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CONFESSIONS AFTER *CONNELLY*: AN EVIDENTIARY SOLUTION FOR EXCLUDING UNRELIABLE CONFESSIONS

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INTRODUCTION

No one supports the introduction of false or unreliable confessions[1] at criminal trials, for they can visit enormous damage on individual defendants and the common good. For much of our history, the exclusion of unreliable confessions was accomplished as a matter of constitutional voluntariness. With the 1986 decision in *Colorado v. Connelly*,[2] the Supreme Court instructed that an evaluation of a confession's reliability was instead to be addressed solely as a matter of state evidentiary law. The rules of evidence, however, were not up to the task twenty years ago, and nothing of significance has happened since to make them better able to shoulder this burden. Accordingly, our evidentiary rules must be augmented to respond to *Connelly*'s challenge, and this Article proposes a new rule to fill the void.

The subject matter of this Article—the criminal justice system's treatment of unreliable confessions in light of *Connelly*—is especially appropriate for two reasons. First, and as noted above, *Connelly* recently celebrated its twentieth

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1. For purposes of this Article, a confession is considered to be "false" if it is factually and materially false. A confession is considered to be "unreliable" if it is too likely to be false to be considered by the fact finder.

2. 479 U.S. 157 (1986).

anniversary. This passage of time is long enough to allow for an informed retrospective of the decision but not so long that the opportunity for meaningful reform has lapsed.

Second, an examination of how to better exclude unreliable and false confessions, which this Article undertakes, is an appropriate companion piece to "Rethinking Police Interrogation: Encouraging Reliable Confessions While Respecting Suspects' Dignity,"[3] published in 2006. In that article, I proposed changes to police interrogation practices, including *Miranda*[4] warnings, that encourage the rendering and reception of reliable confessions. Just as this earlier article suggests reforms to maximize truthful confessions, this Article proposes reforms to minimize false confessions. These complementary ends serve a larger goal, which is the defining purpose of a criminal trial: to search for the truth.

Part I of this Article presents an overview of the phenomena of false confessions. It begins by describing the inordinate impact of confession evidence, regardless of its truthfulness. It then presents statistical evidence regarding the prevalence of false confessions. It concludes by surveying some of the causes of false confessions besides police coercion.

Part II reviews the historical treatment of unreliability and the standards used to exclude unreliable confessions from the jury. It starts with the common law's correlation of reliability and voluntariness and then traces the gradual separation and, with *Connelly*, the ultimate decoupling of these concepts. It also explains how *Miranda*'s concern about the inherent coerciveness of custodial interrogation does not adequately address the problem of false confessions.

Part III considers the present evidentiary rules that plausibly might be invoked to guard against the admission of unreliable confessions. It describes how these rules are insufficient to attain this goal, even if they were given a more robust interpretation and application as suggested by one commentator.

Finally, Part IV proposes a new evidentiary rule for excluding unreliable confessions. It responds to the challenges of *Connelly* in a manner that effectively culls confessions that are too unreliable, maintains consistency with the rules of evidence generally, and respects the discretion traditionally exercised by trial judges and the role of the jury. The proposed rule is flexible and thus can be adapted to a variety of situations and circumstances. Moreover, its application can be shaped and developed over time with the benefit of experience. Before evaluating the merits of the proposed rule, however, it is useful to begin by considering the phenomena of false confessions.

3. Eugene R. Milhizer, *Rethinking Police Interrogation: Encouraging Reliable Confessions While Respecting Suspects' Dignity*, 41 VAL. U. L. REV. 1 (2006).

4. The so-called *Miranda* warnings originate from *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966), in which the Supreme Court held that statements obtained during a custodial interrogation cannot be used at trial unless the prosecution demonstrates compliance with procedural safeguards securing the privilege against self-incrimination.

I. THE IMPACT, PREVALENCE, AND REASONS FOR FALSE CONFESSIONS

The famous and yet-unsolved JonBenet Ramsey murder case illustrates the disturbing reality of false confessions.[5] When John Mark Karr was arrested in Thailand on August 16, 2006, he was widely regarded as a suspect for Ramsey's murder.[6] According to Thai police, Karr confessed to the crime when he was arrested[7] and "told investigators he drugged and sexually assaulted JonBenet before accidentally killing her."[8] The evidence already gathered, however, contradicted his confession. As a consequence, on August 28, the Boulder (Colorado) District Attorney's Office announced that its case against Karr had been vacated.[9] According to District Attorney Mary Lacy, "[t]he DNA associated with the victim in this case does not match John Mark Karr," and there was "circumstantial evidence that Mr. Karr spent Christmas with his family in Atlanta, Georgia."[10]

John Mark Karr was fortunate that his confession was so swiftly discredited. Karr's quick exoneration can be largely attributed to three reasons. First, the DNA evidence did not match.[11] Second, at the time of Karr's false confession, the police and the prosecutor had already discovered substantial evidence that undermined its credibility. Third, because of the intense media scrutiny surrounding the Ramsey case,[12] it is unlikely that Karr's prosecution would be

5. Celebrated cases are especially likely to generate false confessions. Over 200 people falsely confessed to the kidnapping and murder of Charles Lindbergh's baby, more than 30 people falsely confessed to the 1947 murder and mutilation of actress Elizabeth Short (the "Black Dahlia"), and 6 concentration camp prisoners falsely confessed to stealing Heinrich Himmler's pipe. Richard P. Conti, *The Psychology of False Confessions*, 2 J. CREDIBILITY ASSESSMENT & WITNESS PSYCHOL. 14, 20 (1999). A notorious and more recent example is the so-called Central Park Jogger Case, in which five teenage boys confessed to, and were convicted of, the sexual assault of a jogger in New York's Central Park in 1989. Sharon L. Davies, *The Reality of False Confessions—Lessons of the Central Park Jogger Case*, 30 N.Y.U. REV. L. & SOC. CHANGE 209, 209-11 (2006). Thirteen years later, the real culprit, a known serial rapist and murderer, confessed that he alone had committed the crime. *Id.* at 220. Further investigation confirmed the truthfulness of this later confession, thereby exonerating the teenagers. *Id.* at 220-21. Unfortunately, four of the five boys had already served their prison sentences to completion. *Id.* at 220.

6. Brittany Anas, *JonBenet Suspect Is in Custody*, BOULDER DAILY CAMERA, Aug. 17, 2006, at A1. Ramsey's body was found beaten and strangled on December 26, 1996, in her family's Boulder, Colorado, home. Despite the considerable resources and attention focused on the crime, it remained unsolved and was regarded as a "cold case" at the time of Karr's arrest. Judith Graham, *Karr's Televised Confession Raises Questions*, CHI. TRIB., Aug. 17, 2006, at A1.

7. Cecilia M. Vega, *Doubts About His Story – Case Not Closed*: *Authorities Caution Against Speculation Despite Karr's Story*, S.F. CHRON., Aug. 18, 2006, at A1.

8. *Id.*

9. Press Release, Boulder County Dist. Att'y Office, People vs. Karr Case Vacated (Aug. 28, 2006) (on file with author).

10. *Id.*

11. See *infra* note 55 and accompanying text for a discussion of DNA evidence and its usefulness in the field of criminal justice.

12. To illustrate how widely the case is followed, a Google search of the name "JonBenet Ramsey" retrieves 306,000 hits. Google, http://www.google.com (input "JonBenet Ramsey") (last

undertaken without solid corroborating evidence.

Many cases involving false confessions are not so accurately or promptly resolved. Quite to the contrary, confessions of even questionable reliability are often treated as dispositive by police, prosecutors, judges, juries, and even defense attorneys.[13] This treatment can frustrate and pervert the search for the truth about a suspect's or defendant's guilt, which is the defining purpose of a criminal investigation and trial.[14] When the truth is disserved, innocents are wrongly tried and convicted, the guilty remain free to commit other crimes, and victims are denied justice.

Part I of the Article estimates the prevalence of false confessions and surveys the reasons why people falsely confess. Before doing this, it is useful to begin by assessing the impact of confession evidence generally.

A. The Impact of Confession Evidence

Confessions are uniquely powerful evidence of guilt at a criminal trial. Common sense suggests that a person will not willingly confess to a crime unless the person is guilty. This assumption is widely accepted by police, prosecutors, defense attorneys, and judges.[15] Juries are especially likely to accept confessions at face value.[16] As one commentator put it, "confession evidence is a

visited Nov. 28, 2008). A search of a slightly misspelled version of the name "JonBenet Ramsey" retrieves 363,000 hits. Google, http://www.google.com (input "Jon Benet Ramsey") (last visited Nov. 28, 2008). A search of the name "John Mark Karr" retrieves 268,000 hits. Google, http://www.google.com (input "John Mark Karr").

13. *See* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 922 (2004) ("Once police obtain a confession, they typically close the investigation, clear the case as solved, and make no effort to pursue other possible leads . . . . When there is a confession, prosecutors tend to charge the defendant with the highest number and types of offenses and are far less likely to initiate or accept a plea bargain to a reduced charge. . . . Defense attorneys are more likely to pressure their clients who have confessed to waive their constitutional right to a trial and accept a guilty plea to a lesser charge. Judges are conditioned to disbelieve claims of innocence and almost never suppress confessions . . . . [T]he jury will treat the confession as more probative of the defendant's guilt than virtually any other type of evidence . . . ." (footnote omitted)).

14. *See* Milhizer, *supra* note 3, at 6 ("[T]ruthful confessions are singularly capable of promoting the search for truth, which the Supreme Court has described as a 'fundamental goal' of the criminal justice system and the central purpose of a criminal trial." (footnotes omitted) (quoting United States v. Havens, 446 U.S. 620, 626 (1980), and citing Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986), and United States v. Hobles, 422 U.S. 225, 230 (1985))).

15. *See* Drizin & Leo, *supra* note 13, at 922 (commenting on assumption of confessor's guilt); H.C. UNDERHILL, A TREATISE ON THE LAW OF CRIMINAL EVIDENCE § 146, at 278 n.57 (2d ed. 1910) (explaining that "the confessions of persons accused of crime have been held to be evidence of the very highest character, upon the theory that no man would acknowledge that he had committed a grave crime unless he was actually guilty, but experience teaches that this theory is a fallacy, for it is a fact that numbers of persons have confessed that they were guilty of the most heinous crimes" (internal quotation marks omitted)).

16. *See, e.g.*, Drizin & Leo, *supra* note 13, at 922 (noting jury will treat confession as most probative type of evidence); 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, 476 (1988) (noting that juries find confession evidence as most damning); Welsh S. White, *False Confessions and the Constitution: Safeguards*

prosecutor's most potent weapon—so potent that . . . 'the introduction of a confession makes the other aspects of a trial in court superfluous.'"[17] The Supreme Court, lower courts, various legal commentators, and psychological studies have recognized the singularly decisive impact of confession evidence.

In *Arizona v. Fulminante*,[18] the Supreme Court considered whether the harmless error rule should apply to the improper admission of coerced confessions.[19] Although the Court's holding was limited to *coerced* confessions and authorized reviewing improperly admitted confessions under the harmless error rule,[20] its reasoning recognized and underscored the dramatic influence of confession evidence.[21] The dissenting Justices in *Fulminante* argued that coerced confessions, by their nature, should not be subject to the harmless error rule because they are uniquely damaging.[22] The majority countered that "[t]he admission of an involuntary confession—a classic 'trial error'—is markedly different from the other . . . constitutional violations" that are evaluated using the harmless error rule.[23] Although the majority conceded that "in particular

Against Untrustworthy Confessions, 32 HARV. C.R.-C.L. L. REV. 105, 138-39 (1997) (stating that juries will not believe that anyone who did not actually commit crime would confess).

17. Saul M. Kassin, *The Psychology of Confession Evidence*, 52 AM. PSYCHOLOGIST 221, 221 (1997). As two scholars put it, "[w]hat could have more impact during the course of a trial than a revelation from the witness stand that the defendant had previously confessed to the crime? The truth is, probably nothing." Saul M. Kassin & Lawrence S. Wrightsman, *Confession Evidence*, *in* THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE 67, 67 (Saul M. Kassin & Lawrence S. Wrightsman eds., 1985); *accord* MCCORMICK ON EVIDENCE § 148.5 (Edward C. Cleary et al. eds., 1972) ("[T]he real trial, for all practical purposes, occurs when the confession is obtained.").

18. 499 U.S. 279 (1991).

19. *Fulminante*, 499 U.S. at 287-88, 312. While imprisoned on unrelated charges in New Jersey, Fulminante confessed to a paid FBI informant, Sarivola, to the murder and sexual assault of his eleven-year-old stepdaughter in exchange for protection from other inmates. After he was released from prison, Fulminante confessed in somewhat more detail to Sarivola's then-fiancée. *Id.* at 282-84.

20. *Id.* at 309-12. The Court has "rejected the argument that the Constitution requires a blanket rule of automatic reversal in the case of constitutional error[] and concluded instead that 'there may be some constitutional errors which . . . may . . . be deemed harmless.'" Brecht v. Abrahamson, 507 U.S. 619, 630 (1993) (quoting Chapman v. California, 386 U.S. 18, 22 (1967)).

21. Because Justices Kennedy and Scalia joined parts of both opinions, each opinion is somewhat fractured. *See Fulminante*, 499 U.S. at 281 (explaining order of opinion). Justice White's opinion, which consisted of four parts, constitutes the majority opinion for all issues except whether the harmless error rule applies to the wrongful admission of confessions, for which Chief Justice Rehnquist wrote the majority opinion. *See id*. at 282 (noting organization of Justice White's opinion). In his dissent, Justice White was joined by Justices Marshall, Blackmun, and Stevens. *Id*. at 288. As to the ultimate holding that the admission of the confession at issue was not a harmless error, Chief Justice Rehnquist dissented, along with Justices Scalia and O'Connor. *See id*. at 312 (arguing that majority made incorrect conclusion).

22. *Id*. at 288-89 (White, J., dissenting).

23. *Fulminante*, 499 U.S. at 309 (Rehnquist, C.J., opinion of the Court). The Court identifies several errors that are not subject to the harmless rule: "deprivation of the right to counsel at trial," "a judge who was not impartial," "unlawful exclusion of members of the defendant's race from a grand jury," violation of "the right to self-representation at trial," and "the right to public trial." *Id.* at 309-10 (citing Vasquez v. Hillery, 474 U.S. 254, 254-55 (1986); Waller v. Georgia, 467 U.S. 39, 39-40 (1984); McKaskle v. Wiggins, 465 U.S. 168, 173 (1984); Gideon v. Wainwright, 372 U.S. 335, 339 (1963); Tumey v. Ohio, 273 U.S. 510, 535 (1927)). The Court describes such errors as "structural defect[s]

cases [a confession] may be devastating to a defendant," it nevertheless held that whether an errant admission is harmless is to be determined by a reviewing court on a case-by-case basis.[24] Accordingly, all of the Justices in *Fulminante* agreed about the potentially decisive power of confession evidence in general and that the wrongful admission of the specific confession at issue in that case was *not* harmless given the special capacity of confession evidence to influence the jury.[25] As Justice White explained:

> A confession is like no other evidence. Indeed, "the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. . . . [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, *confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so*."[26]

Other courts, in various contexts, have likewise recognized the dramatic power of confession evidence. Some lower federal courts and state courts have held that admission of an illegally obtained confession was not a harmless error.[27] Other courts have decided that a legally obtained and admitted confession rendered other significant constitutional errors harmless.[28] Several

affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Id.* at 310.

24. *Id.* at 312. For Rehnquist, the facts of the case clearly demonstrated that wrongful admission of a confession constituted harmless error. Rehnquist's *dissent* argued that the existence of a second, perhaps more credible confession that was not the product of coercion "seems . . . to be a classic case of harmless error." *Id.* (Rehnquist, C.J., dissenting).

25. The Justices' disagreement in *Fulminante* was limited to whether the harmless error rule should apply only to structural defects or to all potentially fatal evidentiary errors; the Court ultimately held that the harmless error rule may be applied to confession evidence. *Compare Fulminante*, 499 U.S. at 310 (Rehnquist, C.J., opinion of the Court) (holding that harmless error rule only applies to "structural defect[s] affecting the framework within which the trial proceeds"), *with id.* at 289 (White, J., dissenting) (arguing that "a coerced confession is fundamentally different from other types of erroneously admitted evidence to which the rule has been applied").

26. *Id.* at 296 (White, J., opinion of the Court) (alteration in original) (emphasis added) (quoting Bruton v. United States, 391 U.S. 123, 139-40 (1968)).

27. *See, e.g.*, Zappulla v. New York, 391 F.3d 462, 473-74 (2d Cir. 2004) ("The fact that the evidence at issue is a signed detailed confession should weigh heavily against finding that its erroneous admission was harmless."); United States v. Ventura-Cruel, 356 F.3d 55, 64 (1st Cir. 2003) (holding that admission of confession given pursuant to subsequently vacated plea bargain was not harmless error); United States v. Leon-Delfis, 203 F.3d 103, 112 (1st Cir. 2000) ("Confessions are by nature highly probative and likely to be at the center of a jury's attention."); Henry v. Kernan, 197 F.3d 1021, 1030 (9th Cir. 1999) ("No other evidence of intent could have impressed the jury in the same way that defendant's own statements did . . . ."); Payne v. State, 854 N.E.2d 7, 16-17 (Ind. Ct. App. 2006) ("A confession is like no other evidence. . . . It is undeniable that Payne's own words and demeanor . . . had such a profound impact on the jury that we may justifiably doubt the jurors' ability to put it out of their mind even if told to do so."); People v. Dunn, 521 N.W.2d 255, 261 (Mich. 1994) ("Often . . . when the defendant confesses, there can be little doubt concerning his guilt.").

28. *See, e.g.*, United States v. Carpenter, 403 F.3d 9, 12-13 (1st Cir. 2005) (noting that erroneous jury instruction "was harmless in light of the overall strength of the government's case," based in part on defendant's oral confession and fact that "it is entirely reasonable to conclude that the jury would

state supreme courts have concluded that confession evidence alone exceeds propensity evidence in its prejudicial effect on a jury.[29] And courts in at least one state have held that even an accomplice's confession can have such a powerful impact on juries that its erroneous admission is not harmless.[30]

Empirical research has confirmed the unique power of confession evidence. Admittedly, a confession is usually accompanied by other inculpatory evidence, so it is difficult, if not impossible, to isolate a confession as the reason for the conviction in a given case.[31] Studies of confessions that are subsequently proven false, however, can provide some insight about their impact. A 1998 study of sixty cases of documented false confessions found that twenty-two (36%) of the false confessions studied resulted in a conviction at trial and seven (12%) others caused the defendant to plead guilty.[32] By comparison, only eight (13%) cases resulted in an acquittal.[33] In the remaining twenty-three (38%) cases, the charges were dropped before trial, usually because other evidence emerged that exonerated the suspect or because the judge suppressed the confession due to a lack of corroborating evidence.[34] A more recent 2004 study of 125 false confessions, many of which came to light as a result of DNA evidence, found that 44 (35%) of these false confessions led to a conviction, either by a trial on the merits (30, or 24% of all the cases) or a guilty plea (14, or 11% of all the cases).[35] Only 7 (5%) cases resulted in acquittal, while in 64 (51%) cases charges were dropped prior to trial.[36] Given that both of these studies focused exclusively on confessions that were subsequently proven or shown likely to be false,[37] it is startling that between one-third and one-half of the cases surveyed

accord it considerable weight"). Similarly, in *Lufkins v. Leapley*, 965 F.2d 1477, 1482-83 (8th Cir. 1992), an alleged violation of Sixth Amendment right to confront witnesses was held harmless "beyond reasonable argument" because of the existence of a detailed confession. According to the court, "[t]he 'indelible impact' that a full confession may have on a trier of fact cannot be understated." *Id.* at 1482 (quoting *Fulminante*, 499 U.S. at 313 (Kennedy, J., concurring)). The court continued that "in cases where the existence of the crime has been established, the guilt of the accused may stand on nothing more than the defendant's otherwise uncorroborated confession." *Id.*; *cf.* State v. Walton, 41 S.W.3d 75, 92-94 (Tenn. 2001) (holding that police were unlikely to abuse Tennessee common law allowing admission of nontestimonial fruits of confession that, while not coerced, technically violated *Miranda*, because "[i]t is difficult to believe that law-enforcement officers would risk exclusion of a confession, the most probative and powerful evidence of guilt").

29. *E.g.*, State v. Kerwin, 742 A.2d 527, 530 (N.H. 1983) (finding only confession evidence would have greater prejudicial effect on jury than evidence of defendant's prior criminal offense); Commonwealth v. Spruill, 391 A.2d 1048, 1050 (Pa. 1978) (same); State v. Mohapatra, 880 A.2d 802, 811 n.10 (R.I. 2005) (Robinson, J., concurring in part and dissenting in part) (same).

30. State v. Alvarez-Lopez, 98 P.3d 699, 710 (N.M. 2004); *see also* Madrigal v. Bagley, 413 F.3d 548, 552 (6th Cir. 2005) (holding that admission of accomplice's confession was not harmless error because confession played important role in prosecution's case).

31. Leo & Ofshe, *supra* note 16, at 434.

32. *Id.* at 478.

33. *Id.*

34. *Id.* at 473-76.

35. Drizin & Leo, *supra* note 13, at 953.

36. *Id.*

37. *Id.* at 925; Leo & Ofshe, *supra* note 16, at 449, 455.

resulted in a conviction. Virtually every scholar who has addressed the subject agrees that confession evidence is singularly potent in achieving a guilty verdict.[38]

Psychological research has likewise demonstrated the unique power of confession evidence. One study found that confessions are more prejudicial than other powerful forms of evidence, such as eyewitness identifications and character testimony.[39] Other studies have shown that confessions "tend to overwhelm alibis and other forms of exculpatory evidence" and that "prosecutors [often] refuse to concede innocence even after DNA tests unequivocally absolve the wrongfully convicted confessor."[40]

Several reasons have been offered to explain why jurors are unlikely to believe that a defendant who confessed could nonetheless be innocent. First, jurors are prone to commit a "fundamental attribution error,"[41] which leads them to misattribute the cause of the confession to being internal to the confessor (e.g., actual guilt) while discounting external situational factors (e.g., police coercion, desire for notoriety, protection of the real perpetrator).[42] Second, because confessing appears to conflict with a defendant's self-interest, jurors assume that the defendant would not falsely confess absent police misconduct.[43] Third, jurors tend to attach greater credibility to testimony based on personal knowledge, and a defendant's confession, more than other types of evidence, ostensibly exhibits first-hand knowledge of the crime at issue.[44] For all these reasons, jurors attach overwhelming weight to confessions, even in the face of other evidence that discredits them.[45]

38. *See, e.g.*, Cheryl G. Bader, *"Forgive Me Victim for I Have Sinned": Why Repentance and the Criminal Justice System Do Not Mix—A Lesson from Jewish Law*, 31 FORDHAM URB. L.J. 69, 79 (2003) ("Jurors are likely to treat the confession as determinative of a defendant's guilt . . . ."); Davies, *supra* note 5, at 225 ("[The] instinct to assert one's innocence when one is innocent thus leaves many people skeptical of false confession claims . . . ."); Richard A. Leo et al., *Bringing Reliability Back in: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 485 ("[P]olice, prosecutors, judges, jurors, and the media all tend to view confessions as self-authenticating and see them as dispositive evidence of guilt."); White, *supra* note 16, at 139 ("Empirical evidence suggests that a defendant's confession will likely have an even more powerful impact on the jury than eyewitness testimony. . . . [J]uries will often refuse to believe that anyone would confess to a crime that they [sic] had not committed.").

39. Saul M. Kassin & Katherine Neumann, *On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis*, 21 LAW & HUM. BEHAV. 469, 476, 479, 481 (1997). It is noteworthy that the Federal Rules of Evidence generally exclude character evidence because of the fear that juries would attach excessive weight to it. *See* FED. R. EVID. 404 (barring character evidence to prove conformity with prior actions).

40. Saul M. Kassin, *On the Psychology of Confessions: Does Innocence Put Innocents at Risk?*, AM. PSYCHOLOGIST, Apr. 2005, at 215, 222 (2005).

41. Conti, *supra* note 5, at 225; Kassin, *supra* note 40, at 223; Kassin & Wrightsman, *supra* note 17, at 82.

42. Kassin, *supra* note 40, at 223; Kassin & Wrightsman, *supra* note 17, at 82.

43. Kassin & Neumann, *supra* note 39, at 482.

44. *Id.*

45. Craig A. Anderson et al., *Perseverance of Social Theories: The Role of Explanation in the Persistence of Discredited Information*, 39 J. PERSONALITY & SOC. PSYCHOL. 1037, 1045-46 (1980).

B. The Prevalence of False Confessions

The occurrence of false confessions, and the extent to which they contribute to the conviction of innocent defendants, is difficult to quantify accurately. As an initial matter, it is hard to assess how many convicted defendants are actually innocent.[46] One study estimated that more than five percent of all criminal trials "ended in the conviction of an arguably innocent person."[47] Another study put this percentage at three percent.[48] While the data varies somewhat from study to study, the consistent conclusion of the research is that innocent defendants are convicted with disturbing frequency.[49]

It is likewise difficult to assess empirically the impact of false confessions on the conviction of innocent defendants. Research suggests that false confessions account for between 8% and 25% of all such convictions.[50] Although the two

46. *See* Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1322-23 (1997) (arguing that it is difficult to determine whether particular defendant is actually innocent because purpose of court system is not generally to determine whether defendant was involved in crime but rather whether he is "guilty" as matter of law). Even the concept of "actual innocence" is ambiguous and unclear. For example, is a defendant actually innocent if he committed the *actus reus* of the crime but lacked the necessary *mens rea* or was entitled to an affirmative defense? Similarly, is a defendant actually innocent if he engaged in uncharged misconduct or a lesser included offense during the same transaction but was innocent of the charged crime? For purposes of this Article, a confession is said to be "false" if it is factually and materially false. See *supra* note 1 for a discussion of the difference between "false" confessions and "unreliable" confessions.

47. Givelber, *supra* note 46, at 1343 (citing a study by JOHN BALDWIN & MICHAEL MCCONVILLE, JURY TRIALS 41 (1979), which "found that 5.2% of trials ended in the conviction of an arguably innocent person"). In the studies cited by Givelber, the phrase "arguably innocent" refers to one of two possible scenarios. One scenario (used by HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY (1966)) involves the conviction of the defendant by the jury but the participating judge states that he would have acquitted. The other, from Baldwin & McConville, involves the conviction of the defendant by the jury but two or more officials involved in the case doubt the validity of the conviction. Givelber, *supra* note 46, at 1343-46.

48. Givelber, *supra* note 46, at 1343 (citing study in KALVEN & ZEISEL, *supra* note 47, at 68 tbl.18).

49. It can be reasonably postulated that the above figures—3% and 5.2%—underestimate the occurrence of the conviction of innocent defendants because of false confessions. Both studies report an estimated percentage of innocent people convicted as a subset of *all* trials, including acquittals. *Id*. (citing studies by KALVERN & ZEISEL and BALDWIN & MCCONVILLE, *supra* note 47). One would certainly assume that the percentage reported would be higher, perhaps significantly higher, if it were expressed as a subset of only those trials resulting in a conviction.

50. Drizin & Leo, *supra* note 13, at 906-07. A review of the few studies that have considered the role of false confessions in wrongful convictions shows that, according to the most conservative estimates, false confessions account for about eight percent of all convictions of innocent persons. Drizen and Leo recognize, however, that this conservative estimate includes in its results one "methodologically flawed study." *Id.* Other studies have placed this percentage at fourteen, eighteen, twenty-four, and twenty-five percent. *Id.* In a well-known study, researchers concluded that the primary cause of 49 (11.4%) of 350 instances of miscarriages of justice in potentially capital cases was a false confession produced by coercive questioning. Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 57-59 (1987). While some Justices have called the latter study "impressive," Herrera v. Collins, 506 U.S. 390, 430 n.1 (1993) (Blackmun, J., joined by Stevens & Souter, JJ., dissenting), some scholars and other commentators

different studies noted here examined the results of different trials, if they are considered in combination—a concededly problematic and imprecise undertaking—one could plausibly posit that about 15% of the 4% of trials resulting in the conviction of an innocent person can be attributed to false confessions. If these numbers are accepted, then roughly 0.6% of all trials involve the conviction of an innocent person based on a false confession.[51] This translates to over 6,000 felony convictions in state courts in a given year.[52] Of course, no claim is made here that this estimate is accurate or statistically supportable. Indeed, it is probably too conservative.[53] Regardless of exact numbers, however, it can be said with confidence that the conviction of innocent persons because of false confessions is a significant problem that deserves to be addressed.[54]

Advances in forensic science generally, most notably DNA evidence and testing,[55] have helped avoid and correct wrongful convictions.[56] For example, the

have criticized it, *e.g.*, Stephen J. Markman & Paul G. Cassell, *Protecting the Innocent: A Response to the Bedau-Redelet Study*, 41 STAN. L. REV. 121, 121-22 (1988).

51. The 6,000 figure is derived as follows: 1,000,000 convictions in state court per year multiplied by 0.04 (the percentage of trials with false convictions) multiplied by 0.15 (percentage of false convictions attributable to false confessions) equals 6,000, which is 0.6 percent of all convictions.

52. This figure is based on the assumption that there are about 1,000,000 such convictions per year. *E.g.*, U.S. Department of Justice, Bureau of Justice Statistics, Key Facts at a Glance, Felony Convictions in State Courts, *available at* http://www.ojp.usdoj.gov/bjs/glance/tables/felcovtab.htm (last visited Nov. 28, 2008) (1,051,000 convictions in 2002 and 1,078,900 in 2004). Researchers have arrived at this 6,000 figure using other methodology. *See* Conti, *supra* note 5, at 16 (relying on survey responses to reach same number).

53. For example, if the total is computed based on the assumption that twenty percent of the six percent of trials resulting in the conviction of an innocent person results from a false confession, then the total number of such convictions doubles to 12,000.

54. Society rightly views the conviction of an innocent person as far more harmful than the acquittal of a guilty one. *See In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) ("[I]t is far worse to convict an innocent man than to let a guilty man go free."); 5 WILLIAM BLACKSTONE, COMMENTARIES *358 (St. George Tucker ed., Philadelphia, William Young Birch & Abraham Small 1803) (1769) (arguing that it is "better that ten guilty persons escape, than that one innocent suffer"). Or, depending on whom the quote is attributed to, the conviction of an innocent person is worse than the acquittal of a guilty person (Emperor Trajan), 20 guilty men (Fortescue), 5 guilty persons (Sir Matthew Hale), 1000 guilty men (victims of Titus Otis's perjury), or 99 guilty individuals (various Irish cases). James Bradley Thayer, *The Presumption of Innocence in Criminal Cases*, 6 YALE L.J. 185, 187 (1897). "Obviously these phrases are not to be taken literally. They all mean the same thing . . . that it is better to run risks in the way of letting the guilty go, than of convicting the innocent." *Id*. For a discussion of the meaning of various numbers given throughout history, see Alexander Volokh, *N Guilty Men*, 146 U. PENN. L. REV. 173, 174-77 (1997). Many of the sources cited in this footnote were gathered in Anna LaRoy, Discovering Child Pornography: The Death of the Presumption of Innocence 23 n.132 (March 2007) (unpublished manuscript available from the author).

55. DNA, which is short for deoxyribonucleic acid, is the basic building block of the genetic makeup of every human being. DNA is the same in every cell of each person's body. Each individual's DNA is unique, except in the case of identical twins. NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, WHAT EVERY LAW ENFORCEMENT OFFICER SHOULD KNOW ABOUT DNA EVIDENCE (1999), *available at* http://www.ncjrs.gov/pdffiles1/nij/bc000614.pdf. Those who commit crimes sometimes leave behind DNA samples in the form of saliva, hair, blood, or other sources or will often take with them sources of the victim's DNA (especially in rape cases). Criminal investigators in turn may be able

Innocence Project at the Cardozo School of Law reports that over 200 postconviction exonerations are the direct result of DNA evidence.[57] And, while inculpatory DNA evidence is not always conclusive, one scholar has argued that exculpatory DNA evidence can, by itself, be sufficient to justify an acquittal.[58] It has likewise been contended that "the very nature of DNA evidence suggests that its presence or absence may be more significant than that of other forms of forensic evidence."[59] DNA testing thus both helps mitigate the likelihood of unjust convictions while simultaneously exposing how frequently they occur. As two noted commentators have observed, "DNA testing has established factual innocence with certainty in numerous post-conviction cases, so much so that it has now become widely accepted, in the space of just a few years, that wrongful

to determine whether a particular person was at a particular crime scene or whether that person had physical contact with the victim of a crime. By comparing the characteristics of DNA unwittingly left at a crime scene with a sample provided by or taken from a known suspect, investigators can significantly strengthen a case against one suspect or exculpate another. *See* NAT'L INST. OF JUSTICE, *supra* (suggesting need to eliminate other potential contributors of DNA in order to focus investigation on suspect); Kathryn M. Turman, *Understanding DNA Evidence: A Guide for Victim Service Providers*, OVC BULLETIN, April 2001, *available at* http://www.ojp.usdoj.gov/ovc/publications/bulletins/dna_4_2001/welcome.html (noting that DNA evidence is often used to exculpate or convict suspects).

56. Of course, scientific evidence is not limited to DNA evidence. It also includes fingerprint analysis, bite mark analysis, handwriting evidence, hair comparisons, firearm identifications, intoxication testing, and so forth. *See* Paul C. Giannelli, *Forensic Science*, 34 J.L. MED. & ETHICS 310, 311 (2006) (recognizing various forms of forensic evidence, and describing claim that more rigorous standards for admission of DNA evidence should be applied to non-DNA forensic evidence). The evaluation of forensic evidence generally involves four phases: (1) examining and evaluating the samples; (2) comparing the known samples (i.e., taken from the suspect) with the questioned sample (i.e., taken from the crime scene); (3) determining whether it is likely that there will be a "coincidental match" among two or more people in the relevant population for the item tested; and (4) determining whether the questioned and the known samples come from a common source. William A. Tobin & William C. Thompson, *Evaluating and Challenging Forensic Identification Evidence*, CHAMPION, July 2006, at 12, 13-14. Despite the many potential benefits that forensic science offers in helping to identify suspects and to prove the guilt of the accused, the use of forensic evidence remains controversial for a number of reasons. *See generally* Giannelli, *supra*, at 310 (addressing controversy surrounding use of forensic evidence in courtroom). For example, in response to *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), and its progeny, defense attorneys have challenged the admissibility of a wide range of forensic evidence, claiming that it lacks scientific reliability. Giannelli, *supra*, at 311 (citing Gen. Elec. Co. v. Joiner, 522 U.S. 136 (1997), and Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999), as *Daubert*'s progeny). Forensic evidence is also criticized as being prone to abuse by prosecutors and police. *See id.* at 311-12 (noting problems with poor scientific analysis at some crime laboratories). Moreover, some argue that forensic science is in actuality often unscientific, "'underresearched and oversold.'" Tobin & Thompson, *supra*, at 12 (citing Michael J. Saks & Jonathan J. Koehler, *The Coming Paradigm Shift in Forensic Identification Science*, 309 SCIENCE 892 (2005)). Consequently, many commentators and practitioners have urged for reforms to improve the quality of forensic evidence and to prevent its abusive uses. Giannelli, *supra*, at 312-16.

57. The Innocence Project, Mission Statement, *available at* http://www.innocenceproject.org/about/Mission-Statement.php (last visited Nov. 28, 2008).

58. *See, e.g.*, Barry C. Scheck, *DNA and* Daubert, 15 CARDOZO L. REV. 1959, 1966-67 (1994) (arguing that exculpatory DNA evidence provides sufficient justification in and of itself for acquittal).

59. Karen Christian, Note, *"And the DNA Shall Set You Free": Issues Surrounding Postconviction DNA Evidence and the Pursuit of Innocence*, 62 OHIO ST. L.J. 1195, 1225 (2001).

convictions occur with regular and troubling frequency in the American criminal justice system."[60]

Although DNA testing has helped mitigate the adverse consequences of false confessions, it is not a panacea. In many cases, the search for the truth about a defendant's guilt or innocence could not conceivably be assisted by DNA testing. Even in cases in which DNA testing theoretically could be helpful, it is not always available or performed.[61] Also, many courts remain uncertain about the evidentiary parameters of DNA evidence, both because it is often incapable of answering all of the relevant questions in a particular case and because of concerns about whether jurors can adequately appreciate the many nuances involved with its probity and relevance.[62] Further, prosecutors can sometimes exercise discretion or otherwise deny the defense access to DNA evidence.[63] Finally, DNA evidence is subject to human fallibility that can result in the contamination of samples, insufficient time for analysis, errors, and intentional misrepresentation of results by forensic experts.[64]

What emerges is a troubling landscape. Ironically, as the criminal justice system has become better able to identify and correct the possibility of unjust convictions, one is left with a growing sense that the problem of false confessions has been historically underestimated and inadequately addressed.[65] Science can help avoid and rectify some injustices, but its capacity is limited. In order to better appreciate the magnitude of false confessions, it is necessary to have some understanding of why people falsely confess.

60. Drizin & Leo, *supra* note 13, at 905.

61. Jason Borenstein, *DNA in the Legal System: The Benefits Are Clear, the Problems Aren't Always*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 847, 849 (2006).

62. *Id.* at 849-50; *see also, e.g.*, Lopez v. State, No. 14-03-00871-CR, 2004 WL 503323, at *3 (Tex. App. Mar. 16, 2004) (holding that exculpatory DNA evidence would "'merely muddy the waters'" where appellant, who had been convicted of rape, admitted to having sexual intercourse with victim and where victim testified that it was not consensual (quoting Kutzner v. State, 75 S.W.3d 427, 439 (Tex. Crim. App. 2002), *superceded by statute*, TEX. CODE CRIM. PROC. ANN. art. 64.03 (Vernon 2003))).

63. *See* Borenstein, *supra* note 61, at 850-51 (noting examples of prosecutors challenging use of DNA evidence in trials); *see also, e.g.*, Jemison v. Nagle, 158 F. App'x 251, 253 (11th Cir. 2005) (considering habeas corpus petitioner who claimed that prosecutor suppressed exculpatory DNA evidence); State v. Harris, 892 So. 2d 1238, 1253-55 (La. 2005) (addressing destruction of contaminated DNA evidence by police so that it could not be evaluated by defendant's experts).

64. Borenstein, *supra* note 61, at 855-57; *see, e.g.*, *Harris*, 892 So. 2d at 1253 (discussing destruction of potentially exculpatory DNA evidence). Consider the case of Kerry Kotler, who in 1992, after serving eleven years of a twenty-five- to fifty-year sentence for a rape conviction, was released from prison when DNA evidence seemingly established that he was not the perpetrator, contrary to the lineup and photo-array identification by the victim. Less than three years later, he was charged with another rape and convicted, this time based on DNA evidence, perhaps calling into question his earlier ostensible exoneration. EDWARD CONNORS ET AL., DEP'T OF JUSTICE: CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL, 61-64 (1996).

65. As Robert Tanner reported, "What is . . . troubling is how common these [DNA] exonerations have become since the first reversal in 1989. It took 13 years to reach the first 100 DNA exonerations, but just five to double that number." Robert Tanner, *DNA Exonerations Reaches 200, and Nearly 2 Decades of Troubling Questions for Justice System*, ASSOCIATED PRESS, Apr. 24, 2007.

C. The Reasons for False Confessions

False confessions have traditionally been associated with police overreaching.[66] Although it is true that police misconduct and tactics are no doubt an important cause of false confessions, they are by no means the singular source. Quite to the contrary, human experience and scientific research indicate that the false confessions can be traced to a wide range of factors besides police coercion.[67] Indeed, neither John Mark Karr nor Francis Connelly confessed during stationhouse questioning.[68] Moreover, even where the actions of the police contribute to the making of false confessions, those actions may be merely one of many interrelated variables that prompt them. The concern about police misconduct and its relationship to false confessions is well known and need not be elaborated on here.[69] What follows is a brief discussion of some of the less obvious causes of false confessions, which are often unrelated to police coercion.

Professors Kassin and Wrightsman have identified three types of false confession situations: voluntary, coerced-compliant, and coerced-internalized.[70] Voluntary false confessions are incriminating statements that are purposely offered in the absence of pressure by the police,[71] such as Karr's confession in the Ramsey case. Possible motives for such confessions include "'a morbid desire for notoriety' . . . . the unconscious need to expiate guilt over previous transgressions via self-punishment, the hope for a recommendation of leniency, and a desire to aid and protect the real criminal."[72] False confessions may also

66. Over the past half century, the Supreme Court's jurisprudence regarding the admissibility of confessions has focused almost exclusively on the police conduct surrounding their reception. Two noteworthy examples are *Colorado v. Connelly*, 479 U.S. 157 (1986), and *Miranda v. Arizona*, 384 U.S. 436 (1966). *See Connelly*, 479 U.S. at 167 (holding that "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment"); *Miranda*, 384 U.S. at 444 (holding that "the prosecution may not use statements . . . stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination"). Most of the recent decisional authority and legal scholarship relating to confessions has likewise concentrated on police practices. For example, many prominent commentators presently focus on whether the electronic recording of confessions should be undertaken to address the problem of false confessions resulting from police misconduct. *See, e.g.*, Kassin, *supra* note 17, at 225, 229-30 (suggesting that videotaping interrogations might prevent admission of false confessions); Leo et al., *supra* note 38, at 528-35 (arguing that videotaping interrogations is a "safeguard that will provide protection against the admission of false confessions"); White, *supra* note 16, at 153-55 (same).

67. *See* Boaz Sangero, Miranda *Is Not Enough: A New Justification for Demanding "Strong Corroboration" to a Confession*, 28 CARDOZO L. REV. 2791, 2799-2800 (2007) (listing various reasons for false confessions).

68. *See Connelly*, 479 U.S. at 157 (noting that Connelly approached Denver police officer on street to confess to murder); Randal C. Archibold, *Suspect in Ramsey Killing Agrees to Colorado Transfer*, N.Y. TIMES Aug. 23, 2006 at A17 (stating that Karr told reporters he was with Ramsey on night she died).

69. *See generally* Drizin & Leo, *supra* note 13, at 921-32 (considering 125 police-induced false confessions occurring between 1971 and 2002).

70. Kassin & Wrightsman, *supra* note 17, at 76.

71. *Id.*

72. *Id.* at 76-77.

result from mental illness, which renders the confessor "unable to distinguish between fantasy and reality."[73] Coerced-compliant confessions are those, usually induced by extreme pressure (e.g., compulsion, bargaining, and historically, in extreme cases, torture) in which the confessor, having weighed the options, "publicly professes guilt . . . despite knowing privately that he or she is truly innocent."[74] Coerced-internalized confessions occur when the confessor, through more subtle forms of coercion, has come to believe the truth of what he or she is confessing, sometimes altering the confessor's memory, rendering the truth "potentially irretrievable."[75]

The mentally retarded, the mentally ill, and juveniles are overrepresented in false confession cases of all types, including voluntary confessions.[76] Certain characteristics common among mentally retarded persons[77] make them particularly prone to confess falsely.[78] For example, mentally retarded suspects are often motivated by a strong desire to please authority figures, even if to do so requires them to lie and confess to a crime that they did not commit.[79] They also often lack the ability to understand the nature of police questioning or even

73. *Id.* at 77.

74. *Id.*

75. Kassin & Wrightsman, *supra* note 17, at 78.

76. Drizin & Leo, *supra* note 13, at 944-45, 971, 973-74.

77. *See* DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 39 (4th ed. 2000) ("The essential feature of Mental Retardation is significantly subaverage general intellectual functioning . . . that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety . . . .").

78. Consider, for example, Victoria Banks, a mentally retarded woman with an IQ of 40, who accepted a plea bargain to plead guilty to manslaughter for killing a baby that never existed. Michael Luo, *Retarded Suspects Jailed, but Victim May Not Have Existed*, ASSOCIATED PRESS, *in* CHARLESTON GAZETTE & DAILY MAIL, July 7, 2002, at 8 [hereinafter Luo, *Retarded Suspects Jailed*]; Michael Luo, *Three Charged with Murder Despite Lack of Evidence*, ASSOCIATED PRESS, *in* CHARLESTON GAZETTE & DAILY MAIL, July 8, 2002, at 6A [hereinafter Luo, *Three Charged with Murder*]. In February 1999, while Banks was in jail, a local physician determined that she was pregnant, even though she had had a tubal ligation in 1995 and a recently retired jail physician had determined that she was faking the pregnancy. Luo, *Retarded Suspects Jailed*, *supra*. When the local sheriff noticed that Banks no longer appeared pregnant and questioned her about this, she claimed to have had a miscarriage. *Id*. This led to a series of extended interrogations over the next five days. *Id*. The case went forward based on Bank's confession, on the theory that she had killed her newborn baby with the assistance of her sister and estranged husband, Medell Banks. Also credited by the prosecution were the confessions of Bank's sister and husband, despite the fact that the stories of the three were contradictory in most major aspects, no body was ever found, and all three suspects were mentally retarded. *Id*. After Victoria Banks pleaded to the manslaughter charge, Medell Banks was slated to be tried for his role in the killing. His attorney ordered a gynecological test for Victoria Banks, which revealed that her 1995 tubal ligation was still completely intact, rendering it more than highly unlikely that she was ever pregnant in 1999. Luo, *Three Charged with Murder*, *supra*; Michael Luo, *Where Is Justice to Be Found in This Confounding Case?*, ASSOCIATED PRESS, *in* CHARLESTON GAZETTE & DAILY MAIL, July 9, 2002, at 3A. Victoria Banks remains in prison on the manslaughter charge as well as an unrelated charge. Drizin & Leo, *supra* note 13, at 957.

79. Morgan Cloud et al., *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495, 511-12 (2002).

Miranda warnings,[80] which they are commonly deemed to have waived during the interrogation process.[81] Mentally retarded persons sometimes have an inadequate understanding of causation and blameworthiness, which may cause them to accept culpability for crimes they did not commit.[82] They may likewise fail to understand their own limitations and "may feel compelled to answer a question, even if the question exceeds [their] ability to answer."[83] These and other traits often associated with mentally retarded persons help explain why mental retardation can play such a significant role in false confession cases.

Mental illness[84] is likewise an important contributing cause of false confessions.[85] The impact of mental illness is probably grossly underestimated because it is generally not even listed as a possible cause on reports of false confessions.[86] Mental illness is also underreported because it is often not distinguished from mental retardation in the collection of statistical data[87] and is not always obvious.[88] Because mental illness can be stigmatizing, some mentally ill persons try to avoid being identified in this manner.[89] Some who suffer from mental illness may falsely confess because dreams or hallucinations compel them to do so[90] or because they have an overwhelming desire for attention.[91]

80. *See* Miranda v. Arizona, 384 U.S. 436, 467-77 (1966) (enumerating rights suspect must be informed of prior to interrogation as prerequisite to admissibility of any statement made during interrogation).

81. Cloud et al., *supra* note 79, at 498-500, 512.

82. *Id.* at 512-13.

83. *Id.* at 513. The tendency among many mentally retarded persons to mask their disabilities, and the widespread ignorance about mental retardation generally, may make it difficult for police and others to properly interpret the responses of mentally retarded persons. *Id.* at 513-14.

84. Mental illness has been defined as "[a]ny of various conditions characterized by impairment of an individual's normal cognitive, emotional, or behavioral functioning, and caused by social, psychological, biochemical, genetic, or other factors, such as infection or head trauma." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1098 (Joseph P. Pickett, ed., 2000).

85. Drizin & Leo, *supra* note 13, at 973.

86. *Id.*

87. *See, e.g.*, Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 545 (2005) (displaying statistical data listing incidence of false confession data for mentally ill and mentally retarded in same category).

88. *See, e.g.*, María Cabrera Mikele, *Mentally Ill a Puzzle for Police: Columbia Police Undergo Training to Broaden Understanding, Responses*, COLUMBIA MISSOURIAN, Jan. 28, 2007, *available at* http://www.columbiamissourian.com/stories/2007/01/28/mentally-ill-a-puzzle-for-police/ (discussing new training program implemented to help police recognize and deal with mentally ill persons); Canadian Mental Health Association, *What Are the Warning Signs of Mental Illness?*, http://www.cmha.ca/highschool/t_rtp.htm (last visisted Nov. 28, 2008) (noting difficulty in distinguishing between mental illness and other mental health problems, and providing list of common signs of mental illness).

89. *See, e.g.*, MayoClinic.com, *Mental Health: Overcoming the Stigma of Mental Illness*, Dec. 8, 2007, http://www.mayoclinic.com/health/mental-health/MH00076 (describing stigma of mental illness, and observing that it leads some to pretend nothing is wrong).

90. For example, Ron Williamson, who had a history of hospitalization for bipolar disorder, was convicted in 1988 for the rape and murder of Debra Sue Carter based, in significant part, on a "dream confession" in which he told investigators that he dreamed of having stabbed the victim. He was released in 1999, when DNA evidence exonerated him. The Innocence Project: Cases of People Who

Youth is another significant reason for false confessions. Many times juveniles lack the mental and emotional resources to cope with the stress associated with an accusatorial situation. Young persons are also often emotionally immature and have less life experience as compared to adults, and therefore they tend to be naïve and more easily intimidated.[92] While mental retardation, mental illness, and youth can all be causal factors in the rendering of false confessions, they are by no means an exhaustive list.[93] These and similar causes demonstrate the need to look beyond police coercion as the only source of false confessions.

Frequently, several contributing factors will act in combination to cause a false confession. For example, a mentally retarded suspect is at greater risk to confess falsely in the face of assertive police interrogation.[94] A suspect's mental

Have Been Proven Innocent, but Would Still Be in Prison if Courts Didn't Consider New DNA Evidence, http://www.innocenceproject.org/docs/House_Related_Cases_WEB.pdf (last visited Nov. 28, 2008); The Innocence Project: Ron Williamson, http://www.innocenceproject.org/Content/295.php (last visited Nov. 28, 2008).

91. The case of John Jeffers illustrates how mental illness and an overwhelming desire for attention can lead to a false confession even in the absence of police coercion. Jeffers, a seventeen-year-old orphan, was convicted for the 1975 murder of Sherry Gibson. Dave Hosick, *Ex-Prosecutor Convinced of Guilt*, EVANSVILLE COURIER & PRESS, Apr. 4, 2003, at B7. After the case went unsolved for three years, Jeffers confessed to the murder. *Id.* Jeffers accepted a plea agreement calling for a thirty-year prison sentence, even though the victim's family and investigators admit that they "were never convinced of Jeffers' guilt." *Id.* According to police, Jeffers had a history of drug abuse and his story continually changed. Jeffers died of a drug overdose in prison in 1983. Dave Hosick, *Officer Doubted Man's Guilt in '75 Rape, Slaying*, EVANSVILLE COURIER & PRESS, Mar. 4, 2003, at B3. In 2003, Wayne Gulley and Ella Mae Dicks were convicted of the crime after the case was reopened in 2001 based on Dicks's confession. Jodi S. Cohen, *Man Guilty in 1975 Slaying of Woman in Indiana: Ex-Wife Provides Key Testimony*, CHI. TRIB., Aug. 20, 2003, at 6. Police now believe that Jeffers confessed because he desired attention. *Id*.

92. *See* Conti, *supra* note 5, at 23 (noting naiveté and suggestibility of vulnerable suspects); Drizin & Leo, *supra* note 13, at 944 (examining reasons why juveniles are more likely to give false confessions).

93. For example, introverts are more likely than extroverts to confess falsely. Conti, *supra* note 5, at 25 (citing HANS EYSENCK, CRIME AND PERSONALITY (1964)). Language barriers may also lead to false confessions, such as when a confessor does not fluently speak, read, or write English and inadequate translation services are provided during the police interrogation. *See, e.g.*, Grace F. Ashikawa, Note, R. v. Brydges: *The Inadequacy of* Miranda *and a Proposal to Adopt Canada's Rule Calling for the Right to Immediate Free Counsel*, 3 SW. J. L. & TRADE AM. 245, 255 (1996) (noting language barrier as potential reason for false confessions). The case of Omar Aguirre illustrates this problem. Aguirre, a Mexican immigrant who spoke little English and read none, was one of five men arrested for murder based on an accusation that was apparently intended to frame the arrestees in order to protect gang members. David Heinzmann & Jeff Coen, *Jailed by Lies, Freed by Truth*, CHI. TRIB., Dec. 22, 2002, at 1. The only interpreter present during the interrogation process was a Chicago police interrogator. Editorial, *Open to Interpretation*, CHI. TRIB., Aug. 23, 2003, at 20. During the interrogation, Aguirre signed a confession form that was written in English and prepared by the police. Heinzmann & Coen, *supra*. Aguirre later clamed that "he thought he was signing a release to go home." *Id*. Aguirre was convicted and sentenced to a fifty-five-year prison term. After five years of confinement, a federal investigation revealed that he did not commit the murder. *Id.*

94. *See* Cloud et al., *supra* note 79, at 511-14 (providing seven common characteristics that make mentally retarded people more susceptible to police interrogation tactics). Mentally retarded suspects often view the police as being helpful. As a result, they may be unable to understand that interrogation

infirmity[95] or youth[96] may likewise contribute to his making a false confession to police. It would be incorrect, however, to assume that such factors are relevant only in the context of police interrogation. Sometimes mental illness, attention-seeking behavior, drug addiction, and other causes may lead a person to falsely confess even in the absence of any police prompting.[97] And, as previously noted, many such confessions have led to convictions.[98]

In summary, the courts, science, and common sense all agree that confession evidence is uniquely powerful. False confessions occur with disturbing frequency and for reasons wholly unrelated to police coercion, and jurors and other participants in the criminal justice system are prone to believe confessions even when they are demonstrably false. When false confessions are credited, the adverse consequences to individuals and the common good are serious and obvious. Historically, questions about a confession's reliability were handled under the rubric of voluntariness. It is the traditional approach to voluntariness, and how *Connelly* changed it, that is the subject of Part II of this Article.

II. FROM COMMON LAW TO *CONNELLY*: THE DIMINISHING SIGNIFICANCE OF A CONFESSION'S RELIABILITY AND, THUS, OF TRUTH ITSELF

A. The Common Law's Approach to Confessions

"Under the early common law, confessions were admissible at trial without any restrictions whatsoever, so that even an incriminating statement which had been obtained by torture was not excluded."[99] Beginning in the eighteenth

can be adversarial and thus may be particularly susceptible to nonphysical coercion. *Id.* at 512.

95. Corethian Bell, a homeless man who was mentally ill and borderline mentally retarded, was arrested for the murder of his cocaine-addict mother. Kirsten Scharnberg, *Friends Keep Faith, Help to Show Pal Wasn't Killer*, CHI. TRIB., Jan. 20, 2002, at 1. After a fifty-hour interrogation, Bell confessed on video that he had killed his mother because she had started using drugs. *Id.* He later said that he had only confessed because he had been struck by police and believed he would be able to tell the judge the truth later and be released. *Id*. Ultimately, charges against Bell were dropped because the police could not obtain corroborating evidence. In the interim, Bell was confined for seventeen months. *Id.*

96. See *supra* note 91 for a discussion of the Jeffers case.

97. Although police interrogation is often a contributing factor in the rendering of false confessions, this is not always the case. *See* Colorado v. Connelly, 479 U.S. 157, 157, 164 (1986) (noting that defendant's psychosis, not police pressure, caused false confession). See *supra* note 91 for a discussion of the case of John Jeffers, who apparently made a false confession out of a desire for attention.

98. See *supra* Part I.C for a discussion of false confessions. Also, note that the false confessions discussed in notes 5, 78, 90, 91, and 93 all led to the conviction of innocent persons.

99. WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 6.2(a), at 311 (3d ed. 2000). Until the nineteenth century, confessions law was grounded in the privilege against self-incrimination, which had its origin in the late medieval and early modern romano-canonical procedure. Steven Penney, *Theories of Confession Admissibility: A Historical View*, 25 AM. J. CRIM. L. 309, 314-15 (1998). This privilege "was expressed in maxims like *Nemo tenetur seipsum accusare* ('No one shall be required to accuse himself') and *Nemo tenetur prodere seipsum* ('No one shall be required to produce himself' or 'No one shall be required to betray himself')." Albert W. Alschuler, *A Peculiar Privilege in Historical*

century, however, English courts began to disallow coerced confessions because they were too untrustworthy.[100] In 1783, an English court stated what may be viewed as the first formal rule of exclusion[101] in *The King v. Warickshall*:[102]

> A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers; but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected.[103]

Perspective: The Right to Remain Silent, 94 MICH. L. REV. 2625, 2638 (1996). This privilege did nothing to insulate defendants from being compelled to speak in ordinary criminal trials, however, because the structure of the trials and pretrial procedure was not amenable to its invocations. Penney, *supra*, at 315, 317. In fact,

> Defendants were commonly confined prior to trial; denied knowledge to the particulars of the charge; prevented from employing defense counsel; restricted in their ability to subpoena witnesses; and subjected to an amorphous, less than beyond-reasonable-doubt standard of proof. Under these conditions, it was imperative for defendants to speak at trial in order to rebut the charges against them.

Id. at 317 (footnote omitted). It has been noted that "[u]nder the ancient methods of proof, all convictions were convictions based on compelled self-incrimination." United States v. Gecas, 120 F.3d 1419, 1456 (11th Cir. 1997). In the thirteenth century, secular English courts began to replace the "ancient methods of proof" with jury trials, which "removed from the defendant's shoulders the burden of proof associated with ordeals, battles, and oaths." *Id.* at 1440. "The arrival of the jury trial allowed defendants to discharge their burden of proof without themselves becoming involved in the adjudication. . . . [and instead allowed them to] rely on an impartial determination of the underlying facts." *Id.* at 1440-41. In the sixteenth century, defendants in jury trials were prohibited from giving sworn testimony because of the belief that such a system unjustly combined the inquisitional and jury systems. John H. Wigmore, *The Privilege Against Self-Incrimination; Its History*, 15 HARV. L. REV. 610, 628 (1902). It is important to note, however, that defendants were still forced to represent themselves and argue their cases, though the jury was prevented from judging on the basis of the defendant's factual assertions. *Gecas*, 120 F.3d at 1441. During the same time that these developments were taking place with respect to criminal proceedings, the Parliament strengthened the ability of justices of the peace ("JPs") to interrogate criminal suspects prior to their trials. *Id*. at 1442. In 1383, the legislature passed a series of statutes that allowed JPs to conduct interrogations of suspects in "minor criminal matters" such as "heresy" or "poaching." *Id*. In the sixteenth century, although defendants' testimony was excluded from trials, Parliament passed a resolution authorizing the interrogation under oath of "accused bankrupts, abusers of warrants, and other specific types of criminals." *Id.*; *see also* 8 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2250, at 285-86 (John T. McNaughton ed., rev. ed. 1961) (describing persons who were put under oath in pre-seventeenth-century jury trials). Thus, while the courts retreated from requiring defendants to explain their actions under oath, the Parliament simultaneously strengthened the ability of court officials to question (even under oath) those same defendants before the trial took place. When obtained through these common-law interrogational practices, such confessions, as just noted, "were admissible at trial without any restrictions whatsoever, so that even an incriminating statement which had been obtained by torture was not excluded." LAFAVE ET AL., *supra*, § 6.2(a), at 311.

100. OTIS H. STEVENS, THE SUPREME COURT AND CONFESSIONS OF GUILT 19 (1973); WELSH S. WHITE & JAMES J. TOMKOVICZ, CRIMINAL PROCEDURE: CONSTITUTIONAL CONSTRAINTS UPON INVESTIGATION AND PROOF 489 (4th ed. 2001).

101. LAFAVE ET AL., *supra* note 99, § 6.2(a), at 311.

102. (1783) 168 Eng. Rep. 234 (K.B.).

103. *Warickshall*, 168 Eng. Rep. at 235; *accord* Dickerson v. United States, 530 U.S. 428, 433

This viewpoint, which was reflected in the legal treatises of the time and into the twentieth century, made clear that the purpose for the rule excluding or barring *involuntary* confessions was to ensure the exclusion of putatively *unreliable* evidence.[104] In other words, although reliable confessions were to be received into evidence regardless of how they were obtained, confessions that bore too great a risk of being unreliable were to be excluded from trial for that very reason. A confession's reliability was thus equated to its truthfulness, and the synonymy between the voluntariness, reliability, and truthfulness of a confession was well settled under the common law.[105] As an early twentieth-century treatise on the law of criminal evidence observed, "[t]he statement that a confession which has been extorted by threats or procured by promises is not voluntary, and hence is inadmissible as likely to be untrue, is not difficult to understand."[106] Accordingly, "that [the] accused was influenced by hope or fear to make a confession is regarded as creating so strong a presumption that the confession is untrue, that the law rejects it as worthless."[107]

During this period, the United States Supreme Court, motivated largely by the same concerns about reliability as the English courts, adopted the common-law rule and held that involuntary confessions were inadmissible at federal trials. In *Hopt v. Utah*,[108] the Court recognized, as did the English court in *Warickshall*, that "[a] confession, if freely and voluntarily made, is evidence of the most satisfactory character."[109] The Court elaborated that there is a strong presumption "that one who is innocent will not imperil his safety or prejudice his interests by an untrue statement."[110] Therefore, in assessing the voluntariness of

(2000) (citing King v. Rudd, (1783) 168 Eng. Rep. 160, 161 (K.B.) (stating that English courts excluded confessions obtained by threats and promises). Over time the rule was restated in several ways by the English courts. 2 LAFAVE ET AL., *supra* note 99, § 6.2(a), at 311. Some have argued that, although the English courts were concerned about trustworthiness, their decisions also rested on the rationale of protecting free choice. *E.g.*, George C. Thomas III & Marshall D. Bilder, *Aristotle's Paradox and the Self-Incrimination Puzzle*, 82 J. CRIM. L. & CRIMINOLOGY 243, 249-53 (1991) (describing free choice as one rationale for courts' reluctance to admit confessions).

104. Leo et al., *supra* note 38, at 489.

105. Numerous cases followed *Warickshall* in excluding involuntary, and thus unreliable, confessions. *See, e.g.*, The King v. Lockhart, (1785) 168 Eng. Rep. 295, 295 (K.B.) (invalidating confession obtained after receiving "promises of favour"); The King v. Thompson, (1783) 168 Eng. Rep. 248, 249 (K.B.) (invalidating confession given after promise of no prosecution).

106. UNDERHILL, *supra* note 15, § 128, at 247.

107. *Id.* § 126, at 243. See *Commonwealth v. Knapp*, 26 Mass. (9 Pick.) 496 (1830), in which the court said:

> It is not because of any breach of good faith in admitting them, nor because they are extorted illegally . . . but the reason is, that in the agitation of mind in which the party charged is supposed to be, he is liable to be influenced, by the hope of advantage or fear of injury, to state things which are not true.

Id. at 512 (opinion of Morton, J.).

108. 110 U.S. 574 (1884).

109. *Hopt*, 110 U.S. at 584.

110. *Id.* at 584-85 (noting that, because confession "constitutes the strongest evidence against the party making it that can be given of the facts," it "must be subjected to careful scrutiny and received with great caution").

the confession in *Hopt*, the Court focused on whether the police had engaged in conduct that undermined the presumption of reliability. The Court, in other words, accepted that some (perhaps most) guilty suspects are inclined to confess, and that it is constitutionally permissible for police to take advantage of this natural inclination within limits. Consistent with its favorable attitude toward confessions, the Court concluded a confession should be excluded only if it carried too great a risk of being actually false.[111]

This approach to voluntariness and reliability continued well into the twentieth century in the United States, with

> the terminology ["voluntary" and "involuntary" confessions] was a *substitute* for the "trustworthiness" or "reliability" test. For *most* of the two hundred years within which this formulation had constituted "the ultimate test," it had been no more than an *alternative statement* of the rule that a confession was admissible so long as it was free of influences which made it "unreliable" or "probably untrue."[112]

The voluntariness test, as it was almost universally understood and applied, was primarily designed to protect against the admissibility of untrustworthy evidence.[113]

B. Complex of Values

Over time, other considerations besides reliability began to emerge and assume increasing stature in voluntariness determinations.[114] This transition began with *Brown v. Mississippi*,[115] where the Court reversed the convictions of several defendants because of the brutal methods used to obtain their confessions.[116] The *Brown* Court made clear that the Due Process Clause of the

111. *See id.* at 583-85 (expressing preference for admissibility of voluntary confessions). "In the 1897 case of *Bram v. United States* [168 U.S. 532 (1897)], the Court appeared to base exclusion upon a violation of the Fifth Amendment privilege against self-incrimination, but the Court later pulled back from that position." LAFAVE ET AL., *supra* note 99, § 6.2(a), at 311 (footnote omitted).

112. Yale Kamisar, *What Is an "Involuntary" Confession? Some Comments on Inbau and Reid's* Criminal Interrogation and Confessions, 17 RUTGERS L. REV. 728, 742-43 (1963) (footnote omitted). Professor Kamisar explains:

> *Why*, for most of this time, was a confession admissible if "freely and voluntarily made"? Because under such circumstances the "insistent and ever-present forces of self-interest" and "self-protection," as Dean McCormick had described them, rendered the confession "reliable" or "probably true." *Why*, during most of this period, did "coercion" or "compulsion" or "inducement" bar the use of a confession so obtained? Because, when such pressures or influences were brought to bear, "the presumption . . . that one who [was] innocent [would] not imperil his safety or prejudice his interest by an untrue statement, ceases."

Id. at 743 (citation omitted) (quoting *Hopt*, 110 U.S. at 585).

113. Welsh S. White, *What Is an Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001, 2002 (1998).

114. Leo et al., *supra* note 38, at 494.

115. 297 U.S. 278 (1936).

116. *Brown*, 297 U.S. at 287. The defendants were whipped while being hung by a rope to the limb of a tree, tied to a tree, and laid over chairs, some so severely that their backs were "cut to pieces." *Id.* at 281-82. Ultimately, they "confessed" by signing statements that the officers had dictated.

Fourteenth Amendment[117] was the focus in determining the admissibility of confessions.[118] It may have initially seemed as if the Court's rationale in *Brown* was "entirely consistent with the common law rule,"[119] i.e., that confessions obtained by egregious means were presumptively unreliable.[120] By extending due process protections to state confession cases, however, the Court introduced a new justification for the voluntariness inquiry that stood as an independent bar to admitting involuntary confessions, often in spite of their apparent reliability.[121]

The *Brown* decision thus endorsed, for the first time, a viable constitutional alternative to the common-law reliability rationale for excluding confessions at state trials.[122] By applying the Fourteenth Amendment Due Process Clause to state confession cases, the Court could now assess the fairness of admitting or excluding a confession based on the means used to obtain it.[123] This empowered

Id.

117. U.S. CONST. amend. XIV.

118. Leo et al., *supra* note 38, at 493 (citing *Brown*, 297 U.S. at 287). The Court applied the due process voluntariness test in "some 30 different [confession] cases decided during the era that intervened between *Brown* and *Escobedo v. Illinois*, 378 U.S. 478 [(1964)]." Schneckloth v. Bustamonte, 412 U.S. 218, 223 (1973).

119. WHITE & TOMKOVICZ, *supra* note 100, at 489. The Court's decisions immediately following *Brown* stressed the importance of the due process rationale for excluding involuntary confessions, which, for the time being, acknowledged voluntariness as a reliability concern. Specifically, the *Chambers v. Florida*, 309 U.S. 227 (1940), *Ward v. Texas*, 316 U.S. 547 (1942), and *Lyons v. Oklahoma*, 322 U.S. 596 (1944), decisions of the early 1940s interpreted due process as protecting one against the unfair use of an involuntary confession because of its presumed unreliability. These decisions made clear, however, that a confession's voluntariness was as much a constitutional due process concern as a common-law reliability concern and that the Court's interest in ensuring due process could require exclusion of an involuntarily obtained confession even if its reliability was unquestioned. *See Lyons*, 322 U.S. at 605 (instructing that "declarations procured by torture are not premises from which a civilized forum will infer guilt"); *Ward*, 316 U.S. at 551 (excluding confession that was obtained from black defendant who was taken from jail to deserted countryside for interrogation and told prosecutor that "he would be glad to make any statement that [the prosecutor] 'wanted him to make but that he didn't do it'"); *Chambers*, 309 U.S. at 239-42 (excluding confessions that were obtained after week of repeated interrogation while in incommunicado detention, concluding in all-night questioning that produced confession); *see also* LAFAVE ET AL., *supra* note 99, § 6.2(b) at 311 (discussing cases that found use of involuntarily obtained confessions unconstitutional); Leo et al., *supra* note 38, at 494 (providing multiple rationales that Court relied on to exclude confessions).

120. As the Court put it in *Brown*, "[i]t would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these [defendants]." 297 U.S. at 286.

121. Lisenba v. California, 314 U.S. 219, 236 (1941) ("[T]he fact that the confessions have been conclusively adjudged by the decision below to be admissible under State law, notwithstanding the circumstances under which they were made, does not answer the question whether due process was lacking. . . . The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence whether true or false.").

122. Leo et al., *supra* note 38, at 493 ("The Court established the Fourteenth Amendment's due process clause as the constitutional test for assessing the admissibility of confessions in state cases. In addition to common law standards, trial judges would now have to apply a federal due process standard when evaluating the admissibility of confession evidence." (footnote omitted)).

123. *Id.* at 494 ("The Court sought to deter oppressive and unfair police interrogation methods

the Court, in addition to assessing a confession's reliability, to examine the justness of its use at trial, i.e., whether the means of obtaining the confession were so unfair, inhumane, or inherently coercive as to require its exclusion.[124]

This expansion of the matters encompassed under the rubric of voluntariness correspondingly diminished the Court's reliance on the common-law reliability rationale endorsed in *Hopt*. Although reliability retained significance in assessing due process compliance, other relevant considerations began to emerge in the Court's decisional authority from the 1940s to the 1960s.[125] These considerations formed a so-called "complex of values"[126] that the Court invoked in a seemingly ad hoc manner when passing on the voluntariness of confessions. Among the values identified by the Court were (1) the need to oppose police practices that were especially overbearing, regardless of whether the resulting confession was reliable; (2) the desire to conform police activities to the principles embodied in the adversary system; and (3) the goal of deterring police misconduct by excluding confessions obtained by offensive means.[127]

The first of the above-listed values—the imperative to oppose police practices that are especially coercive or overbearing—was discussed in *Brown*. There, the suppression of the defendants' confessions was required because of the brutal nature of the police misconduct regardless of whether the confessions were reliable.[128] The Court's emphasis on the behavior of law enforcement personnel acknowledges the possibility that even the most outrageous forms of interrogation can sometimes produce a reliable confession, such as one that is later corroborated by independent and credible evidence.[129]

. . . .").

124. *Id.* at 494-95.

125. *See* White, *supra* note 113, at 2014 (citing Jackson v. Denno, 378 U.S. 368, 386 (1964), for the proposition that "the Court identified involuntary confessions' 'probable unreliability' as one of the 'complex of values' that justified their exclusion"); *see also* 3 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 825, at 346 (James H. Chadbourn, rev'd ed. 1970) (stating that involuntariness of confession ultimately became basis for its exclusion "irrespective of any attempt to measure its influence to cause a false confession").

126. Blackburn v. Alabama, 361 U.S. 199, 207 (1960) (stating that these interrelated concerns form "a complex of values [that] underlies the stricture against use by the state of confessions which, by way of convenient shorthand, this Court terms involuntary"). "Involuntary confessions" thus became a term of art, and the "complex of values" approach sometimes resulted in the suppression of a demonstrably reliable confession because it was obtained under circumstances that offended due process. *See* 3 WIGMORE, *supra* note 125, § 826(c), at 352-54 n.11 (citing multiple cases in which "complex of values" approach was used, and noting that courts' primary focus moved from reliability of confession to police methods to obtain confession).

127. LAFAVE ET AL., *supra* note 99, § 6.2(b), at 446. Although the three values referenced here are separately listed in the text, they are closely interrelated and often overlap. For example, certain methods of interrogation could lead to the exclusion of a confession because they are too coercive (value 1) and thus inconsistent with the adversary system (value 2), and, accordingly, they ought to be discouraged in the future (value 3).

128. *Brown*, 297 U.S. at 287.

129. As Professor Welsh White explains, the "assertion that independent corroborating evidence will sometimes establish the truthfulness of a confession is undoubtedly correct." White, *supra* note 113, at 2025. He continues, however, that "[i]n many cases . . . the 'independent corroboration

In cases such as *Brown*, the Court evaluated police conduct with regard to its impact on the freedom of a suspect's will. Although an early decision suggested that some types of police misconduct can be so overbearing as to require per se exclusion of a confession,[130] later cases held that voluntariness is to be determined in light of all of the circumstances[131] and that a nexus must be found between the egregiousness of the conduct and a sufficient encumbering of a suspect's will in order to justify the suppression of a confession.[132]

Another value bearing on voluntariness concerns the fidelity of police activities to the principles embodied in the adversary system. In *Rogers v. Richmond*,[133] for example, the Court reasoned that convictions based on coerced confessions must be reversed "not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and

requirement' will not provide an adequate safeguard against the admission of false confessions." *Id.*

130. "[T]he Court did appear to designate certain police interrogation methods—including physical force, threats of harm or punishment, lengthy or incommunicado questioning, solitary confinement, denial of food or sleep, and promises of leniency—as presumptively coercive and therefore unconstitutional." Leo et al., *supra* note 38, at 495 (citing WELSH S. WHITE, MIRANDA'S WANING PROTECTIONS 46 (2001)). In *Stein v. New York*, 346 U.S. 156, 182 (1953), *overruled in part on other grounds by Jackson v. Denno*, 378 U.S. 368 (1964), the Court held that some police misconduct is so inherently coercive and outrageous that "there is no need to weigh or measure its effects on the will of the individual." *Stein*, 346 U.S. at 182. *See also* Brooks v. Florida, 389 U.S. 413, 413-15 (1967) (condemning depriving suspect of food or water); Beecher v. Alabama, 389 U.S. 35, 36-38 (1967) (requiring exclusion of confession obtained by holding gun to suspect's head); Haynes v. Washington, 373 U.S. 503, 507-19 (1963) (condemning holding suspect incommunicado for sixteen hours); Reck v. Page, 367 U.S. 433, 440-44 (1961) (condemning depriving suspect of adequate food, counsel, and contact with friends or family); Malinski v. New York, 324 U.S. 401, 403-10 (1945) (requiring exclusion of confession obtained by keeping suspect in naked state); Ward v. Texas, 316 U.S. 547, 550-55 (1942) (taking suspect from jail to deserted countryside for interrogation); Chambers v. Florida, 309 U.S. 227, 238-42 (1940) (threatening suspect with mob violence).

131. *E.g.*, Arizona v. Fulminante, 499 U.S. 279, 286 (1991) (applying totality of circumstances analysis to determine whether suspect's confession was coerced); Miller v. Fenton, 474 U.S. 104, 112 (1985) (same); *Haynes*, 373 U.S. at 513-14 (same).

132. To determine whether such a nexus exists, Professor Steven Penney posits that:

> The task of the Court is to identify the circumstances in which the defendant's will is in fact overborne. Unfortunately, there is no litmus test for determining this question. In each case the relevant factors must be weighed anew. 'The ultimate test . . . remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness.' This test asks the following question:
>
> > Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.

Penney, *supra* note 99, at 353 (footnotes omitted) (quoting Culombe v. Connecticut, 367 U.S. 568, 602 (1961)); *see, e.g.*, *Fulminante*, 499 U.S. at 287-88 (holding that confession should be suppressed on due process grounds *both* because defendant was confronted with "a credible threat of physical violence unless [he] confessed," *and* because, as a result of that threat, "[his] will was overborne in such a way as to render his confession the product of coercion").

133. 365 U.S. 534 (1961).

not an inquisitorial system."[134] While *Rogers* instructs that "reliability" alone no longer satisfies "voluntariness," it does not specify what factors must be considered, and what weight must be accorded to them, when evaluating the methods of interrogation in light of the adversary process to determine the voluntariness of a confession.[135]

In other cases, the Court emphasized the goal of deterring police misconduct[136] as the reason for excluding confessions obtained by offensive means.[137] In decisions such as *Ashcraft v. Tennessee*[138] and *Haley v. Ohio*,[139] the Court justified "the due process exclusionary rule for confessions (in much the same way as the Fourth Amendment exclusionary rule for physical evidence)[, i.e.,] . . . to deter improper police conduct."[140] Of course, confessions obtained through objectively coercive police questioning are not necessarily unreliable. The defendant's confession in *Ashcraft*, for example, was corroborated by the confession of his alleged accomplice,[141] and the Court's opinion does not cite to any evidence that is inconsistent with the defendant's guilt or his confession. Moreover, a defendant could theoretically exercise a relatively unburdened will and confess even in the face of the most objectively coercive misconduct by police. The *Ashcraft* Court nonetheless determined that the suppression of the defendant's confession was necessary because the tactics used by the police in obtaining it were "so inherently coercive [as to be] irreconcilable with the possession of mental freedom."[142] In other words, even if Ashcraft's confession

134. *Rogers*, 365 U.S. at 540-41. In *Rogers*, the state court seemed to draw a much closer connection between a confession's voluntariness and its reliability. *Id*. at 541-42. The confession in *Rogers* was obtained from the defendant after the police pretended to order the arrest of his ill wife. *Id*. at 535-36. The state court concluded that suppression of the defendant's confession was not required "'if the artifice or deception was not calculated to procure an untrue statement.'" *Id*. at 542 (quoting trial court's charge to jury).

135. *Rogers*, 365 U.S. at 541; Kamisar, *supra* note 112, at 752. "Apparently a trial judge 'adequately define[s] the "voluntariness" required by due process' simply by tossing out a few 'threadbare generalities' and 'empty abstractions,' *e.g.*, 'freely and voluntarily made, made without punishment, intimidation or threat,' or 'made . . . freely and voluntarily and without fear of punishment or hope of reward.'" *Id.* (footnotes omitted) (quoting *Rogers*, 365 U.S. at 564 n.4; Fisher v. United States, 328 U.S. 463, 487 (1946) (Frankfurter, J., dissenting); Ashcraft v. Tennessee, 322 U.S. 143, 146 (1944); Lyons v. State, 138 P.2d 142, 164 (Okla. 1943)).

136. In some sense, deterrence is derivative of the other two goals—it is the remedy for conduct that is overbearing or inconsistent with the Court's view of the adversary system.

137. *See, e.g*., Colorado v. Connelly, 479 U.S. 157, 166 (1986) (citing deterrence of future police misconduct as reason for suppressing confession).

138. 322 U.S. 143, 149-54 (1944) (holding confession inadmissible because it was obtained after continuous questioning for thirty-six hours without allowing suspect rest or sleep).

139. 332 U.S. 596, 600 (1948) (characterizing police conduct as "darkly suspicious" in obtaining defendant's confession).

140. LAFAVE ET AL., *supra* note 99, § 6.2(b), at 312 (footnotes omitted)."The purpose of excluding evidence seized in violation of the Constitution is to substantially deter future violations of the Constitution." *Connelly*, 479 U.S. at 166 (citing United States v. Leon, 468 U.S. 897, 906-13 (1984)).

141. *Ashcraft*, 322 U.S. at 151.

142. *Id*. at 154. The defendant in *Ashcraft* allegedly confessed after thirty-six hours of intense, incommunicado questioning. *Id*.

were reliable and actually the product of a sufficiently free will, its suppression would have been needed to deter police from engaging in similar misconduct that was likely to overbear the will of other suspects during future interrogations.

As the decisional law of this period makes clear, "voluntariness" was no longer synonymous with "trustworthiness."[143] It had evolved into a complex, and sometimes even counterintuitive and contradictory term of art[144] that could, but did not necessarily in each case, encompass a variety of values bearing on a suspect's free will and the reliability of his confession. As one scholar observed, "'[i]t is fatuous, to be sure, to suppose that there will ever be a vocabulary free of all ambiguity. . . . But there are some words which, owing to their history, needlessly obstruct clear thinking,' and 'voluntary,' 'involuntary,' *et al.*, are surely among them."[145]

After stripping away all the rhetoric, what remains is a rather sterile and cynical conception of voluntariness. While the Court ostensibly concentrated on protecting a suspect's right to choose freely (or freely enough) vis-à-vis official conduct, it paid little attention to the quality of the choice made. Nor did the Court concern itself with the more fundamental values implicated by the suspect's choice, such as how truthfully confessing could help a suspect grow in virtue[146] and serve the common good.[147] Quite to the contrary, a confession's reliability is no longer decisive in determining its admissibility, and the Court presumed that suspects confess, even truthfully, only in response to tactics that must be closely scrutinized to ensure that they do not run afoul of other values

143. Kamisar, *supra* note 112, at 746.

144. *Id.*

145. *Id.* at 759 (quoting JEROME FRANK, FATE AND FREEDOM 139 (1945)).

146. As I have argued previously:

> A . . . major problem with the Court's voluntariness approach relates not to what is contained in its "complex of values," but what is omitted from it. The Court, for instance, has never taken the position that truthful confessions dignify the confessor, or that moral police practices dignify the interrogator. The Court has also increasingly minimized and ultimately discounted the role of virtue and conscience in its confession jurisprudence. Moreover, the Court, even apart from its rejection of reliability, has failed to predicate its decisions upon a principled understanding of truth, justice, the common good, and human dignity, as these values have been traditionally understood and constitutionally imbedded. These errors of omission compound the harm caused by the Court's application of its ill-conceived "complex of values," as this construct is neither informed nor offset by these unaccounted for but critical normative considerations, which ought to guide judges and other authorities in the exercise of their respective powers.

Milhizer, *supra* note 3, at 89-90.

147. For example, I have observed that:

> The immutable norms relating to the common good . . . include truth, justice, security, and happiness. Within the context of the criminal justice system, these norms are directly and obviously realized when the system seeks and produces accurate and reliable results. Such results, by definition, comport with and promote truth. They help achieve justice by giving each his due. They make people more secure by reducing crime and needless intrusions upon their privacy and liberty. They make people less anxious by minimizing the fear of false accusations and convictions.

Id. at 76.

that the Court has included in its "complex of values."[148]

Even leaving aside these shortcomings, the "complex of values" traditional involuntariness test was widely criticized as being too imprecise[149] and intolerably uncertain.[150] The general consensus was that "[a]lmost everything was relevant, but almost nothing was decisive. 'Apart from direct physical coercion . . . no single default or fixed combination of defaults guaranteed exclusion . . . .'"[151] As a consequence, many argued that the voluntariness test

> d[id] not provide a clear guideline . . . because . . . assessing whether a police practice unduly impairs a suspect's freedom of choice depends on the normative judgment of how much mental freedom should be afforded the suspect who is confessing, as well as an empirical assessment of how much freedom of choice he had at the time he confessed.[152]

C. What About Miranda*?*

The dissatisfaction with the uncertainty and imprecision of the traditional involuntariness standard was a motivating force for the Court's bright-line approach to voluntariness under the Fifth Amendment.[153] In the 1966 decision of *Miranda v. Arizona*,[154] the Court sought to ensure that confessions were voluntarily rendered by mandating strict compliance with specified procedural requirements as a predicate for admitting statements obtained during custodial

148. Blackburn v. Alabama, 361 U.S. 199, 207 (1960).

149. *See* Joseph D. Grano, Miranda v. Arizona *and the Legal Mind: Formalism's Triumph over Substance and Reason*, 24 AM. CRIM. L. REV. 243, 243 (1987) (observing that, under traditional involuntariness test, "everything [is] relevant but nothing [is] determinative"); Yale Kamisar, Gates, *"Probable Cause," "Good Faith," and Beyond*, 69 IOWA L. REV. 551, 570 (1984) (noting that, under traditional involuntariness test, "[a]lmost everything was relevant, but almost nothing was decisive"); Lloyd L. Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 57 (1974) (describing typical coercion case as one "in which the court[] provide[s] a lengthy factual description followed by a conclusion . . . without anything to connect the two").

150. *See* Joseph D. Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859, 863 (1979) (concluding that traditional involuntariness test resulted in "intolerable uncertainty"); Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 869 (1981) (reviewing YALE KAMISAR, POLICE INTERROGATION & CONFESSIONS (1980)) (noting that traditional involuntariness test "left police without needed guidance"). Other observers have called the due process test "absolutely useless," Monrad G. Paulsen, *The Fourteenth Amendment and the Third Degree*, 6 STAN. L. REV. 411, 430 (1954), and "legal 'double-talk,'" ALBERT R. BEISEL, CONTROL OVER ILLEGAL ENFORCEMENT OF THE CRIMINAL LAW: ROLE OF THE SUPREME COURT 48 (1955).

151. Kamisar, *supra* note 149, at 570 (quoting Miranda v. Arizona, 384 U.S. 436, 508 (1966) (Harlan, J., dissenting)).

152. White, *supra* note 113, at 2010 (citing Grano, *supra* note 150, at 863).

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

154. 384 U.S. 436 (1966). Although decisions such as *Massiah v. United States*, 377 U.S. 201, 207 (1964) (holding that government may not deliberately elicit statements from person under indictment in absence of counsel), and especially *Escobedo v. Illinois*, 378 U.S. 478, 492 (1964) (concluding that Sixth Amendment is violated when postindictment suspect confesses after police deny his request to consult with his counsel), foreshadowed *Miranda*, none of these earlier cases established bright-line procedural requirements for constitutional compliance.

interrogation.[155] *Miranda*, however, like the "complex of values" approach to voluntariness before it, did not adequately account for a confession's reliability. Indeed, *Miranda* represents a veritable triumph of quasi voluntariness over reliability, i.e., not the voluntariness of a confession itself but rather the voluntariness of the *Miranda* waiver that permits custodial interrogation that can lead to a confession.[156]

Although *Miranda* ostensibly had reliable confessions as a goal,[157] its approach was ill designed to achieve this objective. In reality, the *Miranda* Court sought substantially the same end as it had in its pre-*Miranda* "complex of values" cases—to establish and enforce an empirical baseline for assessing and protecting a suspect's "free enough will" vis-à-vis police coercion.[158] *Miranda*'s means for achieving this end, however, were radically different than the Court's voluntariness methodology. Whereas the traditional voluntariness cases use a totality of the circumstances test for assessing voluntariness, *Miranda* requires adherence to newly minted, bright-line criteria.[159] "And, where the pre-*Miranda* cases consult a 'complex of values' designed to inform an essentially factual assessment of free will, the post-*Miranda* approach explicitly relies upon psychological theory and data in constructing its bright lines and then applying them to particular cases."[160] While it would be inaccurate to say that *Miranda* introduced the idea of empirically ascertaining the freedom of a suspect's will,[161] it is true that with *Miranda* the Court sought to achieve better jurisprudence through science by using psychology to enhance its empirical assessment of free

155. *Miranda*, 384 U.S. at 439-42. The dicta in *Miranda* instruct that adequate and sufficient alternatives to the specified rights warnings could be developed. *Id.* at 469. A statutory alternative to the *Miranda* warnings was later declared unconstitutional by the Court in *Dickerson v. United States*, 530 U.S. 428, 444 (2000), thereby effectively requiring compliance with the *Miranda* warning protocols in order to provide Fifth Amendment protections.

156. *See* Colorado v. Connelly, 479 U.S. 157, 170 (1986) ("The sole concern of the Fifth Amendment, on which *Miranda* was based, is governmental coercion. . . . *Miranda* protects defendants against government coercion leading them to surrender rights protected by the Fifth Amendment; it goes no further than that.").

157. *See* Withrow v. Williams, 507 U.S. 680, 692 (1993) (noting that Court has declared on other occasions that *Miranda* helps "brac[e] against 'the possibility of unreliable statements in every instance of in-custody interrogation,' [and] serves to guard against 'the use of unreliable statements at trial'" (quoting Johnson v. New Jersey, 384 U.S. 719, 730 (1966))).

158. *Miranda*, 384 U.S. at 439. Under *Miranda*, "free will" is presumptively exercised if the suspect is provided proper *Miranda* warnings and subsequently "voluntarily" waives them. *See Connelly*, 479 U.S. at 169 ("Of course, a waiver must at a minimum be 'voluntary' to be effective against an accused." (citing North Carolina v. Butler, 441 U.S. 369, 373 (1979); *Miranda*, 384 U.S. at 444)). Nevertheless, notions of "free will" should not be imported into this area as they have no place there. *Id.* at 169. "The sole concern of the Fifth Amendment, on which *Miranda* was based, is governmental coercion." *Id.* at 170.

159. See *supra* notes 153-55 and accompanying text for a discussion of *Miranda*'s bright-line criteria.

160. Milhizer, *supra* note 3, at 19-20 (referring to *Miranda*, 384 U.S. at 448-55).

161. The Court had already moved toward an empirical assessment of free will prior to *Miranda*. *See* White, *supra* note 113, at 2019-20 (discussing pre-*Miranda* decisions that focused on discouraging police practices "likely to produce untrustworthy confessions" rather than assessing trustworthiness of particular confession).

will, and even to provide normative content.[162]

As the above discussion makes clear, this new *Miranda* methodology did not predicate the admission of a confession on its apparent reliability. Rather, under *Miranda*, a confession is admissible only if it can be shown that the suspect "voluntarily, knowingly and intelligently" waived his *Miranda* rights.[163] Notably absent from this determination is any consideration of whether the resulting confession is a truthful and reliable one. Once a suspect's rights have been properly recited and waived, "*Miranda* does not restrict deceptive or suggestive police tactics, manipulative interrogation strategies, hostile or overbearing questioning styles, lengthy confinement, or any of the inherently stressful conditions of modern accusatorial interrogation that may lead the innocent to confess."[164]

The idea of a confession's truthfulness as an independent and constitutionally protected value to be sought and promoted was now on life support. Although *Miranda*'s approach to confessions expressed a preference for the truth,[165] the decision did not equate reliability to truthfulness, nor did it disallow the use of confessions because they were untruthful. Similarly, the contemporaneous "complex of values" approach to voluntariness reflected the diminished significance of a confession's reliability, and thus of truth itself, with the ascendance of other values. To the extent that reliability remained constitutionally relevant, it was largely derivative of other values that might indirectly relate to a confession's truthfulness. Reliability, as an explicit constitutional concern, would be dealt a death blow with the Court's decision in *Colorado v. Connelly*.[166]

162. *See Connelly*, 479 U.S. at 170 ("Indeed, the Fifth Amendment privilege is not concerned 'with moral and psychological pressures to confess emanating from sources other than official coercion.'" (quoting Oregon v. Elstad, 470 U.S. 298, 305 (1985))).

163. *Miranda*, 384 U.S. at 444 ("Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently.").

164. Leo et al., *supra* note 38, at 497-98; *see also* White, *supra* note 113, at 2009 ("A close examination of the post-*Miranda* Due Process cases, however, indicates that, while police interrogators have in some respects been afforded greater freedom than they were during the era immediately preceding *Miranda*, the nature of the voluntariness test has not fundamentally changed. In particular, under both the pre-*Miranda* and post-*Miranda* test, confessions resulting from interrogation methods likely to produce untrustworthy statements should be involuntary." (footnote omitted) (emphasis omitted)).

165. See *supra* notes 153-55 and accompanying text for discussion of the *Miranda* approach to confessions.

166. 479 U.S. 157 (1986).

D. Colorado v. Connelly*: The "Free Enough Will" as a Replacement for Confessions' Reliability*

Connelly banished reliability from the Court's "complex of values" bearing on the voluntariness of a confession.[167] As the Court in *Connelly* instructed, "the voluntariness determination *has nothing to do with the reliability of jury verdicts*; rather, it is designed to determine the presence of police coercion."[168] One cannot fully appreciate *Connelly* and its stunning decoupling of reliability from voluntariness, however, without first understanding the Court's thinking about "free will" as it pertains to the "voluntariness" of a confession.

In the Court's own words, the due process voluntariness "cases refined the test [for voluntariness] into an inquiry that examines 'whether a defendant's will was overborne' by the circumstances surrounding the giving of a confession."[169] Despite its occasional rhetoric to the contrary,[170] the Court's conception of "free will," as used in this context of a confession's voluntariness, is as a relative rather than an absolute term.[171] In an absolute sense, virtually every confession is "free," even those rendered in response to torture or extreme stress, at least insofar as the confessor chooses to admit guilt rather than to suffer further physical pain or mental anguish.[172] In its voluntariness decisions, the Court

167. George E. Dix, *Federal Constitutional Confession Law: The 1986 and 1987 Supreme Court Terms*, 67 TEX. L. REV. 231, 273 (1988) (observing that *Connelly* "reject[ed] . . . reliability as a relevant consideration" for determining admissibility of confessions under federal constitutional law).

168. *Connelly*, 479 U.S. at 168.

169. Dickerson v. United States, 530 U.S. 428, 434 (2000) (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973)).

170. On rare occasions, the Court waxes eloquent about free will in uncompromising terms. *E.g.*, Haynes v. Washington, 373 U.S. 503, 514 (1963) (holding that statement is involuntary if obtained under circumstances in which suspect had no opportunity to exercise "a free and unconstrained will").

171. *E.g.*, Wong Sun v. United States, 371 U.S. 471, 486 (1963) (recognizing that defendant's act of confessing was "*sufficiently* an act of free will" (emphasis added)); Culombe v. Connecticut, 367 U.S. 568, 602 (1961) (noting that test for voluntariness is whether confession is "the product of an *essentially* free and unconstrained choice by its maker" (emphasis added)). This idea of an intermediate threshold for a free enough will is similar to the typical approach to affirmative defenses based on an excuse such as duress. These defenses are generally "predicated on the existence of some complete or *partial* incapacitation of an actor's informed free will." Eugene R. Milhizer, *Justification and Excuse: What They Were, What They Are, and What They Ought to Be*, 78 ST. JOHN'S L. REV. 725, 846-47 (2004) (emphasis added). "[T]he central focus of an excuse determination—free will—is often measured in shades of gray." *Id*. at 851-52. The same can be said of the Court's approach to free will in the context of criminal confessions.

172. *See, e.g.*, George C. Thomas III, *Justice O'Connor's Pragmatic View of Coerced Self-Incrimination*, 13 WOMEN'S RTS. L. REP. 117, 121 (1991) (noting that, as one scholar put it, "[i]f . . . 'voluntary' means only that one exercises choice between alternatives, then . . . '[a]ll conscious verbal utterances are and must be voluntary'" (quoting 2 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 824, at 145 (2d ed. 1923))). The theologian St. Thomas Aquinas further developed this notion of basic "freedom" in determining whether an action is voluntary—i.e., chosen—or involuntary. As St. Thomas explains, "[t]hat which is done through fear, is voluntary without any condition, that is to say, according as it is actually done: but it is involuntary, under a certain condition, that is to say, if such a fear were not threatening." 17 THOMAS AQUINAS, SUMMA THEOLOGIAE, question 6, art. 6 (Blackfriars trans., 1964) (addressing question "does fear render an action simply

instead refers to a suspect's will that is unburdened enough by coercive police tactics to be considered "free" for due process purposes. Thus, freedom of will simply requires some unspecified, intermediate threshold of burdening a suspect's will that may not be transgressed.[173] This threshold, at least theoretically, can be evaluated as a question of fact.[174]

The reliance on a factually assessed "free enough will" in determining voluntariness is at the core of the Court's reasoning in *Connelly*.[175] The defendant in *Connelly*, who suffered from a psychosis[176] that interfered with his capacity to make free and rational choices, approached the police and confessed without prompting.[177] The Court held "that coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary.'"[178] It continued that, in the absence of "police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law."[179]

Connelly thus provides a threefold standard for "voluntariness." First, there must be official government conduct, which means that "'state action' beyond merely receiving defendant's confession into evidence is necessary, that at a minimum there must be 'police conduct causally related to the confession,' and that this conduct must be 'coercive.'"[180] Second, a confession's voluntariness should be evaluated solely by an objective assessment of the actual coercive effect of official conduct and not on the basis of the suspect's subjective perception of reality.[181] Third, the voluntariness determination is largely a factual determination that is capable of being empirically assessed, i.e., what is

involuntary?").

173. *See Dickerson*, 530 U.S. at 434 (noting that "[t]he [traditional involuntariness] determination 'depend[s] upon a weighing of the circumstances of pressure against the power of resistance of the person confessing'" (quoting Stein v. New York, 346 U.S. 156, 185 (1953))).

174. *See* Shotwell Mfg. Co. v. United States, 371 U.S. 341, 348 (1963) ("A coerced confession claim . . . always involves this question: did the governmental conduct complained of 'bring about' a confession 'not freely self-determined'?" (quoting Rogers v. Richmond, 365 U.S. 534, 544 (1961))).

175. Colorado v. Connelly, 479 U.S. 157, 167 (1986).

176. *Id*. at 160-61. The defendant in *Connelly* suffered from schizophrenia. *Id*. at 161. Even though *Connelly* applied the traditional voluntariness standard, it explicitly referenced psychology in much the same way as the post-*Miranda* cases decided during the last few decades. *Id.* at 170.

177. *Id.* at 160-61.

178. *Connelly*, 479 U.S. at 167.

179. *Id.* at 164.

180. LAFAVE ET AL., *supra* note 99, § 6.2(b), at 313 (quoting *Connelly*, 479 U.S. at 164, 167). "[C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." *Connelly*, 479 U.S. at 167. "Absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law." *Id.* at 164.

181. *See Connelly*, 479 U.S. at 166-67 (refusing to require Court to inquire into state of mind of defendant where defendant was not coerced by state). A contrary view was expressed by Justice Brennan in a dissenting opinion, wherein he argued that "ensuring that a confession is a product of free will is an independent concern" of the courts in determining whether a confession is voluntary. *Id*. at 177 (Brennan, J., dissenting); *see also* State v. Carrillo, 750 P.2d 883, 895 (Ariz. 1988) (opining that "objective evaluation of police conduct" should consider subjective mental state of suspect).

objectively too much official coercion for any resulting statement to be considered voluntary.[182]

The Court declared that "reliability," on the other hand, "is a matter to be governed by the evidentiary laws of the forum and not by the Due Process Clause of the Fourteenth Amendment."[183] The Court explained that the Due Process Clause was not intended "'to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false.'"[184] Accordingly, after *Connelly*, reliability was no longer even *a goal* of the due process inquiry.[185] Implicit in *Connelly*'s holding is the assumption that the existing evidentiary rules can shoulder the burden of culling confessions to ensure they are reliable enough and, perhaps, that they already do this. Part III of the Article will consider the adequacy of the present evidence rules to perform this task.

III. RELIABILITY AND THE "EVIDENTIARY LAW OF THE FORUM"

A. Connelly *and Rule 601*

As was discussed in the previous section, *Colorado v. Connelly*[186] decoupled voluntariness and reliability, redefining the voluntariness of a confession[187] exclusively in terms of an objective assessment of the relationship between the defendant and the state.[188] Reliability as a standard of admissibility was not

182. *See* Milhizer, *supra* note 3, at 9 (noting that "Court's voluntariness inquiry has assumed a conspicuously empirical character").

183. *Connelly*, 479 U.S. at 167 (citation omitted). Commenting on this language in *Connelly*, Professor George E. Dix stated:

> The most surprising aspect of the Supreme Court's recent confession decisions is the Court's rejection of reliability as a relevant primary consideration in federal constitutional confession law. In *Colorado v. Connelly*, the Court acknowledged that a confession made by a suspect without free choice might be "quite unreliable." The Court went on to hold, however, that this reliability concern is to be governed by—and apparently of legitimate concern only to—the evidentiary law of the forum, not the federal due process requirement of voluntariness.

Dix, *supra* note 167, at 272 (footnote omitted) (quoting *Connelly*, 479 U.S. at 167-68); *see also* Schneckloth v. Bustamonte, 412 U.S. 218, 227-29 (1973) (arguing that Court's indifference toward reliability with respect to voluntariness of confessions is inconsistent with its approach to consent to search under Fourth Amendment, which expressly recognizes the legitimacy and importance of obtaining "reliable" evidence of crime).

184. *Connelly*, 479 U.S. at 167 (quoting Lisenba v. California, 314 U.S. 219, 236 (1941)).

185. Ironically, about a decade after *Connelly*, the Court, in *Withrow v. Williams*, 507 U.S. 680 (1993), instructed that "*Miranda* [and the Fifth Amendment privilege against compelled self-incrimination] serve[] to guard against 'the use of unreliable statements at trial.'" *Withrow*, 507 U.S. at 692 (quoting Johnson v. New Jersey, 384 U.S. 719, 730 (1966)).

186. 479 U.S. 157 (1986).

187. For the purposes of this Part, any "confession" made is an extrajudicial statement rather than a guilty plea or other in-court statement or admission.

188. *Connelly*, 479 U.S. at 164 (recognizing that "this fact does not justify a conclusion that a defendant's mental condition, *by itself and apart from its relation to official coercion*, should ever

abandoned by *Connelly*, however, because the Court reaffirmed that the "'central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence.'"[189] The Court explained that the assessment of a confession's reliability was exclusively to be "governed by the evidentiary laws of the forum[[190]] and not by the Due Process Clause of the Fourteenth Amendment."[191]

The Court's instruction with respect to the governance of the evidentiary laws of the forum over the issue of reliability presupposes that existing evidentiary laws are sufficient to determine the reliability of a confession.[192] In particular, *Connelly* suggests that Rule 601 of the Federal Rules of Evidence[193] and similar state evidentiary rules are sufficient to accomplish this purpose.[194] As this Part will demonstrate, however, the evidentiary rules of the federal system and the several states are insufficient to bear this burden.

Rule 601 provides that "[e]very person is competent to be a witness except as otherwise provided in these rules."[195] Hence, the default position of Rule 601 is that a person is qualified to offer testimony, including by way of confession, absent a particularized showing that he is not. This approach reflects the general preference of modern evidentiary rules, and courts applying those rules, to receive evidence liberally and entrust the jury with the task of determining its probative value.[196] The import of this preference is that Rule 601 does not provide a basis to evaluate affirmatively the reliability of a confession; rather, the

dispose of the inquiry into constitutional 'voluntariness'" (emphasis added)).

189. *Id*. at 166 (quoting Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986)).

190. The Federal Rules of Evidence are not binding on the state courts. FED. R. EVID. 1101(a) ("These rules apply to the United States district courts, the District Court of Guam, the District Court of the Virgin Islands, the District Court for the Northern Mariana Islands, the United States courts of appeals, the United States Claims Court, and to United States bankruptcy judges and United States magistrate judges, in the actions, cases, and proceedings and to the extent hereinafter set forth."); *see also* 29 AM. JUR. 2D *Evidence* § 12 (1994) (noting that Federal Rules of Evidence only apply to federal courts). Part III will primarily consider the Federal Rules of Evidence, however, because the rules of evidence in the majority of states either mirror or very closely resemble the federal rules in all relevant respects. As of 2000, forty-one states had adopted evidence codes based on the Federal Rules of Evidence. Pamela Vartabedian, Comment, *The Need to Hold Batterers Accountable: Admitting Prior Acts of Abuse in Cases of Domestic Violence*, 47 SANTA CLARA L. REV. 157, 172 & n.121 (2007).

191. *Connelly*, 479 U.S. at 167 (citation omitted).

192. *See generally* FED. R. EVID. 102 ("These rules shall be construed to secure fairness in administration . . . to the end that the truth may be ascertained and proceedings justly determined.").

193. FED. R. EVID. 601 ("Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.").

194. *Connelly*, 479 U.S. at 167. See *supra* note 190 for discussion of states that have adopted the Federal Rules of Evidence in creating their own state evidentiary rules.

195. FED. R. EVID. 601.

196. *See* FED. R. EVID. 402 ("All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority."). As evidence of the courts' preference to allow the jury to weigh the credibility of evidence, see, for example, *United States v. Young*, 573 F.2d 1137, 1139 (9th Cir. 1978).

Rule merely describes the context within which other rules of evidence must function, if at all, to suppress unreliable confession evidence.[197] *Connelly*'s reference to Rule 601, therefore, merely begins the inquiry into whether the existing rules provide a means for excluding unreliable confessions.

B. Exclusion of Unreliable Confessions Under the Federal Rules of Evidence[198]

1. Federal Rule of Evidence 104(c)

Federal Rule of Evidence 104(c) shields a defendant from the prejudice that would be created in the minds of jurors were they present at hearings on the admissibility of confession evidence.[199] Although this is an important

197. Some testimonial evidence can be excluded because it is hearsay. The federal rules define hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FED. R. EVID. 801(c). Hearsay is not admissible except as otherwise provided. FED. R. EVID. 802. Confessions, however, are not governed by the hearsay rules as they are not considered to be hearsay. *See* FED. R. EVID. 801(d)(2) (noting that admission by party opponent is not hearsay). Accordingly, confessions cannot be excluded as hearsay under the federal rules.

198. It is beyond the scope of this Article to provide a thorough, comparative analysis of the states' rules of evidence relating to the reliability of confession evidence. Nevertheless, a summary examination of the rules that pertain to confession evidence in the handful of states that have not adopted the Federal Rules of Evidence reveals that no state has enacted a set of rules that sufficiently addresses the need to suppress unreliable confession evidence. Most states with rules bearing on confession evidence merely reiterate the requirement that the confession be voluntary. *E.g.*, GA. CODE ANN. § 24-3-50 (1995) ("To make a confession admissible, it must have been made voluntarily, without being induced by another by the slightest hope of benefit or remotest fear of injury."); LA. REV. STAT. ANN. § 15:451 (2005) ("Before what [purports] to be a confession can be introduced in evidence, it must be affirmatively shown that it was free and voluntary, and not made under the influence of fear, duress, intimidation, menaces, threats, inducements or promises."). Vermont requires a confession made by a deaf or hearing-impaired person to be more closely examined, although that examination, too, goes to voluntariness. *See* VT. STAT. ANN. tit. 1, § 338 (2003) ("(a) An admission or confession by a deaf or hard of hearing person made to a law enforcement officer or any other person having a prosecutorial function may only be used against the person in a criminal proceeding if: (1) The admission or confession was made knowingly, voluntarily, and intelligently and is not subject to alternative interpretations resulting from the person's habits and patterns of communication. (2) The admission or confession, if made during a custodial interrogation, was made after reasonable steps were taken, including but not limited to the appointment of a qualified interpreter, to ensure that the defendant understood his or her constitutional rights.").

Finally, the states with requirements touching on the defendant's mental capacity generally address only the defendant's ability to perceive reality accurately and express himself truthfully (e.g., Arkansas, California, Kansas, Maine, Michigan, Montana, New Hampshire, New Jersey, North Carolina, Pennsylvania, South Carolina, and Vermont). *See, e.g.*, People v. Crawford, 279 N.W.2d 560, 563 (Mich. Ct. App. 1979) (refusing to exclude confession because defendant was intoxicated, as long as it could be shown he had mental capacity to know what he was saying); People v. Lara, 432 P.2d 202, 215-16 (Cal. 1967) (finding that minor does not per se lack mental capacity to give voluntary confession, but under totality of circumstances test court should consider age, intelligence, ability to comprehend meaning of his statement).

199. FED. R. EVID. 104(c) ("Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.").

protection,[200] the Rule contains no principles for evaluating a confession's reliability, nor does it authorize a court to suppress unreliable confession evidence. Like Rule 601, therefore, Rule 104(c) does no more than establish a context within which other rules must provide concrete, substantive principles for determining the admissibility of confession evidence.

2. Federal Rules of Evidence 401, 402, and 403

Like Rule 601, Federal Rule of Evidence 401 and its companion, Rule 402, are of general application in criminal proceedings. Under Rule 401, evidence that tends to "make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence" is relevant,[201] and Rule 402 empowers a court to admit all relevant evidence except as otherwise provided by law or by rule.[202] Hence, the authorization granted to a court by Rules 401 and 402 to admit evidence provided it has some *quantum* of probative character extends to confession evidence about which there may be a question of reliability, for even an unreliable confession has some degree of probative character. By the authority of Rule 402, therefore, an unreliable confession would only be suppressible if a law or statute "otherwise provided."[203] This poses the question of whether Rule 403 "otherwise provides."

According to Rule 403, courts may exclude relevant evidence, including relevant confession evidence, if "its probative value is substantially outweighed by the danger of unfair prejudice . . . or misleading the jury."[204] Under the authority of this rule, a trial judge is granted broad power, at any time during a criminal proceeding, to weigh the probative nature of proposed evidence, consider its prejudicial effect, and make a discretionary ruling with respect to its admissibility. Although the probative value of confession evidence is indeed related to its reliability, there are at least two reasons that underscore Rule 403's insufficiency as a means of suppressing unreliable confession evidence.

Much evidence admissible under Rule 403 probably may be classified as "objectively neutral," i.e., evidence that, taken out of the context of a criminal proceeding, presents no immediately reasonable presumption that a crime took

200. Even before the promulgation of the Federal Rules of Evidence, failure to abide by this rule was considered reversible error. *See, e.g.*, United States v. Carignan, 342 U.S. 36, 38 (1951) ("Error occurred when the trial court refused to permit respondent to take the stand and testify in the absence of the jury to facts believed to indicate the involuntary character of the confession.").

201. FED. R. EVID. 401.

202. FED. R. EVID. 402 ("All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.").

203. *Id*.

204. FED. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

place or an identified individual is guilty of committing a crime.[205] Where relevant evidence is instead objectively prejudicial, and where the danger is great of that prejudice compromising a jury's ability to deliberate with neutrality, however, Rule 403 often operates to bar its admission. Classic examples of relevant evidence that is excluded because it is highly prejudicial include photographs of a victim's remains[206] or of the victim bleeding profusely.[207]

Confession evidence presents an especially difficult case for applying Rule 403. In general, juries have a tendency to find confession evidence to be highly probative.[208] Indeed, as noted earlier,[209] the Supreme Court has opined that "'confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so.'"[210] Accordingly, a judge presented with a confession about which reliability was at issue would find himself at a crossroads with respect to how Rule 403 would operate and would have no guidance with respect to the better path.

Because the unfairness of the prejudice created by confession evidence increases exponentially as reliability decreases, a judge could be inclined to suppress nearly all confessions to which defense counsel objected on grounds of unreliability. Such a policy, however, would lead to a substantial decrease in the number of confessions admitted into evidence, particularly if defendants became aware that by simply recanting their earlier confessions they would place reliability at issue and establish a basis for suppressing the evidence. On the other hand, a judge might be inclined under Rule 403 to admit nearly all confessions, even where reliability was at issue, on the grounds that a limiting instruction would empower the jury to weigh the evidence bearing on reliability and assign a proportional degree of probative value to the confession evidence. Rule 403 offers no guidance as to which application ought to be preferred, i.e., which application better balances the complementary requirements of admitting true confessions from guilty defendants and guarding against the admission of

205. Evidence that is "objectively neutral" may include weapons and ammunition, travel itineraries, automobiles, clothing, bank statements, DNA test results, prescription medication, and so on. *See* David B. Hennes, Comment, *Manufacturing Evidence for Trial: The Prejudicial Implications of Videotaped Crime Scene Reenactments*, 142 U. PA. L. REV. 2125, 2178 (1994) (discussing persuasive effect of presenting gun used in particular crime to jury, and observing that "[n]ot all vivid probative value is substantially outweighed by unfair prejudice").

206. *See* Campbell v. Keystone Aerial Surveys, Inc., 138 F.3d 996, 1004-05 (5th Cir. 1998) (finding no abuse of discretion in lower court's refusal to admit photographs of victim's remains).

207. *See* Jackson v. Firestone Tire & Rubber Co., 788 F.2d 1070, 1085 (5th Cir. 1986) ("Photographs of the victim bleeding profusely are classic examples of [evidence to be excluded under Rule 403, because it tends to 'induc[e] decision on a purely emotional basis']" (quoting FED. R. EVID. 403 advisory committee's note)).

208. *See* Kassin, *supra* note 17, at 221 ("In criminal law, confession evidence is a prosecutor's most potent weapon—so potent that, in the words of one legal scholar, 'the introduction of a confession makes the other aspects of a trial in court superfluous.'" (quoting MCCORMICK'S, HANDBOOK OF THE LAW OF EVIDENCE 316 (2d ed. 1972))).

209. See *supra* Part I.A for a discussion of the impact of confession evidence in criminal trial.

210. Arizona v. Fulminante, 499 U.S. 279, 296 (1991) (White, J., opinion of the Court) (quoting Bruton v. United States, 391 U.S. 123, 140 (1968)).

unreliable confession evidence.

The argument that Rule 403 does not provide sufficient grounds for evaluating the probative character of all types of evidence is not novel. For example, in 1978, Rule 412 was added to the Federal Rules of Evidence specifically to address the admissibility of an alleged victim's past sexual behavior or alleged sexual predisposition.[211] Furthermore, the Advisory Committee Notes to the 1994 Amendments to Rule 412 show that, while Rule 403 contains the principles of determining the admissibility of such evidence, the unique character of that type of evidence requires a rule that more particularly and precisely addresses the bases for admitting or suppressing such evidence.[212] Similarly, while Rule 403 in theory contains the principles to suppress confession evidence, the unique characteristics of confession evidence[213] require a rule of evidence that is more closely keyed to the particular way in which confession evidence is probative, namely, a rule of evidence that specifically identifies the principle of reliability as the basis for admitting or suppressing confession evidence.

Perhaps ironically, the need for such a rule of evidence is illustrated by one commentator's argument that Rule 403 *is* sufficient to suppress unreliable confession evidence. Beginning with the recognition that Rule 403 contains the theoretical principles for suppressing unreliable confessions,[214] Professor Leo describes the proposed manner in which a confession's reliability would be evaluated under Rule 403: "if the suspect's post-admission narrative fits poorly with the facts of the crime, the judge should rule the confession inadmissible because its prejudicial effect will vastly outweigh its probative value."[215] This, however, is essentially a reduction of the application of Rule 403 to an application of Rule 602's "personal knowledge" requirement. Accordingly, Professor Leo's argument: (1) implicitly recognizes that Rule 403 is deficient

211. Privacy Protection for Rape Victims Act of 1978, Pub. L. No. 95-540, 92 Stat. 2046, 2046-47 (codified at FED. R. EVID. 412).

212. *See* FED. R. EVID. 412 advisory committee's note on 1994 amendments. The language of the Advisory Committee tracks the language in Rule 403, balancing probative value against prejudicial harm:

> The rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process. . . .
>
> Rule 412 seeks to achieve these objectives by barring evidence relating to the alleged victim's sexual behavior or alleged sexual predisposition, whether offered as substantive evidence of [sic] for impeachment, *except in designated circumstances in which the probative value of the evidence significantly outweighs possible harm to the victim*.

Id. (emphasis added).

213. See *supra* Part I.A for an analysis of how reliable confession evidence is, on the one hand, properly considered the best evidence of a defendant's guilt but, on the other hand, how it is exceedingly rare for a jury to decline to convict when presented with confession evidence even where the unreliability of that evidence is demonstrated to the jury.

214. Richard A. Leo, Miranda *and the Problem of False Confessions*, *in* THE *MIRANDA* DEBATE: LAW, JUSTICE, AND POLICING 271, 279 (Richard A. Leo & George C. Thomas III eds., 1998) ("[J]udges should admit confessions into evidence only after they have first met a reasonable standard of reliability based on Federal Rule 403 or its state law analogue.").

215. *Id*.

with respect to evaluating confession evidence, and (2) falls to the criticisms of the position that Rule 602 is sufficient to suppress unreliable confession evidence.[216]

A second indicator that Rule 403 is insufficient to bar the admission of unreliable confession evidence is that it has never been successfully used for this purpose.[217] This strongly suggests that courts either do not know how to apply Rule 403 to confession evidence or they do not recognize that the peculiarly damning character of confession evidence ought to compel a vigorous, pretrial scrutiny of the admissibility of confession evidence when its reliability has been placed at issue.

In sum, Rule 403's authority extends to all evidence, acting as a mighty sword to sever from the body of admitted evidence that which is both unfairly prejudicial and minimally probative. The suppression of unreliable confession evidence, however, requires a scalpel—an instrument that is more finely calibrated to evaluate the reliability of confession evidence.

3. "A More Robust Construction" of Federal Rule of Evidence 602

In "The Reality of False Confessions—Lessons of the Central Park Jogger Case,"[218] Professor Sharon L. Davies argues that the Federal Rules of Evidence do contain the key to suppressing unreliable confession evidence: namely, a "robust construction"[219] of Rule 602, the rule requiring witnesses to have "personal knowledge" of a matter to which they testify.[220] Professor Davies launches her argument by placing it in the context of the notorious "Central Park Jogger Case" in which five boys were convicted for the brutal attack and rape of a female jogger, convictions obtained primarily on the basis of the boys' pretrial confessions.[221] Their confessions—which they recanted before trial—were proven false when the real attacker confessed and was positively identified as the actual perpetrator.[222]

Because the Central Park Jogger case involved no evidence of unconstitutional impropriety in the manner in which the police extracted the boys' confessions,[223] Davies correctly asserts that they could have been excluded

216. See *infra* Part III.B.3 for a discussion of the exclusion of unreliable confessions under the Federal Rules of Evidence and an analysis of a more robust construction of Rule 602.

217. *See*, *e.g.*, United States v. Teague, 93 F.3d 81, 84 (2d Cir. 1996) ("As the only other evidence of [the defendant's] intent to possess the cocaine was his confession, the reliability of which he challenged, the admission of the evidence was also proper under Federal Rule of Evidence 403 . . . ."); *see also* United States v. Dervisevic, No. 01 CR 400, 2002 WL 76973, at *2 (N.D. Ill. Jan. 18, 2002) (avoiding need to consider Rule 403 when defendant could not identify any factor of unreliability in her statements to police).

218. Davies, *supra* note 5, at 209.

219. *Id.* at 231.

220. FED. R. EVID. 602.

221. Davies, *supra* note 5, at 209-20.

222. *Id.* at 220.

223. *Id.* at 243 (finding boys' confessions were voluntary).

only by either expanding the constitutional tests under *Miranda v. Arizona*[224] and *Connelly*[225] or via a rule of evidence.[226] Arguing in company with commentators such as Judge Paul Cassell[227] that expansion of the constitutional tests would be inappropriate and ineffective in reaching the ultimate ends of the criminal justice system,[228] Davies proposes that the instruction of *Connelly* should be followed—and can be effectively followed—by a "robust application" of Rule 602.[229]

Rule 602 prohibits a witness from testifying on a matter unless other evidence suggests that the witness had "personal knowledge" about it.[230] The Rule is loosely construed by most courts, requiring a mere showing, simply by circumstantial evidence or the witness's own testimony, that the witness had the ability and opportunity to witness the event.[231] Furthermore, the Rule generally has not been applied so as to place personal knowledge at issue even when a confessing defendant disavows his confession.[232] But, argues Davies, this is precisely how the Rule should operate,[233] i.e., the recantation of a confession should trigger a preadmission evidentiary hearing to determine whether a reasonable jury could conclude that the confession was in fact based on actual experience.[234]

According to Davies's proposal, a judge conducting such a hearing would employ a "non-exclusive" list of factors for evaluating the reliability of confession evidence when a suspect has recanted that confession.[235] Of the eleven factors proposed by Davies,[236] nine are concerned essentially with

224. 384 U.S. 436 (1966).

225. Davies, *supra* note 5, at 229, 246 & n.151.

226. *Id.* at 243.

227. Paul G. Cassell, *Protecting the Innocent from False Confessions and Lost Confessions—and from* Miranda, 88 J. CRIM. L. & CRIMINOLOGY 497, 537-38 (1998) ("[I]t was shown that preventing police from making false representations about evidence could substantially reduce the number of truthful confessions, which in turn would reduce the number of convictions. This effect is likely to be a general feature of proposals that focus single-mindedly on reducing the incidence of wrongful convictions from false confessions by changing police and court procedures." (footnotes omitted)).

228. Davies, *supra* note 5, at 247.

229. *Id*. at 231-32.

230. FED R. EVID. 602 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.").

231. *See, e.g.*, Adkins v. Dirickson, 523 F. Supp. 1281, 1284 (E.D. Pa. 1981) ("A witness is deemed competent to testify unless it is nearly impossible that he had first-hand observation.").

232. Davies, *supra* note 5, at 233.

233. *Id.* at 233, 243.

234. *Id.* at 243-44.

235. *Id.* at 242-43.

236. *Id.* The factors proposed are:

- whether the confession was obtained only after initial claims of innocence;
- whether the accused's statements about the offense were corroborated or contradicted by other evidence;
- whether the accused described facts surrounding the offense before or after being informed

consistency of the defendant's statements and corroboration of those statements with physical evidence.[237] The remaining two factors are keyed very specifically to the signature nature and public notoriety of the Central Park Jogger case.[238] Applying this proposed construction of Rule 602 to the Central Park Jogger case, Davies contends that a pretrial evidentiary hearing likely would have exposed that the boys did *not* have "personal knowledge" of the crime and that any knowledge they had acquired was derived from information received during their interrogations.[239]

Professor Davies's argument for a robust construction and application of Rule 602 to the Central Park Jogger case is well proposed but ultimately misguided. It relies on the unstated and problematic assumption that reliability and "personal knowledge" are notionally coterminous. By asserting that a robust construction of Rule 602 constitutes "a detailed proposal for requiring trial judges *to assess the reliability of confessions claimed to be false*,"[240] Davies implicitly assumes that a confession is reliable if, and only if, the confessor has personal knowledge of the crime of which he is accused. Lack of personal knowledge is not, however, a universal indicator of an unreliable confession.

For example, a defendant may falsely confess in order to minimize his own role in a crime and assign more culpability to another party.[241] Although evidence of this kind of bias could undermine the confession's reliability, it would be insufficient to negate a confessor's personal knowledge, thereby rendering Rule 602 useless for the purpose of suppressing the confession. Conversely, a juvenile defendant, knowing that his sentence would be lighter

about those facts by his interrogators (e.g., did the officers show the suspect photographs of the victim or crime scene during questioning, and if so, at what point?);

- whether the statement was internally consistent and coherent, or shifted during the course of the interrogation as inconsistencies and discrepancies between what the accused said and the facts known to the police were pointed out;
- whether the accused's statements were externally consistent (whether they were consistent with other physical evidence known to the police);
- in multiple-confession cases, whether each confession was consistent with the others;
- whether the suspicions of the interrogators regarding the accused were based on concrete evidence pointing to the accused's guilt, or on hunch or speculation;
- whether the accused provided details or information about the crime that only the perpetrator of or a participant in the crime would be likely to know (e.g., location of the victim's body, location of the offense weapon, etc.);
- whether the case involved a *modus operandi* (signature) crime, and if so, whether there was evidence that pointed to the accused's involvement in other, similar offenses;
- whether the signature crimes ceased after the accused's apprehension; and
- whether the case involved a serious, high-profile crime.

Davies, *supra* note 5, at 242-43.

237. See *supra* note 236 for a listing of the first nine factors of Davies's proposed factors for evaluating the reliability of confession evidence.

238. See *supra* note 236 for an enumeration of the tenth and eleventh factors pertaining to the crimes stopping upon apprehension of the accused and the seriousness of the crime.

239. Davies, *supra* note 5, at 243-44.

240. *Id.* at 241 (emphasis added).

241. *See* Kassin, *supra* note 17, at 225 (explaining reasons for voluntary false confessions).

than that of an adult codefendant, might falsely confess in order to shoulder more culpability than he actually deserves.[242] This confessor would likewise satisfy all of the requirements for personal knowledge under Rule 602, and thus the Rule would be powerless to suppress his confession. Further, as discussed in the Part I of this Article, issues involving mental illness, language barriers, and immaturity often contribute to the rendering of unreliable confessions. Insofar as these matters fail to raise an issue about a lack of "personal knowledge" by the confessor, however, Rule 602 would again be incapable of suppressing false confessions related to these types of infirmities.

A slight variation on the facts of the Central Park Jogger case illustrates the insufficiency of Rule 602 to suppress an unreliable confession that is ostensibly based on personal knowledge. Suppose that one of the five original defendants had been an adult and the sole perpetrator, and the other four boys witnessed the crime and were juveniles. Suppose further that all five conspired immediately after the crime to minimize the guilt of the adult defendant by making no initial claims of innocence,[243] agreeing instead to confess falsely to significant roles in the crime thereby exculpating the actual criminal. Finally, suppose that the defense counsel became aware of the conspiracy, and the four boys, on defense counsel's advice, recanted their false confessions before trial. According to Professor Davies, their recantation would trigger an evidentiary hearing under Rule 602 at which the judge would employ the "non-exclusive list of factors" and attempt to evaluate whether the four juvenile defendants had personal knowledge of the crime.

It is likely that the four falsely confessing boys could easily satisfy the requirement of personal knowledge under the Davies factors. Because the boys were present during the crime, their statements easily would possess a high degree of internal, external, and relative consistency. Their statements would also be consistent with and corroborated by physical evidence, and they would contain details known only to those at the scene. Any evidence of their conspiracy would not bear per se on the question of personal knowledge—rather, it would concern reliability *generally*—and, therefore, it would not present a basis for suppressing the evidence under Rule 602.[244]

If the list of factors bearing on "personal knowledge" was instead expanded to include all evidence germane to *other* causes of unreliability, such an approach would result in an unreasonably broad and unwieldy construction of Rule 602. It would require a judge, in essence, to conduct a pretrial evidentiary hearing under its auspices to answer the question, "did the defendant commit the crime?" Such an expansive interpretation of the Rule would be inconsistent with its plain language and entirely discordant with the structure of the criminal justice system. Accordingly, and at best, Rule 602 can only be applied properly to a narrow

242. *Id.*

243. This immediate conspiracy would avoid triggering the first factor of Davies's proposed list. *See* Davies, *supra* note 5, at 243 (proposing inquiry as to "whether the confession was obtained only after initial claims of innocence").

244. See *supra* note 236 for a listing of the factors articulated by Davies.

band within the wide spectrum of causes of unreliable confessions, and the Rule's restricted applicability renders it insufficient to accomplish the broader purpose of suppressing unreliable confessions generally.

Hence, while a more robust application of Rule 602 as urged by Professor Davies may be commendable,[245] this approach would not provide a comprehensive solution to the problem of unreliable confessions being admitted into evidence. Indeed, the Federal Rules of Evidence, either discretely or *in toto*, simply do not provide a sufficient practical or legal basis for excluding unreliable confessions.

C. Common Law Corroboration Rules

Although the common law historically provided means for suppressing some unreliable confessions, these too fall short of ensuring that unreliable confessions are systematically excluded from evidence because they are unreliable. Traditionally, confessions required no independent corroboration, and thus convictions were obtained and even capital punishment imposed where there was no inculpatory evidence besides the confession itself.[246] This practice changed after the infamous *Perry's Case*,[247] however, which resulted in the execution of a defendant who had confessed to murdering a victim who was later discovered to be alive.[248] Recognizing that the execution of an innocent man is a grievous miscarriage of justice with respect to both the individual wrongly executed and society's sense of security in the criminal justice system, courts adopted the principle that a confession must be verified[249] by extrinsic evidence,

245. It may even be that Rule 602 cannot be properly applied in the "robust" fashion that Professor Davies urges. *See* Davies, *supra* note 5, at 229-30, 232 (arguing for robust construction of existing rules of evidence, specifically Rule 602). This possibility is suggested by the fact that the defense bar—populated by attorneys who pore over the rules for interpretations that might aid their clients—has never seriously tried to extend the Rule in the manner urged by Professor Davies. A more detailed consideration of this subject is beyond the scope of this Article.

246. *See, e.g.*, 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, 488 (1998) (describing case of defendant John Knapp in which no inculpatory evidence other than defendant's confession supported jury's capital verdict and in which there was "considerable exculpatory evidence supporting [the defendant's] innocence").

247. 14 How. St. Tr. 1311 (1660).

248. *Perry's Case*, 14 How. St. Tr. 1311 (1660).

249. As a consequence of this "verification" requirement, an uncorroborated, extrajudicial confession will not alone provide a sufficient basis for a conviction. As one commentator stated:

> It is well established in the courts of the American judicial system that a criminal defendant cannot be convicted on the basis of his extrajudicial confession alone. The requirement that the corpus delicti be sufficiently corroborated by independent evidence is rooted in the premise that the examination of this additional evidence will avert the danger that a crime was confessed, when in fact no such crime was committed by anyone. Thus, the rule exists to prevent the conviction of an innocent person.

Carolyn K. MacWilliam, Annotation, *Sufficiency of Corroboration of Confession for Purpose of Establishing Corpus Delicti as Question of Law or Fact*, 33 A.L.R. 5th 571, 579 (1995) (footnotes omitted).

because "the extrajudicial statements of an accused may be unreliable."[250]

In order to quicken this principle, American courts adopted, in various jurisdictions and at various times, two ways of corroborating an extrajudicial confession: (1) *corpus delicti*, which concerned whether the crime confessed actually occurred;[251] and, (2) the "trustworthiness" rule,[252] which concerned whether the defendant's confession was trustworthy enough to be admitted into evidence and support a conviction.

1. *Corpus Delicti*

The origin of *corpus delicti* resides in the common law.[253] *Corpus delicti*, which in Latin means the "*body or substance of the crime*,"[254] requires independent proof that the alleged crime actually occurred.[255] To avoid erroneous convictions based on false confessions,[256] common-law courts generally[257] apply this rule by requiring prosecutors to produce the following: (1) evidence of the occurrence of the specific injury with which the defendant is charged, and (2) evidence that such injury resulted from a criminal agency rather than from an innocent or accidental one.[258] In conjunction with such evidence, the defendant's confession satisfies the prosecution's burden of proving the defendant's identity as the perpetrator of the crime.

Although a majority of American jurisdictions recognize some variation of the *corpus delicti* rule,[259] these jurisdictions differ greatly with respect to its form

250. Comment, *Corroboration of Extrajudicial Statements*, 7 STAN. L. REV. 378, 378 (1955).

251. *See* David A. Moran, *In Defense of the Corpus Delicti Rule*, 64 OHIO ST. L.J. 817, 817 (2003) (requiring corroborating evidence of occurrence of crime from prosecution).

252. See *infra* Part III.C.2 for an overview of the adoption of the trustworthiness test in federal courts through a pair of 1954 decisions. The *corpus delicti* rule, however, served as the corroboration rule of choice prior to the establishment of the trustworthiness test, so an examination of both is necessary to understand the role of evidence and corroboration with respect to ascertaining the reliability of a confession.

253. Moran, *supra* note 251, at 826.

254. Rollin M. Perkins, *The Corpus Delicti of Murder*, 48 VA. L. REV. 173, 179 (1962) (emphasis added).

255. *Id*.

256. *E.g.*, *Perry's Case*, 14 How. St. Tr. 1311 (1660) (convicting and executing defendant based on false confession); *see also* Moran, *supra* note 251, at 828 (discussing falsity of confession in *Perry's Case*).

257. But not always. See *infra* notes 259-68 and accompanying text for a discussion of the variations in the application of the rule in American courts.

258. *See*, *e.g.*, Virgin Islands v. Harris 938 F.2d 401, 409 (3d Cir. 1991) (observing that *corpus delicti* rule is no longer part of federal system); United States v. Kerley, 838 F.2d 932, 940 (7th Cir. 1988) (stating that *corpus delicti* rule no longer exists in federal system, and requiring substantial independent evidence to support trustworthiness of confession); People v. Cotton, 478 N.W.2d 681, 689 (Mich. Ct. App. 1991) (finding sufficient evidence to establish assault and conspiracy as result of criminal agency).

259. *See, e.g.*, Smith v. United States, 348 U.S. 147, 154 (1954) (applying *corpus delicti* rule in crimes such as tax evasion where there is no tangible injury); Pate v. State, 63 So. 2d 223, 224 (Ala. Ct. App. 1953) (using *corpus delicti* rule and describing requirement that prosecution must have proof independent of confession). *See generally* 29A AM. JUR. 2D *Evidence* §§ 753, 1472 (1994) (finding that

and application. At least one state considers the rule to encompass criminal agency and the identity of the perpetrator in its definition of proof of harm;[260] other states construe the rule to embrace only proof of harm.[261] Moreover, the amount of evidence necessary to satisfy the requirements of the rule varies significantly among the states, ranging from "slight"[262] to a quantum that would tend to establish proof "beyond a reasonable doubt."[263] Further complicating the rule is the distinction that is sometimes made between the standard of proof required for the "fact" element and the "criminality" element of *corpus delicti*.[264] States also differ with respect to "who will make the determination as to the sufficiency of the corroborating evidence."[265] Some states require the judge to make the determination, others leave it solely to the discretion of the jury, and the remainder hold that it is a mixed question of law and fact to be decided initially by the court but ultimately by the jury.[266] Finally, jurisdictions differ with respect to the order in which evidence is presented. Although this matter often is left to the discretion of the trial judge, states diverge regarding whether evidence offered to satisfy *corpus delicti* must be presented before admission of the confession[267] or whether it may be presented at any time during trial.[268]

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most American jurisdictions apply some form of *corpus delicti* rule, but observing that federal courts and a number of state courts have adopted "trustworthiness" doctrine, emphasizing reliability of confession over independent evidence required under *corpus delicti*).

260. Iowa's rules of practice and procedure provide that "[t]he confession of the defendant, unless made in open court, will not warrant a conviction, unless accompanied with other proof that the defendant committed the offense." IOWA CT. R. 2.21(4) (West 2002).

261. For example, Connecticut, Massachusetts, New Jersey, and North Dakota require only proof of harm or loss. *See* Thomas A. Mullen, *Rule Without Reason: Requiring Independent Proof of the Corpus Delicti as a Condition of Admitting an Extrajudicial Confession*, 27 U.S.F. L. REV. 385, 389 & n.17 (1993) (listing four states as requiring only proof of loss or harm).

262. Colorado describes the evidence required as "slight corroborating evidence." People v. Quinn, 794 P.2d 1066, 1068 (Colo. App. 1990).

263. Louisiana requires proof beyond a reasonable doubt to satisfy the *corpus delicti* rule. State v. Willie, 410 So. 2d 1019, 1029 (La. 1982). Pennsylvania similarly requires that the jury be satisfied beyond a reasonable doubt that the death was a result of a felonious act. Commonwealth v. Fried, 555 A.2d 119, 120 (Pa. Super. Ct. 1989).

264. *See, e.g.*, *Fried*, 555 A.2d at 120 ("[T]o introduce a defendant's confession or admission, the Commonwealth need only show that it was more probable than not that the victim died from unnatural causes. . . . [but] the Commonwealth must prove beyond a reasonable doubt that a crime was in fact committed . . . .").

265. MacWilliam, *supra* note 249, at 571. *Compare, e.g.*, State v. Hale, 367 P.2d 81, 89 (Haw. 1961) (articulating rule that "'[i]t is the province of the court to decide in the first instance whether the evidence adduced of the *corpus delicti* is prima facie sufficient to allow evidence against the accused to go to the jury'" (quoting 1 FRANCIS WHARTON, CRIMINAL LAW 474 (12th ed. 1932))), *with, e.g.*, Azbill v. State, 440 P.2d 1014, 1018 (Nev. 1968) (articulating rule that "the presence or existence of the corpus delicti is a question for the jury").

266. MacWilliam, *supra* note 249, at 571.

267. *E.g.*, Mikita v. State, 171 So. 2d 61, 64 (Fla. App. 1965) (requiring independent proof of corpus delicti before admission of confession of defendant).

268. *See*, *e.g.*, Armstrong v. State, 502 P.2d 440, 447-48 & n.21 (Alaska 1972) (leaving order of proof within discretion of trial court, but stating that "better practice" is to require independent proof before confession"); State v. Easley, 515 S.W.2d 600, 602 (Mo. Ct. App. 1974) (indicating that evidence of corpus delicti need not precede admission of defendant's confession); McIntosh v. State, 466 P.2d

This multifarious status of the *corpus delicti* rule demonstrates that it cannot be used to distinguish systemically between reliable and unreliable confessions. American courts have been at a loss to define and apply *corpus delicti* in a consistent manner, and they are far from producing an intelligible body of legal doctrine that balances the interests of encouraging guilty defendants to confess against the interests of suppressing false confessions. And, even in its most rigorous application, the *corpus delicti* rule only obliquely addresses reliability, in that it requires evidence of commission of the crime rather than evidence of the defendant's causal relationship to it.

As a consequence, some courts have tortured the *corpus delicti* doctrine almost beyond recognition in a hobbled attempt to make it serve the purpose of ensuring that confessions are reliable.[269] Yet, in the end, the rule is incapable of suppressing, for example, the unreliable confession of a mentally unstable person unless the confessor recants.[270] It cannot suppress the unreliable confession of a coactor or witness seeking to protect another party. It does not reach an unreliable confession made by an actor intending to inculpate another party to a degree greater than that party's behavior merits. As one commentator put it, "[t]he rule bars concededly voluntary confessions where there is no independent proof of crime, but does not block the admission of dubious confessions if the prosecution meets a low threshold of evidence supporting the occurrence of the crime."[271]

Some commentators have defended the *corpus delicti* rule against these attacks by arguing that it fails only when defined or applied in a manner inconsistent with its modest purposes.[272] An initial difficulty with this defense is that it incorrectly assumes there is a consensus about the definition and purpose of the *corpus delicti* rule. While some courts do conceive of the rule as having a limited scope,[273] others insist that its purpose includes protecting the mentally unstable or controlling police misconduct.[274] Given this wide divergence about the rule's definition and application, it is unsuited to protect against the

656, 658 (Nev. 1970) (finding that order of proof is subject to discretion of trial court).

269. *See, e.g.*, Moran, *supra* note 251, at 836-37 ("The rule was never intended to suppress *all* unreliable confessions; the rule was designed only to preclude confessions to, and convictions for, *fictitious* crimes . . . . If the corpus delicti rule serves that narrow but laudable purpose, as it clearly does, it hardly seems fair to criticize the rule for not serving other worthwhile causes as well." (footnote omitted)).

270. "It is much less likely that a person will be erroneously convicted as the result of a contested trial when the only evidence is a repudiated confession than that he will be erroneously convicted on a plea of guilty where no evidence whatever is presented." Roy A. Gustafson, *Have We Created a Paradise for Criminals?*, 30 S. CAL. L. REV. 1, 9 (1956).

271. Mullen, *supra* note 261, at 405.

272. See *supra* note 269 for a defense of the rule.

273. *See, e.g.*, People v. Lytton, 178 N.E. 290, 291 (N.Y. 1931) (articulating that rule's purpose is merely to ensure that proof of crime charged is established before defendant is convicted).

274. Jones v. Superior Court, 157 Cal. Rptr. 809, 813 (Cal. Ct. App. 1979) ("Today's judicial retention of the rule reflects the continued fear that confessions may be the result of either improper police activity or the mental instability of the accused, and the recognition that juries are likely to accept confessions uncritically.").

admission of unreliable confessions in any comprehensive or meaningful fashion.

2. Trustworthiness Rule

Because of the many infirmities of the *corpus delicti* rule, the Supreme Court, in a pair of 1954 decisions, rejected it in favor of the "trustworthiness" rule.[275] The "trustworthiness" doctrine "emphasizes the reliability of the defendant's confession over the independent evidence of the corpus delicti."[276] Rather than requiring independent proof of each element of the crime, the trustworthiness rule allows that the "evidence may . . . be collateral to the crime itself,"[277] provided that it "'directly relates to the trustworthiness of the important facts contained in the defendant's statement.'"[278] The *Opper v. United States*[279] Court offered the following rationale in defense of this less restrictive standard:

> [W]e think the better rule to be that the corroborative evidence need not be sufficient, independent of the statements, to establish the *corpus delicti*. It is necessary, therefore, to require the Government to introduce substantial independent evidence which would tend to establish the trustworthiness of the statement. Thus, the independent evidence serves a dual function. It tends to make the admission reliable, thus corroborating it while also establishing independently the other necessary elements of the offense. It is sufficient if the

275. Smith v. United States, 348 U.S. 147 (1954); Opper v. United States, 348 U.S. 84 (1954). Following the Court's lead, many states have abolished the *corpus delicti* rule. *See generally* Armstrong v. State, 502 P.2d 440, 447 (Alaska 1972) (adopting *Opper* standard in Alaska); State v. Hafford, 746 A.2d 150, 172-74 (Conn. 2000) (adopting *Opper* standard for all types of crimes in Connecticut); Harrison v. United States, 281 A.2d 222, 224-25 (D.C. 1971) (following *Opper* standard in the District of Columbia); Gilder v. State, 133 S.E.2d 861, 863 (Ga. 1963) (holding that "corroboration of a confession in any material particular" suffices in Georgia); State v. Yoshida, 354 P.2d 986, 990 (Haw. 1960) (adopting trustworthiness standard in Hawaii); State v. Urie, 437 P.2d 24, 26-27 (Idaho 1968) (holding "slight corroboration will suffice" to admit confession and corroboration need not establish elements of *corpus delicti* in Idaho (citations omitted)); State v. Hansen, 989 P.2d 338, 346 (Mont. 1999) (citing *Opper* approvingly and concluding that "the *corpus delicti rule* outlived its usefulness," but noting that Montana statute, MONT. CODE ANN. § 45-5-111, requires continued use of rule in homicide cases only); State v. George, 257 A.2d 19, 21 (N.H. 1969) (holding substantial evidence independent of confession suffices in New Hampshire); State v. Parker, 337 S.E.2d 487, 495-97 (N.C. 1985) (concluding that confession is admissible if trustworthy even if corpus delicti not established by independent evidence in North Carolina); Fontenot v. State, 881 P.2d 69, 77-78 (Okla. Crim. App. 1994) (abolishing *corpus delicti* rule in favor of *Opper* standard in Oklahoma); Holt v. State, 117 N.W.2d 626, 633 (Wis. 1962) (holding prosecution need only corroborate "any significant fact" in Wisconsin). An eleventh state, North Dakota, formerly had a statutory *corpus delicti* rule that applied only in homicide cases, but that provision was repealed in 1973. *See* State v. Champagne, 198 N.W.2d 218, 227-28 (N.D. 1972) (indicating that, absent homicide *corpus delicti* statute, circumstantial evidence may corroborate confession (citing N.D. CENT. CODE § 12-27-28 (1972))). Therefore, it appears that North Dakota currently has no *corpus delicti* rule.

276. Virgin Islands v. Harris, 938 F.2d 401, 409 (3d Cir. 1991).

277. *Id.* at 409-10.

278. *Id.* at 410 (quoting Brian C. Reeve, State v. Parker*: North Carolina Adopts the Trustworthiness Doctrine*, 64 N.C. L. REV. 1285, 1297 (1986)).

279. 348 U.S. 84 (1954).

> corroboration supports the essential facts admitted sufficiently to justify a jury inference of their truth.[280]

Smith v. United States,[281] decided immediately after *Opper*, added to this rationale and provided that the independent evidence may result from the confession itself:

> All elements of the offense must be established by independent evidence or corroborated admissions, but one available mode of corroboration is for the independent evidence to bolster the confession itself and thereby prove the offense "through" the statements of the accused.[282]

Thus, in a federal criminal trial, a confession must be corroborated by evidence tending to prove the confession is trustworthy and reliable, not necessarily by evidence that establishes independent proof of each element of the crime.[283]

While the "trustworthiness" or "corroboration" rule has the advantage of being more flexible and broadly applied—insofar as it embraces both the purposes of *corpus delicti* and other sources of unreliability—it fails for this very reason to provide an effective line of defense against unreliable confessions. Indeed, state courts have held that "[c]orroboration of the corpus delicti is a 'low threshold[,]' [and] the state needs 'only slight evidence . . . to corroborate a confession and sustain a conviction.'"[284] Illustrating the effect of this low threshold, Professor David Moran points to a New Hampshire Supreme Court case in which "a defendant's confession to illegally driving a vehicle [was] sufficiently corroborated, even though there was no other evidence that he drove the vehicle and his girlfriend testified that she was the driver, because the testimony of other witnesses contradicted certain other aspects of the girlfriend's testimony."[285] As Professor Moran laments, "the *Opper* corroboration rule is . . . so malleable that almost *any* independent evidence of *anything* can serve to 'corroborate' the confession or make it 'trustworthy.'"[286]

Hence, whereas the corpus delicti rule is too restrictive to cull unreliable confession evidence, the "trustworthiness" rule is instead too permissive to achieve this same purpose. Accordingly, there is a void in the common-law approach, as there was with the Federal Rules of Evidence, with respect to suppressing unreliable confession evidence. This Article proposes to fill that void with a new Federal Rule of Evidence, which would empower a judge to consider all of the reasons bearing on a confession's reliability in deciding whether it

280. *Opper*, 348 U.S. at 93 (citation omitted).

281. 348 U.S. 147 (1954).

282. *Smith*, 348 U.S. at 156.

283. Some opponents have contended that this standard is too lax. *See* Moran, *supra* note 251, at 852 (arguing that trustworthiness rule is "so malleable that almost *any* independent evidence of *anything* can serve to 'corroborate' the confession or make it 'trustworthy'"); *id.* at 851-53 (explaining how trustworthiness rule does not protect those for whom *corpus delicti* rule was designed to protect).

284. State v. Housler, 193 S.W.3d 476, 490 (Tenn. 2006) (citation omitted) (quoting State v. Smith, 24 S.W.3d 274, 281-82 (Tenn. 2000)).

285. Moran, *supra* note 251, at 852.

286. *Id.*

should be suppressed because it is too unreliable. The proposed rule is considered in Part IV.

IV. A RETURN TO HISTORY: REPLICATING THE TRADITIONAL VOLUNTARINESS TEST TO SAFEGUARD AGAINST FALSE CONFESSIONS

The preceding discussion establishes the following propositions: (1) confessions are regarded as uniquely powerful proof of guilt within the criminal justice system;[287] (2) false confessions to crimes occur with unsettling frequency;[288] (3) false confessions often result from causes that are independent of police coercion[289] and are not covered by the current *Colorado v. Connelly*[290] voluntariness and *Miranda v. Arizona*[291] standards;[292] and (4) the rules of evidence, which *Connelly* instructs must be used to address the phenomena of false and unreliable confessions,[293] are ill suited for this purpose.[294] In light of this reality, the criminal justice system must be reformed so that it can respond to the problem of false and unreliable confessions more effectively. In particular, the rules of evidence must be adapted to shoulder the burden that *Connelly* placed on it, i.e., the exclusion of unreliable confessions because they are unreliable. Such an adaptation is proposed below, in the form of a new rule of evidence.

A. Proposed New Rule of Evidence

Proposed here is a new and specialized rule of evidence, which subjects the initial consideration of a confession's reliability to a preponderance of the evidence standard as applied by the presiding judge. The proposed rule is as follows:

> *Evidence of a defendant's confession or admission*[295] *is not admissible in any criminal proceeding if, in the judge's determination, considering all of the relevant evidence pertaining to the confession, no reasonable juror by a preponderance of the evidence could conclude that the confession is reliable.*

287. See *supra* Part I.A for a discussion of the impact of confession evidence.

288. See *supra* Part I.B for a discussion of the prevalence of false confessions.

289. See *supra* Part I.C for a discussion of the reasons people make false confessions.

290. 479 U.S. 157 (1986).

291. 384 U.S. 436 (1966).

292. See *supra* Part II for a discussion of the dimishing significance of reliability.

293. See *supra* Part II.D for a discussion of *Connelly*'s "free enough will" standard.

294. See *supra* Part III for a discussion of how the rules of evidence do not adequately determine the reliability of a confession.

295. The distinction between a defendant's confession and admission is that "a confession is an express acknowledgement of guilt, whereas an admission is circumstantial evidence" from which guilt may be inferred. JEROME PRINCE, RICHARDSON ON EVIDENCE § 540, at 533 (10th ed. 1973). The proposed rule addresses both confessions and admissions.

The proposed rule's component parts will in turn each be briefly discussed next.[296]

1. "In the Judge's Determination"

The proposed rule provides that the presiding judge will make the initial determination about an offered confession's reliability.[297] This approach is consistent with the common law's approach to voluntariness based on trustworthiness. An early twentieth century treatise explained that "[b]efore a confession . . . can be received as such, it must first be shown that it was in every respect freely and voluntarily made."[298] It continued that "[t]he preliminary question, was the confession voluntary? bearing directly upon its competency as evidence, must be, according to the majority of the cases, *decided by the court* as a mixed question of law and fact."[299] Other contemporaneous treatises likewise recognized that a confession's voluntariness, and hence its reliability, was to be determined first by the trial judge.[300]

Judges perform a similar role today when deciding whether certain evidence should be excluded from consideration by the jury. A gatekeeping function is

296. In the recent past, new rules of evidence have been adopted to address perceived inadequacies in the rules generally. FED. R. EVID. 412. The so-called "rape shield rule," adopted in 1978, which limits the introduction of evidence relating to the victim in rape cases, was enacted in response to attacks on aspects of rape prosecutions by the feminist movement. *See* PAUL C. GIANNELLI, UNDERSTANDING EVIDENCE, § 10.07, at 150 (2003) (discussing FED. R. EVID. 412-415). These rules, adopted in 1994, which permit the introduction of the accused's character in sexual assault and child molestation cases, were enacted in response to the perceived inadequacy of the criminal justice system to protect society from those who commit sexual assaults. *See* 140 CONG. REC. 23, 602-03 (1994) (statement of Rep. Molinari) (arguing that rules badly needed protection for women and children).

297. Of course, if a confession is admitted into evidence by the trial judge under the proposed rule, the defense is permitted to challenge its reliability, i.e., its credibility, before the jury during the trial on the merits, as with any other evidence presented by the prosecution in order to convince of the jury of the defendant's guilt beyond a reasonable doubt.

298. UNDERHILL, *supra* note 15, § 126, at 242.

299. *Id.* § 126, at 243 (emphasis added). The proposed approach likewise recognizes that reliability is a mixed question of law and fact. *See* Miller v. Fenton, 474 U.S. 104, 112 (1985) (holding voluntariness of confession is question of law requiring independent determination by habeas court); *see also* Thompson v. Keohane, 516 U.S. 99, 112-13 (1995) (noting whether suspect is sufficiently "in custody" to require *Miranda* warning is a mixed question of law and fact requiring independent review).

300. Voluntariness is a "question [that] is addressed *in the first instance to the judge*" and is "one wholly for the court to determine." UNDERHILL, *supra* note 15, § 126, at 244 (emphasis added); *see also* WILLIAM REYNOLDS, THE THEORY OF THE LAW OF EVIDENCE 30 (Chicago, Callaghan & Co. 1883) (stressing that, in first instance, confession will be deemed involuntary "*provided* that in the *opinion of the judge* such inducements gave the accused reasonable ground for supposing that by making a confession he would gain some advantage or avoid some evil in reference to the proceedings against him." (second emphasis added)); JAMES FITZJAMES STEPHEN, A DIGEST OF THE LAW OF EVIDENCE 30-31 (London, MacMillan 1893) ("A confession is deemed to be voluntary if (*in the opinion of the judge*) it is shown to have been made after the complete removal of the impression produced by any inducement, threat, or promise which would otherwise render it involuntary." (emphasis added)).

exercised by the judge in order "to prevent jury error by filtering out the really bad evidence that is likely to lead the jury astray."[301] Exclusionary rules were accordingly established, and, as one commentator observed,

> [i]ncluded within this umbrella of exclusionary rules are categorical prohibitions against the admission of evidence of 'prior bad acts' to show propensity, the admission of a rape complainant's sexual history or predisposition, the admission of subsequent remedial measures to show negligence, the admission of settlement negotiations or the payment of medical expenses to show liability, and the occurrence of plea discussions to show guilt.[302]

When the categorical exclusion of certain evidence is unwarranted, judges are entrusted with deciding whether the evidence should be deemed inadmissible in a particular case under the circumstances, often using nuanced and complicated standards.[303] For example, under the Federal Rules of Evidence, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[304] Sometimes heightened standards are employed, as with evidence offered to prove the sexual behavior or sexual predisposition of an alleged victim.[305]

Judges routinely cull the evidence that is ultimately presented to the jury in order to promote the search for truth. They can exclude evidence because of a concern that "juries will put too much stock in such evidence as proof of

301. Dale A. Nance, *Naturalized Epistemology and the Critique of Evidence Theory*, 87 VA. L. REV. 1551, 1555 (2001).

302. Davies, *supra* note 5, at 231 (footnotes omitted).

303. *See, e.g.*, Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997) (upholding district court's decision to reject opinion evidence due to judge's gatekeeping role); Wolak v. Spucci, 217 F.3d 157 (2d Cir. 2000) (finding that, in gender discrimination claim, probative value of admitting evidence regarding sexual harassment victim's history of viewing pornography outside of her office was substantially outweighed by unfair prejudice); United States v. Brooke, 4 F.3d 1480, 1485-88 (9th Cir. 1993) (finding that, in case in which defendant was on trial for conspiracy to manufacture and possess destructive device, probative value of admitting evidence that defendant had falsely told her friends and acquaintances that she suffered from terminal cancer was outweighed by potential for prejudice under Rule 403).

304. FED. R. EVID. 403.

305. *See* FED. R. EVID. 412(b)(2) ("In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party."); *see also* FED. R. EVID. 412 advisory committee's note ("The test for admitting evidence offered to prove sexual behavior or sexual propensity in civil cases differs in three respects from the general rule governing admissibility set forth in Rule 403. First, it Reverses that usual procedure spelled out in Rule 403 by shifting the burden to the proponent to demonstrate admissibility rather than making the opponent justify exclusion of the evidence. Second, the standard expressed in subdivision (b)(2) is more stringent than in the original rule; it raises the threshold for admission by requiring that the probative value of the evidence *substantially* outweigh the specified dangers. Finally, the Rule 412 test puts 'harm to the victim' on the scale in addition to prejudice to the parties.").

[unwarranted] conclusions."[306] This concern would be especially germane when evidence at issue is the defendant's confession because, as already noted, confession evidence "'is probably the most probative and damaging evidence that can be admitted against [a defendant]. . . . Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so.'"[307] Given the important interests at stake, the proposed rule retains the trial judge's critical and venerable gatekeeping role of excluding confessions when they are too unreliable.[308]

2. "Considering All of the Relevant Evidence Pertaining to the Confession"

In making the determination as to whether a confession was admissible under traditional voluntariness standards, common-law courts employed a totality of the circumstances test.[309] It was widely accepted that only through examining all of the circumstances surrounding a confession would a judge be able to make a reasoned judgment about its reliability. As one scholar explained:

> The admissibility of confessions so largely depends upon the special circumstances of each case that it is difficult, if not impossible, to formulate any rule which will embrace all the cases. And as the question is addressed in the first instance to the judge, and since his discretion must be controlled by all the attendant circumstances the courts have wisely foreborne to mark with absolute precision the limits

306. Davies, *supra* note 5, at 231. See also Kassin & Wrightsman, *supra* note 17, at 80–91, for an examination of judicial perceptions of confession evidence.

307. Arizona v. Fulminante, 499 U.S. 279, 296 (1991) (quoting *Bruton*, 391 U.S. at 139-40 (White, J., dissenting). See *supra* Part I.A for discussion of the impact of confessions. Professor Richard A. Leo, after studying the impact of confessions on juries, concluded that "[j]uries are often so unwilling to believe that anyone would confess to a crime that he did not commit that they are likely to convict on the basis of the confession alone, even if no significant or credible evidence confirms the confession and considerable evidence disconfirms it." Richard A. Leo, *False Confessions: Causes, Consequences, and Solutions*, *in* WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE 36, 46 (Saundra D. Westervelt & John A. Humphrey eds., 2001).

308. *See* GIANNELLI, *supra* note 296, § 1.07, at 14 (explaining theme of current Rules of Evidence is trial judge's discretion). Professor Davies goes so far as to make the claim that "it is reasonable to believe that trial judges will with sufficient training become superior assessors of the truth or falsity of confessions." Davies, *supra* note 5, at 251. She offers three reasons as support for this claim:

> First, unlike jurors, judges regularly attend judicial conferences which provide special opportunities for educating them about the realities of false confessions. . . .
>
> Second, as repeat players in the court system, judges possess a frame of reference as to confession evidence that jurors necessarily lack, which better positions them to assess the significance of the red flags associated with suspect confessions. . . .
>
> Third, empirical studies show that jurors routinely fail to appreciate the serious possibility that voluntary confessions can in fact be false, and are thus staggeringly susceptible to the persuasive effect of confessions.

Id. (citing Leo & Ofshe, *supra* note 16, at 481).

309. See *supra* notes 131-32 for evidence that there is no bright-line test for determining traditional involuntariness similar to the *Miranda* warnings requirements for Fifth Amendment voluntariness.

of admission and exclusion.[310]

Common-law judges considered evidence presented by both the prosecution and defense in making reliability determinations.[311] This practice reflected an understanding that:

> it is [the right of the accused] to show by preliminary evidence that the confession was not voluntary, and it is the duty of the court, in determining the competency of the confession, not only to consider the evidence for the state, showing the confession was voluntary, but the evidence elicited by the accused to prove the contrary in his favor as well.[312]

These procedures allowed evidence relating to reliability to be tested through cross-examination and contradiction.[313]

The new rule proposed here largely replicates this traditional approach.[314] First, it recognizes that a totality of the circumstances evaluation of a confession's reliability is more fitting than the use of bright-line rules or presumptions,[315] especially given the wide array of causes for false confessions,[316] which is not readily susceptible to a mechanical assessment. Second, the proposed rule also allows for the evaluation of a confession's reliability consistent with the adversary character of a criminal trial[317] by affording both the prosecution and the defense the opportunity to offer evidence bearing on

310. UNDERHILL, *supra* note 15, § 126, at 244 (citing Hopt v. Utah, 110 U.S. 574, 583 (1884)).

311. *Id*. § 126, at 243-44 ("[T]he court may hear evidence from both sides to show the circumstances under which the confession was made.").

312. *Id.* § 127, at 246.

313. *See* Jackson v. Denno, 378 U.S. 368, 391 (1964) (holding that due process requires procedures that are "fully adequate to insure a reliable and clear-cut determination of the voluntariness of the confession, including the resolution of disputed facts upon which the voluntariness issue may depend"); *see also* Crawford v. Washington, 541 U.S. 36, 61 (2004) (referring to testing reliability of evidence by "crucible of cross-examination" (citing 3 WILLIAM BLACKSTONE, COMMENTARIES *373 ("This open examination of witnesses . . . is much more conducive to the clearing up of truth . . . ."); MATTHEW HALE, HISTORY AND ANALYSIS OF THE COMMON LAW OF ENGLAND 258 (London, J. Nutt 1713) (asserting that adversarial testing "beats and bolts out the Truth much better"))).

314. *See, e.g.*, Arizona v. Fulminante, 499 U.S. 279, 286 (1991) (using totality of circumstances test for assessing voluntariness of confession); Miller v. Fenton, 474 U.S. 104, 112 (1985) (same); Haynes v. Washington, 373 U.S. 503, 513-14 (1963) (same).

315. *See* Penney, *supra* note 99, at 353 ("[T]here is no litmus test for determining [voluntariness]. In each case the relevant factors must be weighed anew."). Bright-line rules, such as the requirement for *Miranda* warnings for all custodial interrogations, seek the practical benefit of simplified dispositions that are usually correct, even at the cost of occasionally undesirable results at the margin. For a discussion of the prudence of "bright-line rules" generally, see Eugene R. Milhizer, *Group Status and Criminal Defenses: Logical Relationship or Marriage of Convenience?*, 71 MO. L. REV. 547, 617 (2006). *See* Wayne R. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Line" and "Good Faith*," 43 U. PITT. L. REV. 307, 320-33 (1982) (discussing advantages and disadvantages of bright-line rules generally).

316. See *supra* Part I.C for discussion of the reasons for false confessions.

317. *See* Rogers v. Richmond, 365 U.S. 534, 540-41 (1961) (instructing that, under pre-*Connelly* voluntariness standards, tactics employed to induce confessions must be in accord with accusatorial, rather than inquisitorial, judicial system).

reliability and challenge what is offered by their opponent.[318]

3. "No Reasonable Juror"

"The jury is not wholly free in its deliberative process. Rules exist to ensure that the jury considers only those legal issues about which sufficient factual evidence was presented at trial that it can reach a rational, rather than a speculative, verdict."[319] The proposed rule falls squarely within the range of standards judges use to review evidence and make sufficiency determinations that limit the prerogatives of juries.[320] For example, when a judge passes on a motion for a judgment of acquittal, he directs an acquittal only "if the evidence is insufficient to sustain a conviction."[321] In other words, the judge sustains the conviction if there is "'"relevant evidence from which the jury could properly find or infer, beyond a reasonable doubt," that the accused is guilty.'"[322] The proposed rule acts in an analogous fashion with respect to evaluating the reliability of confessions.

The term "reasonable juror," used in conjunction with such a standard, presumes that the "juror would consider fairly all of the evidence presented. . . . [and] conscientiously obey the instructions of the trial court requiring proof beyond a reasonable doubt."[323] Jurors, however, do not always act reasonably.[324] The Court has recognized that "a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt."[325] Federal Rule of Criminal Procedure 29[326] and similar rules[327] were enacted to address this reality. And, for the many reasons discussed earlier, jurors are particularly prone to act unreasonably by crediting

318. As one commentator explained:

> When a confession is offered by the state in a criminal case, it is the right of the counsel of the prisoner, *before it is admitted*, to cross-examine the witness who purposes to testify to it as to circumstances surrounding the making of it, and the defense may also call, at the same time, independent witnesses and examine them, going thoroughly into the whole matter, as to how the confession came to be made, the parties present, the physical condition and state of mind of the prisoner at the time it was made, and then the court, with all these facts before it, is to pass upon its admission.

UNDERHILL, *supra* note 15, § 127, at 246 n.21 (emphasis added) (citing State v. Hill, 47 A. 814, 815 (N.J. 1901)); *see also* Willis v. State, 61 N.W. 254, 255 (Neb. 1894) (noting that defense may cross-examine on circumstances surrounding confession).

319. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 7.01, at 71 (4th ed. 2006).

320. *See generally* 2A CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 467 (3d ed. 2000) (examining standard for passing on motions for judgment of acquittal).

321. *Id.* § 467, at 301 (internal quotation marks omitted).

322. *Id.* (quoting Am. Tobacco Co. v. United States, 328 U.S. 781, 787 n.4 (1946)).

323. Schlup v. Delo, 513 U.S. 298, 329 (1995).

324. *See* Barbara D. Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299, 1331 (1977) (referring to juries as "fallible factfinder[s]").

325. Jackson v. Virginia, 443 U.S. 307, 317 (1979).

326. FED. R. CRIM. P. 29 (motion for Judgment of Acquittal).

327. For example, the military's analogue to Federal Rule of Criminal Procedure 29 is Rule for Courts-Martial 917, Motion for a finding of not guilty. FED. R. COURT MARSHALL 917.

facially unreliable confessions.[328]

The proposed rule accounts for the real possibility of an unreasonable juror while respecting the primacy of the jury as fact finder. Under the proposed rule, a judge would be obligated to exclude a confession only if no reasonable juror could properly find it to be reliable. If a reasonable juror could find by a preponderance of the evidence that the confession is reliable, then the judge is required to admit it regardless of his personal views as to its reliability.[329] As a consequence, the proposed rule would result in the exclusion of only the most suspect confessions in the interest of justice, but it would not license a judge to substitute his own judgment about reliability for that of the jury. Indeed, it is difficult to imagine how or why anyone would take a contrary position and tie a judge's hands when a confession is offered that no reasonable juror could conclude was reliable.

4. "By a Preponderance of the Evidence"

Employing a preponderance of the evidence[330] standard to determine the reliability of a confession is in keeping with current Supreme Court jurisprudence regarding the burden of proof required for other confession admissibility determinations.[331] In *Lego v. Twomey*,[332] the Supreme Court held that the preponderance of the evidence standard can be used to establish the voluntariness of a confession.[333] The petitioner in *Twomey* challenged his conviction, arguing that his guilt was not proven beyond a reasonable doubt because the voluntariness of the confession used against him at his trial had been

328. See *supra* Part I.A for discussion of the impact of confessions.

329. WRIGHT, *supra* note 320, § 467, at 310 ("It is now understood that a single test applies, regardless of the kind of evidence, and that in all cases, whether the evidence be direct or circumstantial, the matter is for the jury to decide unless the court concludes that the jury would have to have a reasonable doubt." (footnote omitted)).

330. Preponderance of the evidence is defined as "[t]he greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other." BLACK'S LAW DICTIONARY 1220 (8th ed. 2004).

331. *E.g.*, Colorado v. Connelly, 479 U.S. 157, 168 (1986) (reiterating earlier holding that "[w]henever the State bears the burden of proof in a motion to suppress a statement that the defendant claims was obtained in violation of our *Miranda* doctrine, the State need prove waiver only by a preponderance of the evidence"). This is not to suggest, however, that judges are incapable of applying other standards in determining whether to admit evidence or give instructions. *E.g.*, United States v. Buchmeier, 255 F.3d 415, 427 (7th Cir. 2001) (holding that judge decides if defendant has met his burden of production for affirmative defense applying "'mere scintilla'" of evidence standard (quoting United States v. Wofford, 122 F.3d 787, 789 (9th Cir. 1997))); State v. Schumaier, 603 N.W.2d 882, 885 (N.D. 1999) (holding that judge decides if defendant has met his burden of production for affirmative defense by applying standard requiring defense to introduce enough evidence to raise reasonable doubt on issue of defense claimed); FED. R. COURT MARSHALL 313(b) (noting that, in determining whether certain inspections or inventory searches are reasonable, military judges apply clear and convincing standard).

332. 404 U.S. 477 (1972).

333. *Twomey*, 404 U.S. at 486.

established only by a preponderance of the evidence.[334] The Court rejected this reasoning, holding that a "guilty verdict is not rendered less reliable . . . simply because the admissibility of a confession is determined by a less stringent standard [than proof beyond a reasonable doubt]."[335]

The Court likewise rejected the constitutional challenge that the confession must be determined admissible beyond a reasonable doubt in order to afford adequate protection to the values served by the exclusionary rules.[336] As the Court explained:

> we are unconvinced that merely emphasizing the importance of the values served by exclusionary rules is itself sufficient demonstration that the Constitution also requires admissibility to be proved beyond reasonable doubt. Evidence obtained in violation of the Fourth Amendment has been excluded from federal criminal trials for many years. The same is true of coerced confessions offered in either federal or state trials. But, from our experience over this period of time no substantial evidence has accumulated that federal rights have suffered from determining admissibility by a preponderance of the evidence. . . . Without good cause, we are unwilling to expand currently applicable exclusionary rules by erecting additional barriers to placing truthful and probative evidence before state juries and by revising the standards applicable in collateral proceedings.[337]

Simultaneously, the Court confirmed that the "[criminal defendant] is entitled to a reliable and clear-cut determination that the confession was in fact voluntarily rendered," thereby explicitly endorsing the preponderance of the evidence standard as capable of achieving this.[338] Although *Lego v. Twomey* addressed voluntariness determinations at voluntariness hearings, its reasoning translates easily to the making of reliability determinations at reliability hearings.[339]

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334. *Id.* at 482.

335. *Id.* at 487-88.

336. *Id.* at 488.

337. *Id.* at 488-89 (footnote and citations omitted).

338. *Twomey*, 404 U.S. at 489.

339. See *supra* notes 299-300 and accompanying text for discussion of voluntariness hearings. The Court's decision in *Twomey* seems to suggest that a confession's reliability might need to be subject to a higher standard, stating

> [s]ince the purpose that a voluntariness hearing is designed to serve has nothing whatever to do with improving the reliability of jury verdicts, we cannot accept the charge that judging the admissibility of a confession by a preponderance of the evidence undermines the mandate of *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

Twomey, 404 U.S. at 486. But the Court in *Twomey* continued:

> *Winship* went no further than to confirm the fundamental right that protects "the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." A high standard of proof is necessary, we said, to ensure against unjust convictions by giving substance to the presumption of innocence. A guilty verdict is not rendered less reliable or less consonant with *Winship* simply because the admissibility of a confession is determined by a less stringent standard.

Id. at 486-87 (citations omitted) (quoting *In re Winship*, 397 U.S. at 364). As with a voluntariness hearing, the reliability determination concerns only the admissibility of the confession and not the

5. "Could Conclude that the Confession Is Reliable"

As previously discussed, under the early common law, a confession's admissibility depended on its reliability and hence its truthfulness.[340] The proposed rule similarly would allow for the exclusion of confessions that are not reliable enough to come before the jury.[341] Several of the current rules of evidence, such as those addressing hearsay and "best evidence," exclude evidence because of reliability concerns.[342] The proposed rule thus borrows both from the rich tradition and present preference for reliability in order to exclude confessions because they are too unreliable.

B. Implementing the Test

Practically speaking, the decision whether the confession is too unreliable to be admitted must be addressed as a preliminary matter out of the hearing of the jury[343] on a motion by the defense.[344] The reliability motion could be conveniently litigated before the trial on the merits,[345] in conjunction with any

proof of each of the elements of the crime charged in order to secure a conviction.

340. See *supra* Part II.A for discussion of the common law's approach to confessions.

341. See *supra* notes 104-06 and accompanying text for a discussion of the synonymity of reliability and truthfulness.

342. GIANNELLI, *supra* note 296, § 1.03[A][2][a], at 5.

343. *See* FED. R. EVID. 104(c) ("Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury."). A confession's admissibility must be addressed as a preliminary matter because once the confession has been admitted at trial, the "damage" has already been done. This might be analogized to the categorical rule that a defendant's character is not admissible in a criminal trial unless the defendant chooses first to place his character before the jury. FED. R. EVID. 404 ("Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes"). Accordingly, a defendant's prior criminal record is ordinarily inadmissible because "'[t]he natural and inevitable tendency of the tribunal—whether judge or jury—is to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge.'" People v. Zackowitz, 172 N.E. 466, 468 (N.Y. 1930) (quoting 1 WIGMORE, EVIDENCE, *supra* note 99, § 194).

344. *See* FED. R. CRIM. P. 12(b)(3)(C) (requiring that constitutional challenges to admissibility of confessions be raised prior to trial by motion to suppress); Luce v. United States, 469 U.S. 38, 40 n.2 (1984) (defining motion in limine to include "any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered"); *see also* FED. R. CRIM. P. 47 (providing form and content, timing, and other requirements for filing motion in criminal proceeding).

345. Judges routinely hear *Miranda* and due process objections prior to trial and receive evidence on both motions at the same time. In fact at the federal level, "[i]t is now well-established that a trial judge has a duty to determine, out of the presence of the jury, any issue as to the voluntariness of a criminal defendant's confession before the confession is received in evidence." William G. Phelps, Annotation, *Duty of Court, in Federal Criminal Prosecution, to Conduct Inquiry into Voluntariness of Accused's Statement—Modern Cases*, 132 A.L.R. FED. 415, 415 (1996). Thus it would not be burdensome on the system for the judge to also hear evidence bearing on reliability—as much of the evidence would overlap—because the judge is already engaged in pretrial evidentiary determinations:

> In any criminal prosecution brought by the United States or by the District of Columbia, a confession . . . shall be admissible in evidence if it is voluntarily given. *Before such confession is received in evidence, the trial judge shall, out of the presence of the jury*, determine any issue

Miranda v. Arizona[346] or *Colorado v. Connelly*[347] voluntariness challenges that the defense elects to bring.[348]

Under *Miranda*, the judge would determine whether the confession was elicited through custodial interrogation without the police first giving the suspect specified warnings and then obtaining from the suspect a knowing and intelligent waiver of the rights described in those warnings.[349] Under *Connelly*, the judge would determine whether the confession was the product of coercive government conduct.[350] Under the proposed rule, the judge would additionally determine whether the confession was reliable enough to be admitted on the merits. Thus, the proposed rule neither replaces nor is subsumed by the existing Fifth and Fourteenth Amendment bases for excluding confessions. Rather, it provides a related but independent basis for exclusion.

A brief examination of the relationship between the *Miranda* and traditional involuntariness standards is instructive on this point. As the *Miranda* standard suggests, it is often more protective of individuals subjected to custodial police questioning than is the due process voluntariness test. The introduction of the *Miranda* warnings requirements in 1966, however, did not displace the need for due process involuntariness litigation.[351] First, there are some situations in which the *Miranda* protections do not apply but traditional involuntariness standards remain operative. For example, in *New York v. Quarles*[352] the Court recognized a "public safety" exception to the *Miranda* requirements under which police officers could dispense with providing *Miranda* warnings while engaging

> as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

18 U.S.C. § 3501(a) (2000) (emphasis added) (codifying constitutional requirement of *Jackson v. Denno*, 378 U.S. 368 (1964) for federal cases), *held unconstitutional by* Dickerson v. United States, 530 U.S. 428, 443-43 (2000).

346. 384 U.S. 436, 473-76 (1966).

347. 479 U.S. 157, 164-67 (1986).

348. Other constitutional bases for excluding a confession could also be litigated in combination with these motions at the judge's discretion. *See*, *e.g.*, Massiah v. United States, 377 U.S. 201, 206-07 (1964) (holding that Sixth Amendment is violated when government agents, in absence of defense counsel, deliberately elicit incriminating information from person against whom adversarial judicial criminal proceedings have commenced).

349. *Miranda*, 384 U.S. at 473-76.

350. *Connelly*, 479 U.S. at 164-67.

351. The Supreme Court expressly observed that, after *Miranda*, "[w]e have never abandoned [the] due process jurisprudence, and thus continue to exclude confessions that were obtained involuntarily." Dickerson v. United States, 530 U.S. 428, 434 (2000). Likewise, *Miranda* did not permanently eclipse *Massiah* and Sixth Amendment bases for excluding confessions. *See* Brewer v. Williams, 430 U.S. 387, 405-06 (1977) (holding that Sixth Amendment right to counsel applies at and after judicial proceedings have been initiated).

352. 467 U.S. 649 (1984). The basic holding of this case was that the failure of police to read *Miranda* rights to a custodial suspect prior to asking the suspect where a weapon was located did not require exclusion of the evidence obtained as a result of that questioning because the questioning fell within a public-safety exception to the *Miranda* requirements. *Quarles*, 467 U.S. at 655-56.

in custodial interrogation.[353] Consistent with this exception, "any self-incriminating statements elicited during questioning [can] now be admitted as trial evidence even if the suspect ha[s] not been apprised of his or her rights."[354] Notwithstanding *Quarles*, such statements would be deemed inadmissible if they were coerced under traditional due process standards.[355]

Second, even where *Miranda* and traditional voluntariness standards overlap, there may be advantages to obtaining suppression under the latter standard and thus the defense will be motivated to seek the exclusion of a confession on both bases. For example, in *Harris v. New York*,[356] the Supreme Court held that statements taken in violation of *Miranda* can be used for impeachment purposes.[357] Several years later, in *Mincey v. Arizona*,[358] the Court held that statements taken in violation of traditional due process standards may not be used for impeachment purposes.[359] Accordingly, the defense has good reason to seek exclusion under traditional involuntariness standards even where they can prevail under *Miranda*.

The same litigation strategies could be anticipated if the proposed rule were adopted, and so all three bases for the exclusion of confessions—*Miranda*, *Connelly*, and reliability under the proposed rule—would remain vital. Depending on the circumstances, the defense may well be motivated to seek exclusion under multiple bases, and the judge would likely hear all such motions in combination. This would not be a significant departure from present motion practice. In fact, insofar as the traditional involuntariness standard before *Connelly* included both police coercion and a confession's reliability within the due process complex of values, judges have historically received evidence pertaining to both issues simultaneously and ruled accordingly.

C. Why the Proposed Rule of Evidence Should Be Adopted

Based on the foregoing discussion, several reasons can be offered in support of the proposed rule. First, and as just mentioned, the proposed rule for

353. Kassin & Wrightsman, *supra* note 17, at 71.

354. *Id.* See *supra* notes 117-21 and accompanying text for a discussion of due process protections.

355. One can easily imagine other situations in which *Miranda* would not be transgressed but traditional involuntariness standards would be violated. For example, when a prisoner is coercively questioned by an undercover policeman posing as a fellow prisoner, *Miranda* would not be violated because this is not a police-dominated atmosphere within the meaning of *Miranda*, Illinois v. Perkins, 496 U.S. 292, 296 (1990), yet suppression may nevertheless be required under the voluntariness standards. Likewise, if a suspect were abusively questioned during a traffic detention, that questioning could violate due process without amounting to a *Miranda* violation. *See* Berkemer v. McCarty, 468 U.S. 420, 423, 432-33 (1984) (holding that roadside questioning of motorist detained pursuant to traffic stop did not constitute custodial interrogation for purposed of doctrine enunciated in *Miranda*). Indeed, the defendant in *Connelly* challenged the admissibility of his confession both under *Miranda* and traditional voluntariness standards. *Connelly*, 479 U.S. at 163-64, 169.

356. 401 U.S. 222 (1971).

357. *Harris*, 401 U.S. at 226.

358. 437 U.S. 385 (1978).

359. *Mincey*, 437 U.S. at 401-02.

reliability fits comfortably within a pretrial framework that is already utilized to make comparable determinations about *Miranda* compliance and due process voluntariness. Trial judges presently make these types of determination as a matter of routine,[360] just as they traditionally evaluated reliability under earlier standards using a totality of the circumstances approach.[361] Put simply, judges are and always have been up to this task, and the task at issue is completely in keeping with their judicial role and function.[362]

Second, the proposed rule recognizes that reliability is a multifaceted, fact-dependent judgment that is not susceptible to bright-line rules or tests.[363] It is thus consonant with a wide range of criminal procedure precedent that calls for the use of totality of the circumstances tests when making similar determinations. For example, the earlier *Aguilar v. Texas*[364]/*Spinelli v. United States*[365] test for probable cause was replaced by a totality of the circumstances approach in *Illinois v. Gates*.[366] Reasonable suspicion is likewise determined by a totality of the circumstances approach.[367] Because the judgment about a confession's reliability involves the same kind of fact-dependent and multifaceted assessments as do probable cause and reasonable suspicion

360. Leo et al., *supra* note 38, at 532 (noting that judges routinely decide whether to admit reliable evidence). Professor Leo and his colleagues suggested a test for promoting reliable confessions:

> [T]he kind of evidentiary evaluation we propose is one that trial courts do all the time to prevent unreliable or nonprobative evidence from biasing, confusing, or misleading juries. Judges are routinely called upon to decide whether to admit reliable evidence. The requirement in a criminal case that the evidence presented to the jury have sufficient indicia of reliability as a threshold to admissibility is neither new nor novel. For example, the rules of evidence prohibiting the admissibility of hearsay evidence are rooted in concerns about the unreliability of such evidence. Similarly, the numerous exceptions to the hearsay rule are grounded in the idea that some forms of hearsay are so trustworthy as to be admissible whether or not the declarant is available. Judges may also admit hearsay statements not specifically covered by a hearsay exception if the statement has "equivalent circumstantial guarantees of trustworthiness."

Id. at 532-33 (footnote omitted) (quoting FED. R. EVID. 807).

361. UNDERHILL, *supra* note 15, § 127, at 245-47.

362. *See* Daubert v. Merrell Dow Pharm., 509 U.S. 579, 592-93 (1993) (authorizing judge to perform gatekeeper role regarding whether reasoning or methodology underlying expert testimony is scientifically valid and whether that reasoning or methodology is properly applied to facts in issue).

363. UNDERHILL, *supra* note 15, § 126, at 244 (citing Hopt v. Utah, 110 U.S. 574, 583 (1884)).

364. Aguilar v. Texas, 378 U.S. 108, 114 (1964) (requiring two-pronged test for determining trustworthiness of hearsay information from informant), *abrogated by* Illinois v. Gates, 462 U.S. 213, 238 (1983).

365. Spinelli v. United States, 393 U.S. 410, 419 (1969) (refining *Aguilar*'s two-pronged test), *abrogated by Gates*, 462 U.S. at 238.

366. 462 U.S. 213, 230-31 (1983) ("The totality-of-circumstances approach is far more consistent with [the Court's] prior treatment of probable cause than is any rigid demand that any specific 'tests' be satisfied . . . ." (foonote omitted)).

367. Illinois v. Wardlow, 528 U.S. 119, 126-27 (2000) (Stevens, J., concurring in part and dissenting in part) ("'The concept of reasonable suspicion. . . . is not readily, or even usefully, reduced to a neat set of legal rules,' but must be determined by looking to 'the totality of the circumstances—the whole picture'" (quoting United States v. Sokolow, 490 U.S. 1, 7-8 (1989))).

determinations, it makes good sense that the same type of totality of the circumstances approach would be used for this purpose.[368]

Third, judging reliability with reference to what a reasonable juror could believe recognizes that reasonable jurors can and do often disagree about the persuasiveness of evidence. The approach urged here is consistent with this reality while respecting the esteemed role of the jury[369] and the complicated ways in which juries perform their duties.[370] It is likewise consistent with the standard jury instructions that allow jurors to accord whatever weight and to draw whatever reasonable inferences they conclude are warranted in accordance with the law and evidence.[371] The proposed rule facilitates, rather than interferes with, a jury's capacity to exercise a common-sense judgment about whether a confession is reliable as a question of fact and, ultimately, about the defendant's guilt.

368. See *supra* note 315 and accompanying text for discussion of the benefits of courts taking a totality of the circumstances approach rather than relying on bright-line rules. In the realm of criminal procedure, bright-line rules are favored in situations in which the dangers and risks associated with split-second decisions call for simple and easily applied guidance as opposed to a more complicated, case-by-case analysis. *E.g.*, New York v. Belton, 453 U.S. 454, 458-59 (1981) (explaining why bright-line rules are favored for search incident to arrest exception to Fourth Amendment exclusionary rule). Bright-line rules have also been established to achieve a variety of other systemic benefits. *E.g.*, Atwater v. Lago Vista, 532 U.S. 318, 350-54 (2001) (concluding that bright-line rule that persons may be arrested for even most minor offenses based on probable cause is justified because (1) there is little risk that police will abuse rule as they have no motive to arrest for misdemeanor offenses without good reason, (2) it avoids constitutionalizing case-by-case assessment of discretionary police judgments, (3) it avoids underenforcement of law by discouraging arrests, and (4) it helps establish readily administrable rules). None of the justifications for bright-line rules listed above applies to reliability determinations.

369. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. CONST. amend. VI. The right to a trial by jury is "fundamental to the American scheme of justice," Duncan v. Louisiana, 391 U.S. 145, 149 (1968), and it is granted "in order to prevent oppression by the Government. . . . If the defendant prefer[s] the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he [is] to have it," *id.* at 155-56 (footnote omitted). *See* Witherspoon v. Illinois, 391 U.S. 510, 519 (1968) (describing jury as "conscience of the community"); United States v. Gilliam, 994 F.2d 97, 101 (2d Cir. 1993) (describing jury as "the oracle of the citizenry").

370. *See* Shari Seidman Diamond, *Truth, Justice, and the Jury*, 26 HARV. J.L. & PUB. POL'Y. 143, 151-54 (2003) (discussing how juries decide cases); Marla Sandys & Ronald C. Dillehay, *First-Ballot Votes, Predeliberation Dispositions, and Final Verdicts in Jury Trials*, 19 LAW & HUM. BEHAV. 175, 183 (1995) (discussing practice of juries taking straw ballots). *See generally* THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE 28-65 (1985) (discussing jury nullification); MICHAEL J. SAKS, JURY VERDICTS 1-36 (1977) (discussing jury size).

371. *See* Dale A. Nance, *Reliability and the Admissibility of Experts*, 34 SETON HALL L. REV. 191, 195 (2003) ("[T]he system provides a trier of fact capable of shouldering the responsibility of determining what inferences from the evidence are warranted."); *see also* Richardson v. Marsh, 481 U.S. 200, 211 (1987) (stating presumption that juries follow instructions). *See generally* Harold A. Ashford & D. Michael Risinger, *Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview*, 79 YALE L.J. 165, 171-74 (1969) (discussing relationship between burden of persuasion and burden of producing evidence).

Fourth, the proposed rule anticipates that technology and its availability, as well as police tactics, change over time. In *Kyllo v. United* States,[372] for example, the Supreme Court rejected an inflexible test for Fourth Amendment protections in the face of advancing technology. The Court noted that "[w]e rejected such a mechanical interpretation of the Fourth Amendment in *Katz*,[373] where the eavesdropping device picked up only sound waves that reached the exterior of the phone booth [to which it was attached]. Reversing that approach would leave the homeowner at the mercy of advancing technology . . . ."[374] In other circumstances, the Court's jurisprudence has suffered when it was tethered to ephemeral realities or theories.[375] The orientation of the proposed rule—which looks to the totality of the circumstances, respects the judgment of community as expressed by reasonable jurors, and foresees changes in technology and science—avoids these pitfalls while retaining its relevance as time passes.

Finally, the proposed rule's totality of the circumstances approach would best facilitate the prudent development of reliability jurisprudence. A major theme of the Federal Rules of Evidence is preserving the trial judge's maneuvering space. As Professor Giannelli explains, "[a]lthough many trial lawyers want fixed rules, which they argue make evidence law more predicable, the drafters believed that too many unforeseen contingencies can arise at trial, and therefore the judge must be given leeway to shape the rules of evidence to deal with them."[376] Such a case-by-case shaping of the rule governing the reliability of confessions would over time facilitate its organic and thoughtful maturation and application.

372. 533 U.S. 27 (2001).

373. Katz v. United States, 389 U.S. 347 (1967) (holding that government's electronically listening to and recording of petitioner's words violated privacy on which he justifiably relied while using telephone booth and thus constituted search and seizure within meaning of Fourth Amendment).

374. *Kyllo*, 533 U.S. at 35.

375. The *Miranda* decision is an example of the latter:

> In *Miranda*, the Supreme Court was profoundly influenced by social-process thinking, and, in particular, the psychological tactics of the Reid Technique, when it considered the admissibility of confessions with regard to the psychological coerciveness of police interrogation strategies. By the 1960s when *Miranda* was decided, the Reid Model, developed by Brian C. Jayne to help explain the Reid Technique for police questioning, had became the preeminent social-process approach to confessions. . . .
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> . . . .
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> . . . Psychologists in the main ultimately rejected the Reid Model because it fixated on police interrogation techniques to the exclusion of other external and internal factors that might lead suspects to confess. Ironically, it is this same psychologically discredited emphasis on police practices that resonated so powerfully with the Warren Court in *Miranda* and continues to echo throughout later confessions cases.

Milhizer, *supra* note 3, at 31, 33-34 (footnotes omitted); *see also id.* at 40-48 (discussing limitations in translating interactive psychology to confessions jurisprudence).

376. GIANNELLI, *supra* note 296, § 1.07, at 14.

Even beyond the realm of evidence law, the Court has often wisely exercised judicial restraint in establishing standards in order to allow for the incremental development of the law through case-by-case adjudication. One prominent example is in defamation cases with respect to the actual malice standard. The Court has held that "[t]he meaning of terms such as 'actual malice'—and, more particularly, 'reckless disregard'—however, is not readily captured in 'one infallible definition.' Rather, only through the course of case-by-case adjudication can we give content to these otherwise elusive constitutional standards."[377] Similarly, whether a given confession is reliable enough to be admitted is an inherently elusive matter. The unfettered totality of the circumstances approach to reliability urged here will allow the proposed rule to accrete substance through the evolutionary process of judicial decision making, thereby ultimately producing a richer and more meaningful legal standard for assessing reliability.

D. Responding to Anticipated Critiques and Alternative Proposals

Other proponents of resuscitating reliability do not subscribe to the general "totality of the circumstances" approach proposed here. Perhaps the most prominent of these are Professor Richard Leo and his colleagues, who put forward an analogous process for testing reliability, which includes a judicial determination using a preponderance of the evidence standard.[378] Their approach differs from the rule proposed here, however, insofar as it distinguishes between recorded and unrecorded confessions, proposing a stricter test for unrecorded confessions and prescribing that three specified evaluative factors be weighed for recorded confessions.[379]

While the identification of evaluative factors relating to the reliability of confessions can be useful, it is submitted here that they are better incorporated into the commentary to the rule[380] and developed by case law[381] rather than

377. Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 686 (1989) (citation omitted) (quoting St. Amant v. Thompson, 390 U.S. 727, 730 (1968)). The Court further stated, "[m]ost fundamentally, the rule is premised on the recognition that '[j]udges, as expositors of the Constitution,' have a duty to 'independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.'" *Id.* (quoting Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 511 (1984)).

378. Leo et al., *supra* note 38, at 531-32.

379. *Id.* at 531-35.

380. The Federal Rules of Evidence often incorporate guidance into the commentary of a rule rather than articulate precise standards in a rule itself. For example, the commentary on Rule 406 relating to habit provides:

> When disagreement has appeared [over habit evidence], its focus has been upon the question what constitutes habit, and the reason for this is readily apparent. The extent to which instances must be multiplied and consistency of behavior maintained in order to rise to the status of habit inevitably gives rise to differences of opinion. *While adequacy of sampling and uniformity of response are key factors, precise standards for measuring their sufficiency for evidence purposes cannot be formulated.*

FED. R. EVID. 406 advisory committee's note (citation omitted) (emphasis added).

being codified as part of the rule itself. The "Federal Rules were not intended to be a complete codification of all evidentiary rules,"[382] and the Court has expressed a willingness to rely on the common law for guidance in interpreting them.[383] Thus, the legal-relevance standard in Federal Rule of Evidence 403 speaks in general terms about "the danger of unfair prejudice, confusion of the issues, [and] misleading the jury"[384] while eschewing any prescribed multifactor test that may hamstring judges and unduly constrain their discretion.[385] The same goals of flexibility and incremental development of the jurisprudence resonate with equal force to the question of reliability.[386]

The rule proposed here also rejects the categorical distinction between recorded and unrecorded confessions endorsed by Professor Leo and his colleagues. Although the recording of confessions is often advantageous,[387] it

381. The Federal Rules recognize that in some instances it is better for factors to be developed through case law than to be codified in the rules themselves. For example, evaluative factors have been developed through case law to be considered in the balancing test under Federal Rule of Evidence 609(a) to determine if a prior conviction is admissible. In *United States v. Brewer*, the Court noted that factors to be considered under Rule 609(a) include those developed by decisional law that predates the Rule, 451 F. Supp. 50, 53 (E.D. Tenn. 1978), while the Rule itself is limited to a determination of whether the probative value of admitting the evidence outweighs its prejudicial effect, FED R. EVID. 609. The five factors enunciated by the cases to be considered in making this determination are (1) the nature of the crime, (2) the time of conviction and the witness's subsequent history, (3) similarity between the past crime and the charged crime, (4) importance of defendant's testimony, and (5) the centrality of the credibility issue. *Brewer*, 451 F. Supp. at 53 (citing Gordon v. United States, 383 F.2d 936 (1967), *cert. denied* 390 U.S. 1029 (1968); Luck v. United States, 348 F.2d 763 (1965)).

382. GIANNELLI, *supra* note 296, § 1.06, at 11. The reporter for the rules wrote that "the answers to all questions that may arise under the Rules may not be found in specific terms in the Rules." Edward W. Cleary, *Preliminary Notes on Reading the Rules of Evidence*, 57 NEB. L. REV. 908, 908 (1978).

383. *See* Tome v. United States, 513 U.S. 150, 156-57 (1995) (concluding, in case involving admissibility of prior consistent statement under Rule 801(d)(1)(B), that Rule preserved common-law requirement that statement had to predate motive to fabricate).

384. FED. R. EVID. 403.

385. *See* FED. R. EVID. 403 advisory committee's note ("In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction. The availability of other means of proof may also be an appropriate factor." (citation omitted)).

386. The wisdom of this approach is illustrated in other aspects of the Court's confession jurisprudence in cases such as *Michigan v. Mosley*, 423 U.S. 96, 104-05 (1975), in which the Court employed a totality of the circumstances test to evaluate whether a suspect waived his Fifth Amendment right to silence, while providing an illustrative and nonexhaustive list of factors that related to that determination.

387. *See* Steven A. Drizin & Marissa J. Reich, *Heeding the Lessons of History: The Need for Mandatory Recording of Police Interrogations to Accurately Assess the Reliability and Voluntariness of Confessions*, 52 DRAKE L. REV. 619, 620-28 (2004) (advocating mandatory taping of confessions as means of assessing voluntariness and truthfulness); Roberto Iraola, *The Electronic Recording of Criminal Interrogations*, 40 U. RICH. L. REV. 463, 477-79 (2006) (same); Shannon L. McCarthy, Comment, *Criminal Procedure—Not There Yet: Police Interrogations Should Be Electronically Recorded or Excluded*, 39 SUFFOLK U. L. REV. 333, 341 (2005) (same); Lisa C. Oliver, Comment, *Mandatory Recording of Custodial Interrogations Nationwide*, 39 SUFFOLK U. L. REV. 263, 287 (2005) (advocating revision of model code to require recording of all confessions).

does not necessarily follow that this practice should be accorded a special evidentiary status. Decisions involving the commitment of resources to record confessions and the detailed aspects of interrogation protocols ought to be decided at the lowest levels by accountable decision makers, rather than being directed by federal or state evidentiary rules.[388] By analogy, while it might be a good idea to videotape traffic stops, all such encounters are judged by the same Fourth Amendment standards of reasonableness regardless of whether they are recorded. Moreover, some observers have criticized requirements for mandatory recording of confessions,[389] and history suggests that theories relating to the recording of confessions are likely to change over time.[390] In addition, a rule that categorically favors recorded confessions could result in the exclusion of reliable confessions simply because they were not recorded, and thus it may actually undermine the truth-seeking goal of criminal trials. Further, recorded confessions can present an incomplete and distorted portrayal of the interrogation process.[391] Finally, there are the practical concerns that some suspects will object to having their statements recorded,[392] and thus a systematic preference for videotaped confessions may stifle candor and result in less reliable confessions.[393]

388. See *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990), in which the Court instructed that it did not endorse the idea of

> transfer[ring] from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger. Experts in police science might disagree over which of several methods of apprehending drunken drivers is preferable as an ideal. But for purposes of Fourth Amendment analysis, the choice among such reasonable alternatives remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers.

Sitz, 496 U.S. at 453-54.

389. *See* Christopher Dunn & Richard A. Brown, *Point/Counterpoint: Interrogations, Yes, No; Should Police Be Required to Videotape Questioning of Suspects?*, N.Y. L.J., Dec. 8, 2003, at 12 (discussing some of the advantages and disadvantages of mandatory videotaping of confessions).

390. See *supra* notes 372-75 and accompanying text for discussion of the implications of changing technology on police tactics.

391. *See* Rodney Uphoff, *Convicting the Innocent: Aberration of Systematic Problem?*, 2006 WIS. L. REV. 739, 794-95 & n.368 ("Moreover, some police departments that do videotape confessions do not record all of the interrogation. Thus, it is generally the defendant's word against that of a law enforcement officer or officers as to what happened and what was said during the interrogation." (footnote omitted)).

392. *See, e.g.*, Edwards v. Arizona, 451 U.S. 477, 479-80 (1981) (chronicling facts in which suspect objected to being recorded but was willing to talk to officers). Even though the detectives informed Edwards that the recording of his statement was irrelevant because they could testify in court concerning whatever he said, Edwards maintained: "I'll tell you anything you want to know, but I don't want it on tape." *Id.* at 479. Once the detectives agreed not to record his statement, Edwards implicated himself in the crime. *Id.*; *see also* Williamson v. United States, 512 U.S. 594, 597 (1994) (interpreting factual scenario in which suspect was willing to implicate self, but refused to record confession). "Though Harris freely implicated himself, he did not want his story to be recorded, and he refused to sign a written version of the statement." *Id.*

393. Consider Justice Harlan's dissent in *United States v. White*, 401 U.S. 745 (1971) (plurality opinion). There the defendant, White, was prosecuted and convicted based on information obtained

Apart from all of the above considerations, there is empirical evidence showing that the videotaping of confessions can be manipulated in such a way as to affect jurors' perceptions of voluntariness and influence the inferences they draw from confession evidence.[394] One study "tested the hypothesis that judgments of voluntariness in videotaped confessions would be systematically biased by camera angle."[395] Interrogations were taped "from three angles so that either the interrogators, the suspects, or both were visually salient," i.e., more prominent in the eyes of the jury.[396] The results reflected that the subjects' judgments about coercion varied depending on the camera angle that was shown.[397] Another study revealed that even corrective instructions by the trial judge did not mitigate the prejudicial effects of the camera's perspective.[398] There is no reason to believe that some police could not "game" the recording of confessions in the same way that others have manipulated the *Miranda* warning protocols.[399] Thus, it does not appear that the videotaping of interrogations necessarily enhances a later reliability determination about any confessions received, at least not to the extent that videotaping deserves to be categorically preferred.

CONCLUSION

A foundational purpose of the Federal Rules of Evidence is, in its own words, "that the truth may be ascertained."[400] The Supreme Court has called the

through a cooperating third party via electronic transmission of a conversation to the government. *White*, 401 U.S. at 745-49. The plurality determined that the government activity of obtaining the contents of conversations between White and a government informant (a consenting third party) was not a search or seizure under the Fourth Amendment, as White had no legitimate privacy interest in information he voluntarily confided to another. *Id.* at 751-53. In dissent, Justice Harlan argued that the electronic transmission of conversations to the government ought not to be allowed because it damages the common good (i.e., this results in less trust and smothers spontaneity). *Id.* at 787 (Harlan, J., dissenting). Similarly, suspects who know that they are being recorded may feel less inclined to talk because of a lack of trust in the system (the recording procedures) and may be more cautious about what they say (i.e., spontaneity will be stifled). *See generally* Chandler v. Florida, 449 U.S. 560, 570-83 (1981) (discussing impact of televising trials on fairness of proceedings).

394. Kassin & Wrightsman, *supra* note 17, at 88.

395. *Id.*

396. *Id.*

397. *Id.* ("Subjects watched one of [the three] versions of the episode. Sure enough, their judgments of coercion were lowest when the suspect was salient, highest when the interrogator was salient, and intermediate when the two were equally visible. In short, this seemingly trivial detail of procedure can, as attribution psychologists would predict, have a marked effect on juries' perceptions of confession evidence.").

398. *See* G. David Lassiter et al., *Videotaped Interrogations and Confessions: A Simple Change in Camera Perspective Alters Verdicts in Simulated Trials*, 87 J. APPLIED PSYCH. 867, 870-71 (2002) (finding neither realistic videotaped trial simulation nor potentially corrective judicial instruction was sufficient to mitigate prejudicial effect of camera perspectives on mock jurors' assessments of voluntariness of confession).

399. *See* Missouri v. Seibert, 542 U.S. 600, 604 (2004) (addressing deliberate two-step strategy used by police to undermine *Miranda* warnings requirements).

400. FED. R. EVID. 102.

search for the truth the central purpose of a criminal trial[401] and the "fundamental goal" of the criminal justice system.[402] When criminal trials produce truthful results, their legitimacy is enhanced and the public is reassured and more secure.[403] Truthful results—in particular, convictions that are objectively and demonstrably supported—necessarily protect those who are actually innocent, another cardinal goal of the criminal justice system that has been reaffirmed often by the Court.[404] "Indeed, concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system."[405]

As we have seen, one of the surest ways of convicting an innocent person is by the reception of a false confession admitting guilt. We have also seen that false confessions occur with disturbing frequency and that the constitutional protections afforded by the Fifth Amendment as interpreted by *Miranda v. Arizona*[406] and the Fourteenth Amendment as interpreted by *Colorado v. Connelly*[407] are wholly inadequate to address this phenomena. As implausible as it may seem, since the *Connelly* decision some twenty years ago, the criminal justice system has implemented no systematic mechanism for culling unreliable confessions at trial because they are too likely to be false. This is a failure of monumental proportions.

Some commentators have recognized this deficiency and proposed evidentiary solutions. While many of the proposals have merit, none fully and appropriately addresses the issue of reliability. Those who argue for a more robust application of the current rules of evidence offer an inadequate response. The current rules, even if more vigorously applied, are not responsive to the causes of false confessions. Others favor complicated rules with different

401. See *supra* note 14 for a discussion of the ideal purpose of a criminal investigation and trial. *See* GIANNELLI, *supra* note 296, § 1.07, at 13 (calling ascertainment of truth "main goal" of criminal trial).

402. United States v. Havens, 446 U.S. 620, 626 (1980). *See generally* Joseph D. Grano, *Ascertaining the Truth*, 77 CORNELL L. REV. 1061, 1064 (1992) (identifying central importance of discovering truth in criminal justice system).

403. United States v. Nobles, 422 U.S. 225, 230 (1985) ("The dual aim of our criminal justice system is 'that guilt shall not escape or innocence suffer . . . .'" (quoting Berger v. United States, 295 U.S. 78, 88 (1935))); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 759 (1994) (describing purpose of criminal trial as "sorting the innocent from the guilty").

404. *See* Schlup v. Delo, 513 U.S. 298, 324-25 & n.41 (1995) (citing Lankford v. Idaho, 500 U.S. 110, 125 (1991) (calling execution of innocent person "[t]he quintessential miscarriage of justice"); *cf.* Clemons v. Mississippi, 494 U.S. 738, 750 n.4 (1990) (setting apart capital punishment from other forms of punishment); Booth v. Maryland, 482 U.S. 496, 509 n.12 (1987) (requiring unique considerations for capital punishment, in contrast with other sentences); Solem v. Helm, 463 U.S. 277, 294 (1983) (drawing bright line between capital punishment and other, less onerous sentences); Gardner v. Florida, 430 U.S. 349, 357-58 (1977) (plurality opinion) (noting need to reexamine capital punishment standards); Woodson v. North Carolina, 428 U.S. 280, 303-04, 305 (1976) (plurality opinion) (criticizing mandatory death sentence statute as failing to adequately protect defendants from arbitrary or emotional verdicts by considering mitigating factors).

405. *Schlup*, 513 U.S. at 325.

406. 384 U.S. 436, 473-76 (1966).

407. 479 U.S. 157, 164-67 (1986).

evidentiary standards and specified evaluative factors. This approach misapprehends the basic nature of the reliability determination and could in some cases even undermine it.

What is proposed here is a simple rule based on traditional standards. It recognizes the judge's venerable role in determining reliability. It accepts that reliability is a question to be determined by a totality of the circumstances test, unencumbered by complex factors or a list of prongs. It respects the special status and competence of the jury, excluding only those confessions that no reasonable juror could find reliable. It is practical and it is logical. And, it is long overdue.

Nearly forty years ago, Justice Harlan expressed a sentiment that most would say is axiomatic—that it is "a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."[408] It is time to give force to that sentiment and make it a reality.

408. *In re* Winship, 397 U.S. at 372 (Harlan, J., concurring).