited. Despite the proposals that have been circled false confessions for decades, the solicitation of false confessions,
and the wrongful prosecution of individuals, has continued. 210 This research proposes the education of justice system actors at all levels in order to address false confessions both in hopes of reducing their solicitation, and more likely, in addressing them after solicitation at every level in order to “catch” them before a disadvantaged person is wrongfully convicted as a result of their confession. To implement this proposal, the police, the prosecuting attorneys, the defense attorneys, and the judges must all be educated to act as filters meant to catch false confessions for disadvantaged individuals.

Under this proposal, police would act as the first filter for false confessions. Educating the police on the disadvantaged identities that are most vulnerable to false confession and how these identities intersect in individuals should help to mitigate their solicitation. 211 Approaching suspects with their vulnerabilities for false confession in mind would allow police to question without crossing the line to solicitation. 212 Modifying police tactics to take disadvantaged identities into consideration as false confession risk factors is a useful first step, but without full education on these risk factors and enthusiastic implementation and adherence to policies to address the solicitation of false confessions to extermination, false confessions will still happen. Education and action at escalating levels of the justice system is imperative to filter the false confessions that police solicit.

Upon solicitation of a false confession, prosecutors are the next filter. Prosecuting agencies have prosecutorial discretion, meaning they determine which cases will be filed and which will not. 213 By educating prosecutors on the increased risk of false confessions with intersectional, disadvantaged identities, this research can contribute to reassessing the valuation of confession evidence from its current gold standard. Prosecutors should consider the intersecting, disadvantaged identities of suspects who confess and approach their confessions as evidence requiring deeper scrutiny. Increasingly advanced scrutiny should be applied to individuals with multiple disadvantaged identities, when contradictory evidence exists, or when there is a lack of supporting evidence to a confession. Shouldeering the responsibility of determining which cases to deny and which to prosecute, prosecuting attorneys who are educated on the effects of intersecting identities on false confessions are in a unique position to filter out and prevent the prosecution of innocent suspects. 214

If a false confession is solicited by the police, and the case is prosecuted by the prosecuting agency, defense attorneys are the next filter in the line of defense for preventing the wrongful conviction of someone who has falsely confessed.

210 See Drizin & Leo, supra note 12, at 929.
211 See Kassin et al., supra note 5, at 30–31.
212 See id.
213 Steven Chong, Just., Sup. Ct. of Sing., The Role and Duties of a Prosecutor—The Lawyer Who Never “Loses” a Case, Whether Conviction or Acquittal, 2 (Nov. 10, 2011).
Defense attorneys should be acutely aware of the intersectional identities of their clients and the disadvantages these identities may pose. Confessions from high-risk individuals should raise a red flag for defense attorneys. The overall prevalence of false confessions in wrongful convictions "strongly suggests that fact finders sometimes risk overvaluing or misinterpreting these kinds of evidence."\(^{215}\) False confession risk should be cited at all relevant stages of a case, including motions to suppress confession evidence, through expert witness testimony, in closing arguments, and in jury instructions. Providing tools to the fact-finder to understand the social and psychological evidence behind false confessions in disadvantaged identities "may give the jury better tools for assessing probative value more accurately," and "may enable savvier assessment of [this kind] of proof . . . helping fact finders to assess these kinds of evidence with an informed, critical eye."\(^{216}\) The defense attorney should make every effort to highlight the heightened risk of false confession for the defendant and the unreliability of confession evidence with high-risk individuals possessing intersectional, disadvantaged identities.

Finally, if a false confession is solicited, prosecuted, and taken to trial, judicial education is the final necessary filter for false confessions. Judges determine whether there is probable cause to arrest, they hear the defense’s motion to suppress evidence and will determine whether a false confession will be admitted or whether it is more prejudicial than it is probative, judges will determine which instructions will be approved for submission to the jury in a trial, and judges may also act as the fact finder in bench trials.\(^{217}\) As the last filter for false confessions, judges must be educated to take the intersectional identities of defendants into consideration when making the aforementioned decisions, rulings, or findings. Without an educated and understanding judge, the efforts of the defense attorney may not be sufficient to bypass the perceived gold-standard of false confessions in a trial.

Why is the multi-level proposal necessary? Every level of the justice system should be aware and educated on false confessions and the heightened risk for individuals with intersectional, disadvantaged identities. Society’s inclination to accept confessions as indisputable proof of guilt is misplaced, as the data and research here proves. It is essential to educate justice system actors and bring them into the conversation around false confessions in order to begin addressing it at every level. Filtering confessions through four levels of actors with a lens focused on intersectional identities could help to eradicate the wrongful convictions of falsely confessed, disadvantaged defendants.


\(^{216}\) Id.

V. COUNTERARGUMENTS

Wrongful convictions are the single greatest injustice of the criminal justice system, stripping innocent people of their freedoms and sowing doubt in the system. As this research has shown, false confessions from people with disadvantaged identities are a significant, causal factor in wrongful convictions. Some, however, may argue that false confessions are not a cause worth addressing. The fact that “most suspects who falsely confess—probably the great majority—are never convicted at all” and that “[i]n most, charges were dismissed before trial or never filed at all because of indisputable proof of innocence” can be used to argue that the majority of false confessions are resolved through further investigation and do not result in a wrongful conviction.\(^{218}\) While most false confessions may not make it to prosecution, too many do, and too many of those that are prosecuted are found guilty. Twelve percent of exonerations’ cases involved false confessions.\(^{219}\) Any one person in prison for a crime they did not commit is a failure of the justice system; 336 people were failed by the justice system due to solicitation of, and reliance on, false confessions.\(^{220}\)

With the continuing advancements in science and technology, some may argue that police investigation won’t need to rely on confessions and that the issue of false confessions may soon be moot. The reliability and power of “hard” evidence like video surveillance or DNA could soon replace the “gold standard” of confession evidence. While that day may come, of the 104 DNA exonerations with false confessions (as of 2018), twenty-three (or 22%) of them had exculpatory DNA evidence available at the time of their conviction.\(^{221}\) Despite the presence of the exculpatory DNA evidence, the false confessions were enough to result in their wrongful conviction.\(^{222}\) While DNA is a powerful resource as evidence in proving, or disproving, the guilt of suspects, these statistics prove that 22% of the time, DNA evidence is not strong enough to overcome the power of a false confession.\(^{223}\) The focus on DNA evidence to corroborate guilt is not misplaced, but it is not the end-all solution for preventing the wrongful conviction of the disadvantaged populations who falsely confess.

False confessions must be accepted as a significant issue in the justice system. In considering the issue of false confessions, specific attention must be directed to resolving the disparity of false confessions from disadvantaged identities, as they contribute the massive majority of false confessions and are most at risk to admit guilt to a crime they did not commit. The fact that even more people falsely confess than are prosecuted and convicted only further supports the fact that false confessions are a larger, more common issue than the average person suspects. While the advancement in technology or science may one day resolve

\(^{218}\) Gross & Possley, supra note 7.

\(^{219}\) Nat’l Registry of Exonerations, supra note 20.

\(^{220}\) Id.

\(^{221}\) Id.

\(^{222}\) The Innocence Project, supra note 2.

\(^{223}\) See id.
the issue of false confessions, the system meant to uphold justice cannot wait for its injustices to resolve themselves. The most realistic, comprehensive path to address the issue of false confessions from disadvantaged populations is through the education and action of all justice system actors.

CONCLUSION

The “gold” standard of confessions is fool’s gold. The phenomenon of false confessions is not as rare or insignificant as the general population believes. While a database of all false confessions made in interrogation does not exist, research proves that false confessions occur in police interrogations at rates much higher than the amount discovered post-exoneration. Of the existing false confession data, mostly deriving from exoneration cases, data shows that gender, race, age, and mental disability/illness impact the risk of false confession significantly. It also shows that nearly 80% of falsely confessed exonerees had one or more disadvantaged identities, and over one third had multiple disadvantaged identities.224 The intersection of these identities compounds the risk that the individual will falsely confess and increases their likelihood of being convicted wrongfully.

If the education proposal here is enacted successfully at all levels of the justice system, the risk of wrongfully prosecuting and convicting disadvantaged populations based upon false confessions would be dramatically reduced, if not eliminated. Any wrongful conviction is a failure of the justice system. Police, prosecutors, defense attorneys, and judges are responsible for rectifying these injustices. If the system is unable or unwilling to enact drastic changes to correct the system in such a way that false confessions no longer occur, then the system must be prepared to be educated and take action to protect the members of the community most vulnerable to falsely confess. Over one third of the known wrongful convictions based upon false confession could have been prevented by recognizing their multiple disadvantaged identities.225 How many more multiple disadvantaged people are still wrongfully incarcerated? How many more will face the same, avoidable fate if no action is taken?

224 See Nat’l Registry of Exonerations, supra note 170; see also Nat’l Registry of Exonerations, supra note 171.
225 Id.