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ARTICLE

PROMOTING ACCURACY IN THE USE OF CONFESSION EVIDENCE: AN ARGUMENT FOR PRETRIAL RELIABILITY ASSESSMENTS TO PREVENT WRONGFUL CONVICTIONS

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 This Article is published as part of the proceedings of the Temple Law Review Fall 2012 Symposium: False Confessions—Intersecting Science, Ethics, and the Law, held at Temple University Beasley School of Law on November 9, 2012. We dedicate this Article to Damon Thibodeaux, the three hundredth person since 1989 to be exonerated and released from prison due to postconviction DNA testing and the eighteenth to be released from death row. Thibodeaux's death sentence was overturned on September 28, 2012 after DNA and other evidence proved that he had not committed the crime to which he was coerced into falsely confessing. According to data compiled by the Innocence Project, approximately twenty-six percent (78/302) of the DNA exonerations involved defendants who falsely confessed. See *infra* note 488 for a list of the names of the seventy-eight wrongfully convicted individuals.

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I. INTRODUCTION

On May 28, 1987, a Montgomery County, Pennsylvania jury convicted Bruce Godschalk, a twenty-three year-old landscaper, of two counts of forcible rape and two counts of burglary, sentencing him to twenty years in prison.[1] Less than a year earlier, on July 13, 1986, Elizabeth Bednar had been raped in her bedroom by a stranger who entered her home through an open window at the Kingswood apartment complex in King of Prussia, Pennsylvania.[2] Almost two months later, on September 7, 1986, Patricia Morrissey, a young single woman who lived in the same apartment complex, was also assaulted and raped in her bedroom.[3] Based on the similarity of the descriptions provided by the victims, as well as the similar means of entry into the residences, the police concluded that the same person—whom newspapers dubbed "the mainline rapist"[4]—had perpetrated both attacks. After a composite sketch was prepared and published in the newspapers and on television, the adopted sister of Bruce Godschalk called the police suggesting that the sketch resembled him. On January 5, 1987, Morrissey positively identified Godschalk as her rapist in a photo array, while Bednar told police that she did not get a good enough view of the rapist to make an identification.[5]

One week later, Upper Merion Township Detectives Bruce Saville and Michael Karcewski interrogated Godschalk for approximately three hours.[6] The interrogation was not recorded, but the formal confession that followed the interrogation was.[7] According to the detectives' sworn testimony, Godschalk had come to and remained at the police station on his own free will; the detectives had not detained him but had left the door open, and they had told him that he was free to leave.[8] Moreover, Godschalk told them that he wanted to stay at the station and answer the detectives' questions, and that when asked whether he wanted an attorney, Godschalk said no, insisting that he wanted to cooperate with the police.[9] After Godschalk made his admissions, but before the detectives turned on the tape recorder, they solicitously read him his constitutional rights and he freely waived them.[10] The detectives maintained that Godschalk had voluntarily admitted to the crimes with no pressure or coercion; indeed, they claimed, that Godschalk supplied them with nonpublic details of both crimes that only the true perpetrator knew.[11]

1. *Know the Cases: Bruce Godschalk*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Bruce_Godschalk.php (last visited Oct. 26, 2013).

2. DANIEL S. MEDWED, PROSECUTION COMPLEX: AMERICA'S RACE TO CONVICT AND ITS IMPACT ON THE INNOCENT 119–21 (2012).

3. RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 181 (2008).

4. *Id.*

5. MEDWED, *supra* note 2, at 119.

6. LEO, *supra* note 3, at 181–86.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *See* MEDWED, *supra* note 2, at 119–22. However, according to Godschalk, detectives Saville and Karcewski repeatedly accused him of assaulting and raping Bednar and Morrissey, repeatedly refused to credit

Godschalk's confessions to both crimes contained numerous nonpublic crime facts that almost certainly could not have been guessed by chance.[12] For the sexual assault of Patricia Morrissey, Godschalk's confession included the following nonpublic crime facts[13]:

- that the rapist had been outside the bedroom window watching the victim;
- that the victim had been reading a magazine while she was lying in bed;
- that there was a light next to victim's bed, which was on, allowing the rapist to see in;
- that the rapist had sex with the victim on the bed;
- that the victim had been wearing underpants;
- that the victim was on her stomach during intercourse;
- that prior to having sex, the rapist removed the victim's tampon and tossed it to her side;
- that the victim was a brunette with a medium build;
- that the rapist had been very gentle with the victim;
- that the rapist left the apartment by going out the door;
- that the rapist was chased off a patio by a man prior to the assault.

For the sexual assault of Elizabeth Bednar, Godschalk's confession included the following nonpublic crime facts[14]:

- that the rapist watched the victim while she was in the rec room reading a book;
- that the victim was wearing a robe;
- that the rapist entered the apartment complex through a rec-room window;
- that the rapist waited until the victim went upstairs before entering the townhouse;
- that the rapist went up two sets of stairs before finding the victim's bedroom;
- that the rapist took a pillow from another room before entering the victim's room and used it during the assault;
- that the victim told the rapist that others lived in the home and that someone could come home;

his emphatic denials, told him that they had fingerprint and witness evidence that proved his guilt, refused his requests to leave, yelled at and threatened him, and promised to release him if he admitted guilt. Frightened, crying, and believing that he was not free to leave, Godschalk eventually admitted to both rapes. The detectives then asked Godschalk numerous leading and forced-choice questions from which he guessed and correctly inferred details of both crimes. Believing that he would be released if he cooperated and told the detectives what they wanted to hear, Godschalk incorporated those details into his confession. *See* LEO, *supra* note 3, at 181–86.

12. BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 39–40 (2011).

13. Memorandum from Bruce Saville, Detective, Upper Merion Township, to Bruce Castor (June 14, 2001) (on file with authors).

14. *Id*.

- that the victim was nude;
- that the rapist told the victim he had been drinking prior to the incident and that his beverage of choice was beer; and
- that the rapist had sex with the victim on the floor.

Analyzing Godschalk's detailed confession statement in 1987, it is almost impossible to imagine how the jury—who also heard the selectively recorded audio portion of the interrogation[15]—could have reached any conclusion other than that Godschalk was guilty of both rapes. Detectives Saville and Karcewski had repeatedly claimed[16]—as did the prosecutor who charged Godschalk, the jury that convicted him, and an appellate court that denied his claim for postconviction relief[17]—that that these nonpublic crime facts originated with Godschalk and that their presence in Godschalk's confession proved that he committed both sexual assaults. The corroboration of Godschalk's admission to both rapes seemed irrefutable. As Detective Saville succinctly stated in a memo, "[t]he facts mentioned in the [Bednar] and [Morrissey] cases were never released to the press, prior to arrest, and therefore could not have been known by Godschalk without his participation in the crimes."[18] When Godschalk's defense argued at trial that he had been fed these details, the prosecution responded, "[w]ell, if he were guessing, he was guessing pretty darn good."[19] The prosecutor then told the jury, incredulously, that it was "a mathematically [sic] impossibility that Mr. Godschalk could have guessed correctly on so many nonpublic facts regarding how the crime was committed."[20]

Yet Godschalk was factually innocent. Godschalk did not know or have any interaction with either Ms. Morrissey or Ms. Bednar, he had never been to either crime scene, and he had no preexisting knowledge of the crime facts. In January 2002, DNA testing conclusively determined that the semen from each of the two rapes had come from the same individual, but that person was not Godschalk.[21] In February 2002, his conviction was vacated and he was released from prison after serving fifteen years.[22] At the time, Godschalk was one of more than one hundred persons exonerated of

15. Interrogation of Bruce Godschalk by Detective Bruce Saville, King of Prussia, Pa. (Jan. 13, 1987), *available at* http://www.law.virginia.edu/html/librarysite/garrett_falseconfess.htm.

16. The detectives made these claims in their police reports, pretrial and trial testimony, memos, and public statements. *E.g.*, Transcript of Notes of Testimony at 64–67, Commonwealth v. Godschalk, No. 00934-87 (Pa. Ct. Com. Pl. June 16, 1987).

17. *See* Commonwealth v. Godschalk, 679 A.2d 1295, 1296–97 (Pa. Super. Ct. 1996) (affirming Godschalk's conviction on appeal, and specifically citingthe nonpublic facts contained in his confession as evidence of its reliability: "He confessed to raping both of the women and also admitted that he had moved the tampon of the second victim, a detail of the rape which had not been released to the public. Appellant also described the position of the victims during the rapes, another detail which had not been released to the public").

18. Memorandum from Bruce Saville, Detective, Upper Merion Twp., to Bruce Castor, District Attorney, Montgomery Cnty. (June 4, 2001) (on file with authors).

19. Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1078 (2010) (alteration in original) (quoting Trial Transcript at 22, Commonwealth v. Godschalk, No. 934-87 (Pa. Ct. Com. Pl. May 28, 1987).

20. *Id.* (alteration in original) (quoting Transcript of Notes of Testimony, *supra* note 16, at 22–23).

21. *Know the Cases: Bruce Godschalk*, *supra* note 1.

22. *Id.*

serious criminal convictions by postconviction DNA testing. That number has since tripled to more than three hundred.[23]

The Godschalk case illustrates how readily an innocent suspect can be induced to give a false confession, indeed multiple false confessions. But even more dramatically, the case illustrates how readily police interrogators can "contaminate"—i.e., leak or disclose nonpublic details to—an innocent suspect, how readily a contaminated suspect can be led to incorporate those nonpublic crime details into his confession narrative, and how the presence of these nonpublic crime facts can be used to create the illusion that a completely false confession is verifiably true.[24] The Godschalk case also illustrates how readily the law may fail to protect contaminated false confessors against the fate of wrongful conviction and incarceration, despite the many constitutional safeguards of the American criminal justice system—such as the privilege against self-incrimination, the due process right to be free from coercion leading to an involuntary confession, the right to confront one's accusers, the right to effective assistance of counsel, the right to a fair trial, and proof beyond a reasonable doubt standard, to name a few.

In this Article, we argue that the constitutional law of criminal procedure is inadequate to address false confessions that are the product of police contamination, and, building on our earlier work[25] as well as that of others,[26] we propose a specific framework and mechanism for courts to review and screen the reliability of confession evidence prior to trial. In Section II, we analyze in more depth the problem of police contamination of confession evidence during interrogation, and the substantial risk this creates for wrongful conviction of the innocent—or, as one leading researcher has recently put it, why confessions trump innocence.[27] In Section III, we describe the empirically demonstrated inadequacy of the rules of constitutional criminal procedure to exclude false confessions at trial and thereby prevent wrongful convictions based on false confessions. Most state courts continue to apply federal due process criteria to evaluate the admissibility of confession evidence, yet perversely these criteria are concerned exclusively with the so-called voluntariness, not the reliability, of confession evidence. In Section IV we put forth a broader legal framework for judges to take a

23. *Mission Statement*, INNOCENCE PROJECT, http://www.innocenceproject.org/about/Mission-Statement.php (last visited Oct. 26, 2013).

24. An innocent suspect may be "contaminated" by sources other than police, such as by media reports, community gossip, overheard conversation, and being present at a crime scene. *See* Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 990–97 (1997) (describing effect contamination can have on confessions).

25. Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 520–35; Andrew E. Taslitz, *High Expectations and Some Wounded Hopes: The Policy and Politics of a Uniform Statute on Videotaping Custodial Interrogations*, 7 NW. J. L. & SOC. POL'Y 400, 427 (2012).

26. *E.g.*, Sharon L. Davies, *The Reality of False Confessions—Lessons of the Central Park Jogger Case*, 30 N.Y.U. REV. L. & SOC. CHANGE 209, 241–43 (2006); Eugene R. Milhizer, *Confessions After* Connelly*: An Evidentiary Solution for Excluding Unreliable Confessions*, 81 TEMP. L. REV. 1, 47–66 (2008); Boaz Sangero, Miranda *Is Not Enough: A New Justification for Demanding "Strong Corroboration" to a Confession*, 28 CARDOZO L. REV. 2791, 2815 (2007); Sandra Guerra Thompson, *Judicial Gatekeeping of Police-Generated Witness Testimony*, 102 J. CRIM. L. & CRIMINOLOGY 329, 395 (2012).

27. Saul M. Kassin, *Why Confessions Trump Innocence*, AM. PSYCHOLOGIST, Apr. 30, 2012, at 1.

more active role in preventing false confessions from being introduced into evidence at trial by considering the reliability of confession evidence at a pretrial hearing. We also offer specific suggestions for how pretrial reliability assessments for confession evidence could effectively and efficiently work in practice. Courts already conduct lengthy (and sometimes expert-intensive) pretrial suppression hearings on the voluntariness of confessions; we are proposing that such hearings also allow for a robust examination of the reliability of a defendant's confession so that false (but otherwise legally voluntary) confessions like Bruce Godschalk's might be excluded from evidence at trial and prevent some number of wrongful convictions based on false confession evidence. In Section V, we respond to several objections to the idea of pretrial reliability assessments to screen unreliable confession evidence, arguing that pretrial reliability assessments are feasible, that trial judges in a variety of contexts routinely prevent evidence with sufficient indicia of unreliability from getting to the jury—indeed, this function is central to their traditional gatekeeping role—and that pretrial reliability assessments will enhance, not hamstring, law enforcement. Finally, in Section VI, we offer some concluding observations about how to achieve more accurate outcomes in disputed confession cases.

II. THE PROBLEM OF CONTAMINATED FALSE CONFESSIONS AND THE RISK OF WRONGFUL CONVICTION

A. Introduction

Contamination of physical evidence in criminal cases is a phenomenon that anyone who watches police dramas on television is likely familiar with. It is usually associated with the mishandling of evidence at a crime scene or in a crime laboratory during which material is transferred from an unwanted source to a piece of physical evidence, thereby diminishing the ability to use that evidence in the investigation because its original source can no longer be conclusively determined.[28] Police technicians are trained to take a number of precautions to prevent contamination at crime scenes and in crime laboratories. These include: creating perimeters around crime scenes; identifying paths of entry into and out of crime scenes; keeping logs to identify who handled what piece of evidence and when; and wearing gloves, masks, eyewear, and footwear at crime scenes as well as in crime laboratories. Once physical evidence is contaminated, it loses its probative value and therefore is no longer useful to detectives; in some cases, an entire investigation may be compromised. If physical evidence is unknowingly contaminated but mistakenly used against a defendant at trial, it creates the risk of an erroneous outcome based on source misidentification.[29]

Like physical evidence, testimonial evidence can also be contaminated. Contamination in confession cases occurs when police leak or disclose to the suspect (whether inadvertently or not) unique nonpublic crime details that could not likely have been guessed by chance or learned from another source.[30] These nonpublic crime

28. TECHNICAL WORKING GRP. ON CRIME SCENE INVESTIGATION, OFFICE OF JUSTICE PROGRAMS, CRIME SCENE INVESTIGATION: A GUIDE FOR LAW ENFORCEMENT 42 (2000).

29. *Id.*

30. Ofshe & Leo, *supra* note 24, at 996.

details are sometimes referred to as "inside" or "guilty" knowledge because they are believed to reveal that the suspect possesses information that only the true perpetrator would know and therefore that he must be guilty. If police interrogators elicit a false confession from an innocent suspect whom they have contaminated, he will likely incorporate the contaminated information—sometimes referred to as "misleading specialized knowledge"[31]—into his false postadmission narrative. The presence of these nonpublic crime details in the suspect's postadmission account creates the illusion that his confession is thus corroborated and therefore verifiably true, as occurred in the Bruce Godschalk case. The risk of a wrongful conviction is further heightened when, in the absence of a fully recorded interrogation, police and prosecutors assert that these nonpublic details contained in the suspect's confession—the misleading specialized knowledge—originated with the suspect rather than with the police. As with the contamination of physical evidence, the use of contaminated testimonial evidence against an innocent suspect at trial may also lead to a wrongful conviction based on source misidentification (i.e., identifying the suspect, rather than the interrogators, as the source of the nonpublic details contained in his confession). Like contaminated physical evidence, confessions that are contaminated are tainted and unreliable. The process of contamination during interrogation substantially increases the risk that a factually false confession will appear true and persuasive, and that as a result it will lead to a wrongful conviction.[32]

B. The Brandon Garrett Study

Since the early 1990s, a number of researchers have empirically studied and written about the phenomenon of contamination during interrogation, describing how it can lead innocent suspects to incorporate nonpublic crime scene details into their false confessions, and how it can subsequently mislead police, prosecutors, judges, and juries to believe that innocent defendants are guilty because their confessions appear to be corroborated and reliable.[33] However, in 2010, Professor Brandon Garrett published the first systematic analysis of interrogation contamination in a dataset of demonstrably false confession cases.[34] Nirider, Tepfer, and Drizin have argued that Garrett's empirical research is "groundbreaking"[35] because of his finding that "the problem of contamination is epidemic, not episodic, in cases of false confessions."[36]

Specifically, Professor Garrett examined the first 250 postconviction DNA exonerations of innocent prisoners since 1989, forty of which contained false

31. GISLI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS: A HANDBOOK 180 (2003); LEO, *supra* note 3, at 254–55.

32. LEO, *supra* note 3, at 255.

33. GUDJONSSON, *supra* note 31, at 117–19; Ofshe & Leo, *supra* note 24, at 995–96. *See generally* Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions*, 88 J. CRIM. L. & CRIMINOLOGY 429 (1998); Saul M. Kassin, *A Critical Appraisal of Modern Police Interrogations*, *in* INVESTIGATIVE INTERVIEWING: RIGHTS, RESEARCH, REGULATION 207 (Tom Williamson ed., 2006); LEO, *supra* note 3.

34. *See generally* Garrett, *supra* note 19.

35. Laura H. Nirider et al., *Combating Contamination in Confession Cases*, 79 U. CHI. L. REV. 837, 846 (2012).

36. *Id*. at 849.

confessions to rapes and murders.[37] Professor Garrett was able to obtain the trial or pretrial records for forty of these DNA exonerees, which is the dataset that his study meticulously analyzes. In thirty-eight of these forty cases (ninety-five percent), police wrote in their reports and subsequently testified under oath at pretrial hearings and at trial that these defendants (future DNA exonerees) not only admitted to committing the crimes, but also that they confessed to a number of specific nonpublic facts about how the crime occurred, supplying "surprisingly rich, detailed, and accurate information"[38]—including facts that matched the crime scene evidence, scientific evidence, expert evidence and/or accounts by the victim[39]—in their confession narratives. In short, ninety-five percent of the defendants' (future DNA exonerees) confessions were replete with guilty or inside knowledge of the crime.[40]

Yet all of these individuals were factually innocent—none of them had committed the crimes of which they were convicted or had been present at the crime scene or knew any of the nonpublic details memorialized in their confession statements and recounted at great lengths in their trials.[41] Garrett asks the question: where did these details come from, and how did this happen? Moreover, what do these forty cases teach us about the problem of contaminated false confessions and the risks they create for the wrongful conviction of the innocent?

Garrett's most important findings can be succinctly stated. Police investigators logically had to have disclosed nonpublic crime details to the exonerees during the (unrecorded) interrogations. They did so by telling the exonerees how the crime happened and leaking and feeding them crime facts.[42] The contamination by police investigators included showing the defendants police reports, codefendant statements, crime photographs, and even taking them to the crime scene itself.[43] Yet in their reports and in sworn pretrial and trial testimony, the same investigators emphatically represented that these nonpublic crime facts had been provided by the defendants, not the investigators—that they "had assiduously avoided contaminating the confessions by not asking leading questions, but rather allowing the suspects to volunteer crucial facts."[44]

As Garrett goes on to note:

> The nonpublic facts contained in confession statements then became the centerpiece of the State's case. Although defense counsel moved to exclude almost all of these confessions from the trial, courts found each to be voluntary and admissible, often citing to the apparent reliability of the

37. Garrett, *supra* note 19, at 1052 n.2 ("This study set closed with the 250th DNA exoneration, which occurred in February 2010 as this Article approached publication.").

38. *Id.* at 1054.

39. *Id.* at 1057.

40. *Id.* at 1054.

41. *Id.* at 1054 ("We now know that each of these people was innocent and was not at the crime scene.").

42. Looking back with the hindsight of conclusive DNA tests proving innocence, we know that the innocent could not have known or guessed such inside information. *See id.* at 1070–71 ("In all but two of these exonerees' cases, police claimed that the defendant had offered a litany of details that we now know these innocent people could not plausibly have known independently.").

43. *Id.* at 1068–74.

44. *Id.* at 1057.

> confessions. The facts were typically the focus of the State's closing arguments to the jury. Even after DNA testing excluded these people, courts sometimes initially denied relief, citing the seeming reliability of these confessions. The ironic result is that the public learned about these false confessions in part because of the contaminated facts. These false confessions were so persuasive, detailed and believable that they resulted in convictions which were often repeatedly upheld during appeals and habeas review.[45]

The case of Douglas Warney, which will become important later in this Article, provides one of many compelling case examples from Garrett's data set. Warney, who is cognitively impaired with an IQ of sixty-eight and has a history of mental illness (AIDS-related dementia), was charged with the brutal stabbing and murder of William Beason in Rochester, New York in 1996.[46] According to police investigators, Warney's confession contained numerous nonpublic crime facts that seemingly corroborated his guilt. As Garrett points out,[47] these included:

- that the victim was wearing a nightshirt;
- that the victim was cooking chicken;
- that the victim was missing money from his wallet;
- that the murder weapon was a knife with an approximately twelve inch serrated blade;
- that the knife had been kept in the kitchen;
- that the victim was stabbed multiple times;
- that the victim owned a pinky ring and a particular necklace;
- that a tissue used as a bandage was covered with blood; and that
- there was a pornographic tape in the victim's television.

The investigator who interrogated Warney emphatically denied feeding Warney crime facts or suggesting correct answers to him during the unrecorded interrogation.[48] The prosecutor who successfully convicted Warney argued to the jury that the accuracy of Warney's confession was corroborated by his detailed knowledge of these nonpublic crime facts.[49] Although the state had no other evidence than the confession from the unrecorded interrogation, Warney was convicted of second-degree murder and sentenced to twenty-five years to life.[50] It would be almost a decade later before DNA testing established his innocence,[51] and he was fully exonerated.[52]

If Garrett's analysis provides empirical support for the proposition that

45. *Id.* at 1057–58 (footnotes omitted).

46. Leo & Ofshe, *supra* note 33, at 465–66.

47. Garrett, *supra* note 19, at 1071–72.

48. *Id.* at 1072.

49. *Id.*

50. Leo & Ofshe, *supra* note 33, at 466.

51. DNA testing not only excluded Warney as the source of the DNA found at the crime scene, but it also identified it as belonging to Eldred Johnson, Jr., who confessed that he acted alone when killing the victim. Robert Aronson & Jacqueline McMurtrie, *The Use and Misuse of High-Tech Evidence by Prosecutors: Ethical and Evidentiary Issues*, 76 FORDHAM L. REV. 1453, 1485 (2007).

52. *Know the Cases: Douglas Warney*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Douglas_Warney.php (last visited Oct. 26, 2013).

contamination is epidemic in false confession cases as Nirider, Tepfer, and Drizin assert, it also provides key insights into why police contamination during interrogation increases the risk of creating false confessions that will lead to wrongful convictions. Here too, other empirical researchers prior to Garrett have written extensively about the postadmission interrogation process and the risks of contaminated confessions to the innocent.[53] What makes Garrett's original contribution so powerful is his documentation, with one case example after another, of how pervasive contamination appears to be in false confession cases. Not only did ninety-five percent of the cases in his data set involve police contamination during interrogation, but in these cases the innocent suspect did not merely repeat back one or two nonpublic details in their confessions but rather a litany of unique crime facts.[54]

C. Why Confession Contamination Is So Dangerous

Yet, as Garrett's study shows, the process of police contamination during interrogation is both counterintuitive and often difficult to detect, which are two of the primary reasons it creates so high a risk of wrongful conviction. Police contamination during interrogation is counterintuitive because it serves no rational or legitimate investigative purpose. It is, quite simply, bad police practice. In fact, police investigators are trained to avoid educating a suspect about the crime facts or providing him with key details. As one of the authors of the leading interrogation training manual in the United States has written:

> [I]t is imperative that interrogators do not reveal details of the crime so that they can use the disclosure of such information by the suspect as verification of the confession's authenticity. In each case there should be documented "hold back" information about the details of how the crime was committed; details from the crime scene; details about specific activities perpetrated by the offender; etc. The goal is to match the suspect's confession against these details to establish the veracity of the statement.[55]

Police investigators themselves recognize that a suspect's confession lacks evidentiary value if they have fed him nonpublic crime details. It is not surprising that the detectives in Garrett's study testified emphatically in pretrial hearings and at trial that they did not tell the suspect how the crime had occurred or supply unique crime facts through leading, suggestive or directive questions. In fact, it appears that the detectives in Garrett's study—as well as those in other proven false confession cases—were contaminating their suspects' confessions and thus apparently did so inadvertently. But if interrogators reveal unique nonpublic crime facts to suspects without even realizing they are doing so, then the phenomena of contaminated confessions becomes even more counterintuitive and risky. Rather than intentionally trying to frame innocent men for crimes they did not commit, police investigators who inadvertently contaminate their suspects appear to be blinded by investigator bias[56] and

53. *See generally* Ofshe & Leo, *supra* note 24.

54. Garrett, *supra* note 19, at 1066, 1071.

55. Joseph P. Buckley, *The Reid Technique of Interviewing and Interrogation*, *in* INVESTIGATIVE INTERVIEWING: RIGHTS, RESEARCH, REGULATION 190, 204–05 (Tom Williamson ed., 2006).

56. Christian A. Meissner & Saul M. Kassin, "*He's Guilty": Investigator Bias in Judgments of Truth and*

tunnel vision[57] that is common in the American method of accusatory, guilt-presumptive interrogation.[58]

Perhaps even more disturbing, police contamination during interrogation is often difficult to detect, and therefore may create a substantial risk of wrongful conviction that cannot be easily prevented unless an interrogation is electronically recorded in its entirety. As one police detective who elicited a false confession described:

> We believed so much in our suspect's guilt that we ignored all evidence to the contrary. To demonstrate the strength of our case, we showed the suspect our evidence, and unintentionally fed her details that she was able to parrot back to us at a later time. Contrary to our operating procedures at the time, my colleagues and I chose to videotape the interrogation. This is what saved me from making a horrible mistake in the long run. It was a classic false confession case and without the video we would never have known.[59]

None of the interrogations leading to the forty false confessions in Garrett's study were recorded in their entirety. As other empirical studies have shown, it is rare when police have recorded confessions that were subsequently proven false.[60] However, as in these other studies, many of the interrogations in Garrett's data set were only partially or selectively recorded, a practice that simultaneously increased the risk that the contamination would go undetected by the criminal justice system and increased the risk of wrongful conviction.[61] As Garrett observed about the cases in his study:

> Due to the contamination of exonerees' confessions, the criminal justice system could not later untangle what transpired. Though many of these confessions displayed indicia of gross unreliability, the confessions all passed muster at trial and post-conviction. . . . These false confessions withstood scrutiny precisely because they were bolstered by detailed facts that we now know must have been disclosed. Courts uniformly emphasized that these confessions contained admissions that only the true murderer or rapist could have known. Selective recording of many of these interrogations typically only cemented the contamination, where recording occurred after facts had already been disclosed to the innocent suspect.[62]

Indeed, the forty individuals in Garrett's study who were eventually exonerated—on average more than thirteen years after their conviction[63]—were able to prove their innocence not on the strength of their legal challenges to the tainted evidence that was used to convict them, but only due to the independent development of DNA technology. But for this historical accident (and the fact that biological material from

Deception, 26 LAW & HUM. BEHAV. 469, 473 (2002); Christian A. Meissner & Saul M. Kassin, "*You're Guilty, So Just Confess!": Cognitive and Behavioral Confirmation Biases in the Interrogation Room*, *in* INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT 85, 89–90 (G. Daniel Lassiter ed., 2004).

57. Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 292.

58. *See generally* LEO, *supra* note 3.

59. Garrett, *supra* note 19, at 1075.

60. Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 931 (2004); Leo & Ofshe, *supra* note 33, at 495.

61. Garrett, *supra* note 19, at 1079.

62. *Id.* at 1118.

63. GARRETT, *supra* note 12, at 5.

their crime was available in the first place[64] and had been preserved many years later),[65] almost no one would have believed the claims of innocence of the exonerees in Garrett's data set—like Bruce Godschalk and Douglas Warney. Instead, they almost certainly would have served out their full sentence, many of them with no hope of ever being released from prison. Others, like Earl Washington, Rolando Cruz, and Ronald Jones, for example, may even have been executed.[66] Before DNA testing had become available, these false confessors could not prove the police contamination that tainted their confessions and led to their convictions; or put differently, they could not refute the testimony of police and the arguments by prosecutors, that because their confessions contained guilty knowledge of the crime they were, in fact, guilty of the crime.

D. The Power of Confession Evidence

Whether or not they are contaminated, confessions have long been considered among the most dispositive types of evidence in criminal cases. Historically known as the "queen of proofs,"[67] they have been described as "uniquely potent,"[68] "inherently prejudicial,"[69] and "the gold standard in evidence."[70] In *Bruton v. United States*,[71] Justice White, in dissent, observed that a confession is "probably the most probative and damaging evidence that can be admitted."[72] In *Colorado v. Connelly*,[73] Justices Brennan and Marshall noted that, "no other class of evidence is so profoundly prejudicial."[74] "Triers of fact accord confessions such heavy weight in their determinations that 'the introduction of a confession makes the other aspects of trial in

64. The number of DNA exonerations represents only a tiny fraction of the number of innocent people wrongfully convicted. In the vast majority of cases, DNA evidence either was not left at the scene by the perpetrator, or was not collected by police or not preserved by the police. *See id.* at 5–6 (implying that there are many wrongly convicted persons still in jail who do not have access to DNA evidence).

65. Mark A. Godsey, *Reliability Lost, False Confessions Discovered*, 10 CHAP. L. REV. 623, 623 (2007) ("DNA testing gives our criminal justice system something like a crystal ball—it allows us to look back in time with absolute clarity to determine how and where things went wrong in ways we never could before.").

66. *See Know the Cases: Earl Washington*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Earl_Washington.php (last visited Oct. 26, 2013); *Know the Cases: Rolando Cruz*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Rolando_Cruz.php (last visited Oct. 26, 2013); *Know the Cases: Ronald Jones*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Ronald_Jones.php (last visited Oct. 26, 2013). Six of the DNA exonerees in Garrett's study would have received the death penalty. Garrett, *supra* note 19, at 1065. In addition, some of the DNA exonerees in Garrett's study, such as Christopher Ochoa, Anthony Gray, and David Vasquez, accepted plea bargains to avoid the death penalty. *Id.* at 1097 n.271.

67. PETER BROOKS, TROUBLING CONFESSIONS: SPEAKING GUILT IN LAW AND LITERATURE 9 (2000).

68. Saul M. Kassin & Katherine Neumann, *On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis*, 21 LAW & HUM. BEHAV. 469, 481 (1997).

69. *Id*. at 471.

70. Saul M. Kassin et al., *Police Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 4 (2010); *see also* Milhizer, *supra* note 26, at 8 ("[V]irtually every scholar who has address the subject agrees that confession evidence is singularly potent in achieving a guilty verdict.").

71. 391 U.S. 123 (1968).

72. *Bruton*, 391 U.S. at 139 (White, J., dissenting).

73. 479 U.S. 157 (1986).

74. *Connelly*, 479 U.S. at 182 (Brennan, J., dissenting).

court superfluous, and the real trial, for all practical purposes, occurs when the confession is obtained.'"[75] As social science research from a variety of methodologies has demonstrated,[76] confessions exert a strong biasing effect on the perceptions and decision making of criminal justice officials and lay jurors alike, tending to define the case against a defendant and usually overriding any contradictory information or evidence of innocence.[77]

A suspect's confession sets in motion a seemingly irrefutable presumption of guilt throughout the criminal justice process. Once police elicit a confession, they typically close their investigation, clear the case as solved, and make no effort to pursue exculpatory evidence or other possible leads, even if the confession is inconsistent with or contradicted by other case evidence.[78] Prosecutors tend to make the confession the centerpiece of their case against a defendant, often charging confessors with a higher number and more types of offenses than comparable defendants who have not confessed.[79] Even defense attorneys treat suspects who confess more harshly, often pressuring them to accept a guilty plea to a lesser charge to avoid the higher sentence that will inevitably follow from a jury conviction.[80] Perhaps not surprisingly, false confession DNA exoneration cases are significantly more likely to involve bad defense lawyering than nonconfession DNA exonerations.[81] Trial judges also tend to presume that defendants who have confessed are guilty, rarely suppress their confessions,[82] and treat them more punitively.[83] Jurors as well are unduly prejudiced by confessions. A

75. *Id.* (quoting EDWARD W. CLEARY, MCCORMICK ON EVIDENCE 316 (2d ed. 1972)).

76. Drizin & Leo, *supra* note 60, at 963–94; Kassin & Neumann, *supra* note 68, at 481; Leo & Ofshe, *supra* note 33, at 430; Gerald R. Miller & F. Joseph Boster, *Three Images of the Trial: Their Implications for Psychological Research*, *in* PSYCHOLOGY IN THE LEGAL PROCESS 19, 19 (Bruce Dennis Sales ed., 1977); *see also* Danielle E. Chojnacki et al., *An Empirical Basis for the Admission of Expert Testimony on False Confessions*, 40 ARIZ. ST. L. J. 1, 14–20 (2008) (examining high level research on false confessions); Mark Costanzo et al., *Juror Beliefs About Police Interrogation, False Confession and Expert Testimony*, 7 J. LEGAL EMPIRICAL STUD. 231, 240–45 (2010) (discussing findings regarding juries' interpretations of false confession evidence indicating a misunderstanding of the situational factors present in false confessions); Iris Blandon-Gitlin et al., *Jurors Believe Interrogation Tactics Are Not Likely to Elicit False Confessions: Will Expert Witness Testimony Inform Them Otherwise?*, 17 PSYCHOL., CRIME & L. 239, 255–57 (2011) (discussing the psychological effect that false confessions had on survey participants); Linda A. Henkel et al., *A Survey of People's Attitudes and Beliefs About False Confession*s, 26 BEHAV. SCI. & L. 555, 555–56 (2008) (providing research demonstrating that though people possess general awareness about false confessions, many showed a bias when it came to being aware of the dispositional factors relating to false confessions); Richard A. Leo & Brittany Liu, *What Do Potential Jurors Know About Police Interrogation and False Confessions?*, 27 BEHAV. SCI. & L. 381, 382 (2009) (stating that research shows that innocents "who falsely confessed during police interrogation were, nevertheless, convicted by juries, only to later have their factual innocence proven beyond a reasonable doubt").

77. Leo & Ofshe, *supra* note 33, at 429; *see also* Kassin, *supra* note 27, at 3 (stating that trust in confessions can sometimes lead to refusal to accept contrary evidence, including DNA).

78. Garrett, *supra* note 19, at 1110; Leo & Ofshe, *supra* note 33, at 440.

79. Leo & Ofshe, *supra* note 33, at 440–41.

80. Ofshe & Leo, *supra* note 24, at 984.

81. Kassin, *supra* note 27, at 7.

82. Daniel Givelber, *Punishing Protestations of Innocence: Denying Responsibility and Its Consequences*, 37 AM. CRIM. L. REV. 1363, 1366 (2000).

83. *Id.* at 1408; *see also* D. Brian Wallace & Saul M. Kassin, *Harmless Error Analysis: How Do Judges Respond to Confession Errors*, 36 LAW & HUM. BEHAV.151, 152 (2012) (explaining that a confession

number of mock jury studies have shown that confession evidence exerts more impact on verdicts than other powerful forms of evidence,[84] and that jurors tend to uncritically accept confessions as reliable even when they are told that the confessor suffered from psychological illness or interrogation-induced stress,[85] or when the confessions are retracted and perceived to be involuntary.[86]

These observations have also been borne out in empirical studies of false confessions. As Garrett notes about the forty cases in his study, "police often ceased their investigation once they obtained a confession, and, in doing so, they not only failed to substantiate the confession but failed to investigate glaring inconsistencies between the confession and crime scene evidence."[87] Moreover, continues Garrett, "[t]he vast majority of these exonerees made statements in their interrogations that were contradicted by crime scene evidence, victim accounts, or other evidence known to police during their investigation."[88] Analyzing all the postconviction DNA exonerations, Allison Redlich found that those who had falsely confessed were four times more likely to accept a plea bargain than were those who had not confessed.[89] But most wrongful convictions—regardless of the data set under study—result from jury trials, not plea bargains.[90] Empirical studies by Richard Leo, Richard Ofshe, and Steven Drizin show that innocent confessors who took their case to trial were erroneously convicted seventy-three to eighty-one percent of the time, only to have their confessions subsequently proven false.[91] These studies demonstrate that a false confession profoundly biases a jury's evaluation of the case in favor of conviction, so much so that they may allow it to outweigh even strong evidence of a suspect's factual

increases likelihood of conviction despite awareness of the possibility of coerced, false confessions).

84. Miller & Boster, *supra* note 76, at 19–38; Kassin & Neumann, *supra* note 68, at 481.

85. Linda A. Henkel, *Jurors' Reactions to Recanted Confessions: Do the Defendant's Personal and Dispositional Characteristics Play a Role?*, 14 PSYCHOL., CRIME & L. 566, 572–73 (2008).

86. Saul M. Kassin & Holly Sukel, *Coerced Confessions and the Jury: An Experimental Test of "Harmless Error" Rule*, 21 LAW & HUM. BEHAV. 27, 42 (1997); Allison D. Redlich et al., *Perceptions of Children During a Police Interview: A Comparison of Suspects and Alleged Victims*, 38 J. APPLIED SOC. PSYCHOL. 705, 723 (2008); Wallace & Kassin, *supra* note 83, at 157–58. Confessions are so powerful that they often corrupt other evidence. Knowledge that a suspect has confessed can lead eyewitnesses to make erroneous identifications, polygraph experts to find deception where none exists, and fingerprint examiners to identify matches that do not exist. Saul M. Kassin et al., *Confessions that Corrupt: Evidence From the DNA Exoneration Files*, 23 PSYCHOL. SCI. 41, 44 (2012).

87. Garrett, *supra* note 19, at 1086–87.

88. *Id.* at 1087.

89. Allison D. Redlich, *False Confessions, False Guilty Pleas: Similarities and Differences*, *in* POLICE INTERROGATION AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY 49, 60 (G. Daniel Lassiter & Christian Meissner eds., 2010); *see also* Kassin, *supra* note 27, at 7 (applying Redlich's finding that false confessions led to higher plea bargain acceptances to show how false confessions deprive many defendants of their day in court).

90. In Bedau and Radelet's study approximately five percent (17/350) of the wrongful conviction cases involved false plea bargains. *See* Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 57 (1987). In the Garrett study, approximately six percent (16/250) of the exonerees pleaded guilty. *See* GARRETT, *supra* note 12, at 150. In the Gross and Shaffer study, approximately five percent (44/873) of the exonerations involved false plea bargains. *See* Samuel R. Gross & Michael Shaffer, *Exonerations in the United States, 1989–2012*, at 13 (Public Law and Legal Theory Working Paper Series, Working Paper No. 277, 2012).

91. Drizin & Leo, *supra* note 60, at 995–96; Leo & Ofshe, *supra* note 33, at 482.

innocence. These studies also demonstrate that real-world juries simply fail to appropriately discount false confession evidence, even when the innocent defendant's uncorroborated confession was elicited by coercive methods. As Welsh White has noted, "the system does not have safeguards that will prevent the jury from giving disproportionate weight to such confessions."[92] Admitting a confession into evidence is virtually outcome determinative.[93]

A false confession is therefore a dangerous piece of evidence to put before a jury. False confessions are uniquely prejudicial and, if introduced at trial, are likely to be believed, and thus create a high risk of wrongful conviction, for at least three reasons. First, most people tend to presume that confessions are true unless they were elicited through physical coercion or given by a defendant who is mentally ill. This has been referred to as the "myth of psychological interrogation,"[94] and this myth has repeatedly been proven false by studies on interrogation-induced false confessions.[95] Nevertheless, in the absence of physical coercion or mental illness, most people treat the allegation of a false confession with great skepticism. Studies show that once the state introduces a confession into evidence against an accused, most jurors tend to presume that defendant's guilt.[96] This is understandable. The act of confessing falsely is viewed as irrational (if not nonsensical), self-destructive, and contrary both to common sense and to the way that self-interested humans are presumed to act.[97] Moreover people tend to believe that they could not be made to falsely confess to a crime they did not commit, especially a serious felony, regardless of the psychological pressure that was brought to bear on them.[98]

But confessions—as well as the interrogations techniques, methods, and strategies that produce them—are outside the realm of common experience.[99] Most people do not know that police detectives receive highly specialized training on psychological interrogation methods and techniques; most people cannot identify those techniques or explain how they are intended to achieve their goal of moving the presumed guilty suspect from denial to admission; most people are not familiar with the scientific research showing how and why such methods can be psychologically coercive; and, perhaps most importantly, most people do not understand how or why such interrogation methods can, if misapplied to the innocent, cause individuals to falsely

92. WELSH S. WHITE, MIRANDA'S WANING PROTECTIONS: POLICE INTERROGATION PRACTICES AFTER DICKERSON 155 (2001).

93. Michael D. Pepson & John N. Sharifi, Lego v. Twomey*: The Improbable Relationship Between an Obscure Supreme Court Decision and Wrongful Convictions*, 47 AM. CRIM. L. REV. 1185, 1214 (2010).

94. *See* LEO, *supra* note 3, at 196.

95. Leo & Ofshe, *supra* note 33, at 492; *see also* Drizin & Leo, *supra* note 60, at 910 (showing that most interrogation-induced false confessions are not the product of physical coercion or mental illness).

96. Drizin & Leo, *supra* note 60, at 921–22; Leo & Ofshe, *supra* note 33, at 481–82.

97. Richard A. Leo, *False Confessions: Causes, Consequences, and Implications*, 37 J. AM. ACAD. PSYCHIATRY & LAW 332, 333 (2009); *see also* Kassin, *supra* note 27, at 3 (stating that a false confession "is not a phenomenon that is known to the average layperson as a matter of common sense" and that most do not understand the coercive nature of police investigations).

98. Henkel et al., *supra* note 76, at 573.

99. Blandon-Gitlin et al., *supra* note 76, at 17–19; Chojnacki et al., *supra* note 76, at 39; Costanzo et al., *supra* note 76, at 238–45; Leo & Liu, *supra* note 76, at 387–90.

admit or confess to crimes they did not commit.[100] In an example of what social psychologists call the fundamental attribution error—the tendency to explain someone's behavior as an effect of his personality rather than his situation or environment[101]—survey studies have shown that even though people recognize that certain interrogation tactics are psychologically coercive, they do not perceive an accompanying risk of false confession or the interrogation or personality factors that would increase it.

The second reason that false confessions are a dangerous piece of evidence to put before a jury is that most individuals, including trained professionals, cannot distinguish between truth telling and lying at high levels of accuracy, even in forensic contexts.[102] Psychological research has consistently shown that most commonsense behavioral cues are not diagnostic of truth and deception.[103] Laypeople on average are only fifty-four percent accurate at distinguishing truth and deception.[104] This problem extends to distinguishing between judgments of true and false confessions. Although people report that "I'd know a false confessions if I saw one," the accuracy of this common assumption is not supported by empirical research.[105] The underlying problem is that people rely on behavioral cues that are not statistically correlated with truth telling or deception.[106]

The third reason that false confessions are a dangerous piece of evidence to place before a jury is that they often contain numerous content cues that people associate with truth telling and guilty knowledge. As we have seen, false confessions are often contaminated with unique nonpublic crime details that were not in the public domain. These are facts that supposedly "only the true perpetrator could know," but in reality have been leaked or disclosed by police during interrogation. Yet police and prosecutors invariably assert, in pretrial hearings and at trial, that these highly improbable nonpublic case facts originated with the defendant. The misleading specialized knowledge present in contaminated false confessions creates the persuasive illusion that they are corroborated and thus verifiably true. As we have seen, contamination during interrogation creates a substantial risk that the false confession will lead to a wrongful conviction because the process of contamination is so counterintuitive and, in the absence of a fully recorded interrogation, difficult to detect.

100. LEO, *supra* note 3, at 196–97.

101. Lee Ross, *The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process*, 10 ADV. EXP. SOC. PSYCHOL. 173, 184 (1977).

102. ALDERT VRIJ, DETECTING LIES AND DECEIT: PITFALLS AND OPPORTUNITIES 2 (2d ed. 2008).

103. Charles F. Bond, Jr. & Bella M. DePaulo, *Accuracy of Deception Judgments*, 10 PERSONALITY & SOC. PSYCHOL. REV. 214, 231 (2006); Bella M. DePaulo et al., *Cues to Deception*, 129 PSYCHOL. BULL. 74, 105 (2003).

104. Bond & DePaulo, *supra* note 103, at 224. Police detectives and other professional lie catchers are accurate only forty-five to sixty percent of the time. *See* Paul Ekman & Maureen O'Sullivan, *Who Can Catch a Liar?*, 46 AM. PSYCHOL. 913, 914 (1991) (finding that professional lie catchers performed only slightly better than chance); Saul M. Kassin & Gisli H. Gudjonsson, *The Psychology of Confession Evidence: A Review of the Literature and Issues*, 5 PSYCHOL. SCI. IN PUB. INTEREST 33, 37 (2004) ("In general, professional lie catchers exhibit accuracy rates in the range from 45% to 60%, with a mean of 54%.").

105. Saul M. Kassin et al., *I'd Know a False Confessions If I Saw One: A Comparative Study of College Students and Police Investigators*, 29 LAW & HUM. BEHAV. 211, 221 (2005).

106. DePaulo et al., *supra* note 103, at 105.

But the contamination of false confessions that Garrett's groundbreaking study helpfully elucidates does not stop here. Recent empirical work by Richard Leo,[107] later independently and apparently unknowingly replicated by Sara Appleby, Lisa Hasel, and Saul Kassin,[108] shows contamination and postadmission influence to be even more robust and therefore even more damaging, dramatic and dangerous to innocent false confessors at trial. In addition to supplying key facts, police investigators in false confession cases also pressure, persuade, and sometimes even coerce suspects to adopt a particular narrative that creates a framework of culpability within which the nonpublic specific details of the crime take on deeper meaning and persuasive force. This second-order level of contamination and influence during interrogation is more akin to what Ofshe and Leo once referred to as "formatting" the crime,[109] and more recently what Leo has referred to as "constructing culpability" in the "confession-making" phase of interrogation.[110] It goes beyond the mere feeding or leaking of details. In addition, interrogators format a suspect's postadmission narrative by suggesting how and why the crime occurred, providing possible motives and plausible explanations, correcting, suggesting and filling in missing crime-relevant information, and directing the suspect to (factual and legal) conclusions about his alleged actions and the events of the crime. As a result, contaminated/formatted false confessions contain not only nonpublic crime facts, but a coherent and compelling storyline, motives and explanations, detailed and vivid crime knowledge, displays of emotion (including crying), description of the confessor's thoughts and feelings (both before and after supposedly committing the crime), displays of catharsis and remorse, requests for forgiveness, and even expressions of voluntariness. It is this substantive content and contextual knowledge of the crime (within which nonpublic details are embedded) that gives the suspect's confession and narrative its full power, persuasiveness and verisimilitude.[111] It is also why a contaminated/formatted false confession is such a seemingly compelling and convincing—and thus dangerous—piece of evidence to place before a jury and one that so often leads to wrongful conviction.[112]

E. False Confessions and the Risk of Wrongful Conviction

It is important to see that whether the trial judge allows a confession to be admitted into evidence against the defendant is the key decision point in determining the risk that a false confession will lead to a wrongful conviction. Put differently, false confessions by themselves are not highly likely to lead to wrongful conviction unless

107. LEO, *supra* note 3, at 246–53.

108. Sara C. Appleby et al., *Police-Induced Confessions: An Empirical Analysis of Their Content and Impact*, 19 PSYCHOL., CRIME & L. 1, 8–9 (2011).

109. Ofshe & Leo, *supra* note 24, at 1088–1106.

110. LEO, *supra* note 3, at 190.

111. *Id*.

112. Detectives are also trained to insert errors into written confessions and to get suspects to make or initial changes to the confessions. They are also trained to insert language indicating that the suspect has read the entire statement, had the opportunity to make changes to it, and attests to its accuracy. Finally, detectives are also trained to get suspects to sign and initial each page. These "tricks" help the police counter the contamination narrative by making the suspect appear to be an active participant in authoring the confession. *See* LEO, *supra* note 3, at 175–77.

they are entered into evidence against a defendant at trial. Most innocent defendants who have falsely confessed are not convicted because their cases never get to trial: police (rarely) fail to submit the case for prosecution; or, more commonly, prosecutors either decline to file charges or dismiss charges after they have been filed; or trial judges (again, rarely) suppress the confession; or false confessors accept a plea bargain rather than take their case to trial.[113] In the two largest studies of false confessions to date, most false confession cases did not result in conviction. In Leo and Ofshe's 1998 study of sixty cases, forty-eight percent (twenty-nine) of the false confessors were wrongfully convicted,[114] and in Drizin and Leo's 2004 study of 125 false cases, thirty-five percent (forty-four) of the false confessors were wrongfully convicted.[115] However, as mentioned earlier, seventy-three percent of these false confessors who chose to take their cases to trial in the Leo and Ofshe study, and eighty-one percent in the Drizin and Leo study, were wrongfully convicted.[116] As these studies indicate, when a false confession gets entered into the stream of evidence at trial, it is highly likely to result in the conviction of the innocent person. Thus, criminal trials overwhelmingly fail as a safeguard for protecting innocent false confessors from the fate of wrongful conviction and incarceration.[117]

III. THE INADEQUACY OF CONSTITUTIONAL CRIMINAL PROCEDURE

A. Introduction

To better understand why criminal trials—with all their pageantry, presumptions, and protections—fail to protect innocent false confessors from erroneous conviction, it is instructive to return to the Brandon Garrett study. As Garrett points out, most of the false confessions in his data set contained gross indicia of unreliability, such as glaring inconsistencies between the confessions and the crime scene evidence and/or the victims' accounts and exculpatory physical, scientific and/or witness evidence that contradicted the confession.[118] Yet the issue of their reliability was rarely litigated because trial courts typically conduct no reliability review of confession evidence.[119]

113. In the Leo and Ofshe study, twelve percent of the false confessors (7/60) pled guilty; in the Drizin and Leo study, eleven percent of the false confessors (14/125) pled guilty. Leo & Ofshe, *supra* note 33, at 478; Drizin & Leo, *supra* note 60, at 953. The total percentage of convictions by plea were twenty-four percent (7/29) in the Leo and Ofshe study, and thirty-two percent in the Drizin and Leo study. Drizin & Leo, *supra* note 60, at 953; Leo & Ofshe, *supra* note 33, at 478. These numbers stand in striking contrast to the percentage of criminal defendants who plead guilty in criminal cases: "Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas." Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012).

114. Leo & Ofshe, *supra* note 33, at 473.

115. Drizin & Leo, *supra* note 60, at 953.

116. Drizin & Leo, *supra* note 60, at 959–62; Leo & Ofshe, *supra* note 33, at 482.

117. *See generally* Dan Simon, *The Limited Diagnosticity of Criminal Trials*, 64 VAND. L. REV. 143 (2011) (arguing that the trial process, serving to safeguard the rights of criminal defendants, "falls short of delivering the level of diagnosticity that befits its epistemic demands and the certitude that it proclaims").

118. Garrett, *supra* note 19, at 1087 ("The vast majority of these exonerees made statements in their interrogations that were contradicted by crime scene evidence, victim accounts, or other evidence known to police during their investigation.").

119. One could argue that the errors in the suspect's confession undermine the contamination narrative

All of the exonerees in the Garrett study either waived their *Miranda* rights to silence and counsel or had not been provided with *Miranda* warnings because police did not regard them to be in custody at the time of their interrogation.[120] Almost all of the exonerees attempted to have their confessions suppressed as coerced and involuntary at pretrial hearings and/or at trial,[121] but in each case the trial court ruled the confessions to be voluntary and admissible,[122] often emphasizing the reliability of the confession in denying the defendant's motion to suppress.[123] A majority of the exonerees whose cases went to trial testified that they were innocent and recanted their confession, many claiming that police had fed them the details of the crime, but, of course, all of them were convicted nonetheless.[124] All who sought postconviction relief were denied, with appellate courts repeatedly upholding the convictions during appeals and habeas review and often citing to the "'overwhelming nature of the evidence against them and describing in detail the nonpublic and 'fully corroborative' facts they each reportedly volunteered."[125] Some of the exonerees were initially denied access to DNA testing or had to fight with prosecutors and courts for many years to obtain it, as in Bruce Godschalk's case.[126] Even after obtaining DNA testing, some of the exonerees continued to face resistance from prosecutors in vacating their convictions[127] as well as from courts and other officials who continued to believe in the reliability of their confessions.[128]

In America, the admissibility of confession evidence at trial is regulated by the constitutional law of criminal procedure. Yet American criminal procedure has altogether abandoned its historic concern with the reliability of confession evidence. Perversely, the constitutional rules of criminal procedure do not allow a trial judge to suppress confession evidence at trial on the grounds that it is false and unreliable. Worse still, the constitutional law of criminal procedure provides no doctrinal mechanism for either recognizing or suppressing contaminated and formatted false confessions. Instead, it is concerned only with whether a defendant's confession was "voluntary" under "the totality of the circumstances" and, if applicable, with whether the defendant prior to his interrogation was provided with and at least implicitly waived

because if the police were guilty of contamination, they surely would have cleaned up these errors before accepting the suspect's narrative. Therefore complete contamination is rarely needed to gain a conviction. As long as some "nonpublic" facts are correct, prosecutors can blame the errors on the suspect, claiming, for example, that he was trying to deceive the police or was too ashamed to make a full and complete admission. In reality, these errors are often the result of false-fed facts—facts that support an initial theory by the police—which later is disproven by scientific or other evidence, as the data set of contaminated cases in Garrett's study reveals. Garrett, *supra* note 19, at 1090.

120. Garrett, *supra* note 19, at 1092–94. See *infra* Part III.C and accompanying text for a discussion of *Miranda* rights and their impact.

121. Garrett, *supra* note 19, at 1094–97.

122. *Id*.

123. *Id.* at 1092.

124. *Id*. at 1099–1102.

125. *Id.* at 1107.

126. *Id*. at 1108–09.

127. *See* MEDWED, *supra* note 2, at 145 (arguing that prosecutors should respond to requests for DNA testing with "minister of justice ideal" in mind).

128. Garrett, *supra* note 19, at 1108–09.

his fourfold *Miranda* rights.[129] This is a staggering legal and practical failure in a system of criminal justice concerned with truth finding, and contributes to the high percentage of false confessors who are wrongfully convicted at trial. In this Section, we will review how the law of constitutional procedure arrived at this sorry state of affairs, and then turn our attention to corroboration rules in evidence law that will provide the basis for our proposal for pretrial reliability hearings.

B. The Due Process Voluntariness Test

It is a story that has been told many times by legal scholars,[130] including by the four of us.[131] Until the eighteenth century, confessions at common law were admissible at trial regardless of how they were obtained.[132] The 1783 case of *The King v. Warickshall* formally established an exclusionary rule for involuntary confessions.[133] Although English and early American courts used the language of involuntariness to exclude confessions, the term involuntary was then synonymous with untrustworthy or unreliable.[134] English and American courts excluded confessions as involuntary primarily to prevent untrustworthy evidence from being used to convict defendants.[135] As Otis Stephens observes: "The common-law rule was designed primarily to guard against the introduction of unreliable evidence. It was based on the assumption that a criminal suspect subjected to threats or other forms of intimidation might make a false confession to save himself from further coercion."[136]

Throughout the nineteenth and first half of the twentieth century, American courts would draw on this reliability-based voluntariness rule to exclude confessions. "The

129. Berghuis v. Thompkins, 130 S. Ct. 2250, 2264 (2010).

130. *E.g.*, OTIS H. STEPHENS, JR., THE SUPREME COURT AND CONFESSIONS OF GUILT 17 (1973); Mark A. Godsey, *Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination*, 93 CALIF. L. REV. 465, 488 (2005); Lawrence Herman, *The Unexplored Relationship Between the Privilege Against Compulsory Self-Incrimination and The Involuntary Confession Rule (Part I)*, 53 OHIO ST. L.J. 101, 170 (1992); Lawrence Herman, *The Unexplored Relationship Between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confession Rule (Part II)*, 53 OHIO ST. L.J. 497, 538 (1992); Yale Kamisar, *What is an "Involuntary" Confession? Some Comments on Inbau and Reid's Criminal Interrogation and Confessions*, 17 RUTGERS L. REV. 728, 741 (1963); Steven Penney, *Theories of Confession Admissibility: A Historical View*, 25 AM. J. CRIM. L. 309, 310 (1998); Welsh S. White, *What Is An Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001, 2002 (1998).

131. *E.g.*, LEO, *supra* note 3, at 272–76; GEORGE C. THOMAS & RICHARD A. LEO, CONFESSIONS OF GUILT: FROM TORTURE TO MIRANDA AND BEYOND 226–31 (2012); Leo et al., *supra* note 25, at 488–99.

132. Penney, *supra* note 130, at 320.

133. King v. Warickshall, 168 Eng. Rep. 234, 235 (K.B. 1783).

134. *See* YALE KAMISAR, POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY 11 (1980) (observing that "whatever the *current* meaning of the elusive terms 'voluntary' and 'involuntary' confessions, *originally* the terminology was a substitute for the 'trustworthiness' or 'reliability' test," and that "[f]or *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'").

135. Welsh White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Evidence*, 32 HARV. C.R.-C.L. L. REV. 105, 111–12 (1997); *see also* White, *supra* note 130, at 2002 (observing that "from its origin until well into the twentieth century the [voluntariness test] was primarily designed to protect against the admission of untrustworthy evidence").

136. STEPHENS, *supra* note 130, at 17.

sole purpose of the voluntariness rule," as Steven Penney put it, "was to reduce the possibility of wrongful conviction."[137] Importantly, the voluntariness doctrine was a common law rule of evidence designed to prevent the introduction of unreliable evidence at trial, not a rule of constitutional law.[138]

This would soon change. The Supreme Court first introduced the concept of voluntariness into constitutional confession jurisprudence in the anomalous 1897 case of *Bram v. United States*.[139] But it was not until a line of cases beginning in 1936 with *Brown v. Mississippi*[140] that the Court would create a voluntariness test based on the due process clause of the Fourteenth Amendment to exclude involuntary confessions in state cases (and the nearly identical due process clause of the Fifth Amendment to exclude involuntary confessions in federal cases). In *Brown*, the Court unanimously reversed the convictions of three African American defendants who had been physically tortured into providing detailed confessions and were convicted (and sentenced to death) solely on the basis of these indisputably coerced statements.[141] While *Brown* made clear that the due process clause of the Fourteenth Amendment was now the basis for determining the admissibility of disputed confessions, it left unstated whether the new due process based voluntariness test rested on the same rationale as the old common law involuntary confession rule. At first, it was assumed that these two doctrines were, in effect, one and the same, that *Brown* had held that involuntary confessions are to be excluded because they are inherently untrustworthy and thus violated constitutionally protected principles of fairness.[142] Put differently, some commentators, such as Wigmore, maintained that *Brown* had merely constitutionalized the common law involuntary confession rule.[143]

137. Penney, *supra* note 130, at 322.

138. Godsey, *supra* note 130, at 481–82.

139. 168 U.S. 532 (1897). *Bram* was anomalous for at least two reasons. First, it recast a rule of evidence as a constitutional right, in effect conflating the common law voluntariness rule with the Fifth Amendment self-incrimination clause. *See* Godsey, *supra* note 130, at 474 (noting that *Bram* "introduced this test by confusing the self-incrimination clause with the inapposite voluntariness doctrine, a common law rule of evidence that has little relation to the text, historical origins, or policies of the self-incrimination clause," which served to "set the stage for the confusion that has pervaded our confession jurisprudence to this day"). Second, while *Bram* announced a new constitutional test for the admissibility of confession evidence, it was "promptly forgotten" and for the next seven decades, and "the Court consistently held that the Fifth Amendment privilege was inapplicable to police interrogation." Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435, 437 (1987). In *Bram*, the Court declared the voluntariness test to be the basis for confession admissibility under the self-incrimination clause, but it was the only case that ever stood for this proposition and thus "fell into disuse as a restriction on police interrogation." Herman, *supra* note 130, at 530; *see also* THOMAS & LEO, *supra* note 131, at 90–93.

140. 297 U.S. 278 (1936).

141. *Brown*, 297 U.S. at 279 ("Aside from the confessions, there was no evidence sufficient to warrant the submission of the case to the jury."). For more information on *Brown v. Mississippi*, see THOMAS & LEO, *supra* note 131, at 144–46.

142. Penney, *supra* note 130, at 337 ("Whatever the social and political causes of the Supreme Court's foray into state confessions cases, it has generally been assumed that the due process voluntariness test was initially concerned only with reliability. On this view *Brown* established, unremarkably, that physical torture impugns the trustworthiness of a resulting confession." (footnote omitted)).

143. *See, e.g.*, White, *supra* note 135, at 112 ("In 1940, four years after the Court's first ruling that a confession was involuntary under the due process test, Wigmore maintained that the sole basis for excluding a

They were wrong. As the due process voluntariness test evolved in the decades following *Brown*, the Court would make clear that it ultimately rested on several rationales or a "complex of values."[144] In addition to excluding coerced confessions because they were likely to be false or untrustworthy, the rationales underlying the new constitutional voluntariness doctrine included both deterring offensive or unfair police interrogation methods *and* protecting the free will of suspects from being overborne during interrogation. The reliability-based rationale that had formed the basis of common law involuntary confession rule and carried over into the early due process voluntariness test would soon give way to these other rationales and then eventually disappear from the due process voluntariness jurisprudence altogether. Only five years after *Brown*, the Court famously wrote in *Lisenba v. California*[145] that, "[T]he aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence."[146] As the Court decided one confession case after another in the 1940s and the 1950s, it became increasingly clear that self-determination,[147] or mental freedom[148]—the idea that confessions should only be deemed voluntary and thus admissible if given freely by a suspect whose will had not been overborne—was the dominant, if not near exclusive, rationale underlying the constitutional standard. A quarter of a century after *Brown*, the Court in *Culombe v. Connecticut*[149] summarized the due process voluntariness test as follows:

> The ultimate test remains that . . . of voluntariness. 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 confessions offends due process.[150]

The same year as *Columbe*, the Court decided another confession case, *Rogers v. Richmond*,[151] that foreshadowed the disappearance of the reliability rationale. In *Rogers*, the defendant had been interrogated for approximately six hours and confessed to a murder after investigators threatened to take his arthritic wife into police custody for interrogation. The trial court had admitted the confession on the ground that the interrogation methods "had no tendency to produce a confession that was not in accord with the truth."[152] The Supreme Court in *Rogers* reversed the conviction because:

> The attention of the trial judge should have been focused, for purposes of the Federal Constitution, on the question whether the behavior of the State's law

confession was the confession's lack of trustworthiness. Thus, he apparently interpreted the due process voluntariness test as merely constitutionalizing the common law rule that excluded untrustworthy confessions." (footnote omitted)).

144. *See* Blackburn v. Alabama, 361 U.S. 199, 207 (1960).

145. 314 U.S. 219 (1941).

146. *Lisenba*, 314 U.S. at 236.

147. Penney, *supra* note 130, at 344–61.

148. Joseph Grano, *Voluntariness*, *Free Will, and the Law of Confessions*, 65 VA. L. REV. 859, 865 (1979).

149. 367 U.S. 568 (1961).

150. *Culombe*, 367 U.S. at 602.

151. 365 U.S. 534 (1961).

152. *Rogers*, 365 U.S. at 541–42.

> enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined—a question to be answered with complete disregard of whether or not petitioner in fact spoke the truth.[153]

In other words, the Court held that a confession's admissibility must be determined by whether the police interrogation methods overbore the suspect's will and thereby rendered it involuntary, an analysis that was completely independent of the reliability of the confession itself. As Otis Stephens has pointed out, the holding in *Rogers* "sound[ed] the death knell of the rule of trustworthiness."[154] While the Court displayed a concern for deterring the kind of improper police interrogation practices that could lead to false and unreliable confessions, the "overbearing of the will" standard had come to define the modern due process voluntariness test.[155] The reliability rationale was now at best a secondary consideration in the due process voluntariness inquiry.

In 1986 in *Colorado v. Connelly*,[156] the Court put to rest any question about whether the reliability rationale continued to underlie the due process voluntariness test.[157] In *Connelly*, the Court held the defendant's confession was voluntary despite its apparent untrustworthiness[158] because there had been no police coercion in eliciting it.[159] The Court in *Connelly* essentially declared that evaluating the reliability of a confession is neither a goal[160] nor even a relevant consideration[161] in the voluntariness inquiry. The *Connelly* Court in effect abolished reliability from the due process analysis altogether: "the voluntariness determination has nothing to do with the reliability of jury verdicts; rather, it is designed to determine the presence of police coercion."[162] Even more significantly, the Court instructed lower courts that the rules

153. *Id*. at 544.

154. STEPHENS, *supra* note 130, at 117; *see also* Yale Kamisar, *On the "Fruits" of Miranda Violations, Coerced Confessions and Compelled Testimony*, 93 MICH. L. REV. 929, 939–41 (2005) (discussing replacement of trustworthiness test); Davies, *supra* note 26, at 239–40 (same).

155. *See Rogers*, 365 U.S. at 541 (noting that while "confessions cruelly extorted may be and have been, to an unascertained extend found to be untrustworthy . . . the constitutional principle of excluding confessions that are not voluntary does not rest on this consideration").

156. 479 U.S. 157 (1986).

157. Leo et al., *supra* note 25, at 498–99.

158. *Connelly*, 479 U.S. at 167. In dissent, Justice Brennan wrote:

> [T]he overwhelming evidence in the record points to the unreliability of Mr. Connelly's delusional mind. . . .
>
> Moreover, the record is barren of any corroboration of the mentally ill defendant's confession. No physical evidence links the defendant to the alleged crime. Police did not identify the alleged victim's body as the woman named by the defendant. Mr. Connelly identified the alleged scene of the crime, but it has not been verified that the unidentified body was found there or that a confession actually occurred there. There is not a shred of competent evidence in this record linking the defendant to the charged homicide. There is only Mr. Connelly's confession.

Id. at 183 (Brennan, J., dissenting). *But see* William T. Pizzi, Colorado v. Connelly*: What Really Happened*, 7 OHIO ST. J. CRIM. L. 377, 379 (2009) (arguing that Justice Brennan unfairly framed the facts in *Connelly*).

159. *Connelly*, 479 U.S. at 167 (1986).

160. Milhizer, *supra* note 26, at 31.

161. George E. Dix, *Federal Constitutional Confessions Law: The 1986 and 1987 Supreme Court Terms*, 67 TEX. L. REV. 231, 273 (1988).

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

of evidence—not the rules of federal constitutional criminal procedure—were the proper body of law to apply when evaluating the admissibility of unreliable confession evidence: "A statement rendered by one in the condition of respondent might prove to be quite unreliable, but this is a matter to be governed by the evidentiary laws of the forum . . . and not by the Due Process Clause of the Fourteenth Amendment."[163]

By abandoning the reliability rationale on which the common law involuntary confession rule had been premised more than two centuries earlier, the Court in *Connelly* made clear that the Fourteenth Amendment due process voluntariness test is not directly concerned with the admission of unreliable confessions,[164] nor does it require state courts to undertake any reliability analysis prior to admitting a confession into evidence at trial.[165]

The current Fourteenth Amendment due process voluntariness test can thus be stated as follows. Based on the totality of the circumstances, trial court judges must assess whether police conduct during interrogation overbore the will of the suspect and thus led to an involuntary confession. In making this determination, the trial judge must consider both the interrogation methods/pressures and the suspect's personality characteristics/traits.[166] In order to find the confession involuntary, the trial judge must find a causal connection between the overbearing police conduct and the resulting statement.[167] Though the test is easily stated, it is not easily applied: it is a highly subjective and fact-specific determination in every case. There is no litmus test or bright lines. With the exception of the physical coercion—as occurred in the paradigm case of *Brown*—the Court has refused to state any *per se* rules of exclusion.[168] In other words, as Lawrence Herman has observed, "virtually everything is relevant and nothing is determinative."[169]

The due process voluntariness test has long been criticized by numerous legal scholars.[170] As many have pointed out, it is vague, ambiguous, and ultimately

163. *Id.* at 167.

164. To be sure, as Welsh White and Andrew Taslitz have each argued, the Court has in other contexts held that due process requires that the government employ procedures that will safeguard the innocent from wrongful conviction, and that one of the purposes of the voluntariness test is to reduce the risk of convicting the innocent. Taslitz, *supra* note 25, at 422; White, *supra* note 135, at 106–07. Nevertheless, *Connelly* made clear that the Fourteenth Amendment due process voluntariness test that regulates the admissibility of confession evidence is not violated if a trial court admits into evidence a legally voluntary but factually false or unreliable confession. The Court's due process pronouncements regarding reliability in other contexts may be aspirational, but in the confession context they clearly fail to provide any protection against the admissibility against false confessions because that is no longer one of their purposes. *Connelly*, 479 U.S. at 164.

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

166. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973) ("In determining whether a defendant's will was overborne in a particular case, the Court has assessed the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation.").

167. Paul Marcus, *It's Not Just About* Miranda*: Determining the Voluntariness of Confessions in Criminal Prosecutions*, 40 VAL. U. L. REV. 601, 620 (2006).

168. Penney, *supra* note 130, at 358 (observing that physical torture is the only bright-line rule in this area).

169. Lawrence Herman, *The Supreme Court, the Attorney General, and the Good Old Days of Police Interrogation*, 48 OHIO ST. L.J. 733, 745 (1987).

170. Godsey, *supra* note 130, at 539 ("The involuntary confession rule is perhaps the most criticized doctrine in all of criminal procedure.").

indeterminate, if not incoherent.[171] Moreover, because it lacks clarity, the due process voluntariness test, in application, has proven inconsistent and unpredictable. It has thus failed to provide meaningful guidance to judges, lawyers or even the police themselves.[172] Even the Supreme Court has recognized many of these criticisms.[173] Perhaps not surprisingly, trial courts rarely find confessions to be involuntary;[174] what's more, they routinely find confessions voluntary that are the product of extreme pressure, threats, and promises.[175] Whether involuntary or not, confessions are rarely excluded from evidence at trial.[176] Though the due process voluntariness test is almost universally recognized to be deeply flawed—both in theory and in practice—in the last half century there have been no calls to abolish it, and it remains substantively unchanged.[177]

From our perspective, the central problem with the Fourteenth Amendment due process voluntariness test, as it is currently conceived, is that it offers little meaningful protection against the wrongful conviction of the innocent. The due process voluntariness test fails to ensure, *let alone even consider*, the reliability of confession evidence at trial.[178] As Supreme Court doctrine in the last half century has made abundantly clear, the purpose of the due process voluntariness test is not to evaluate the veracity of confessions or to exclude false or unreliable confession evidence.[179] The

171. Albert W. Alschuler, *Constraint and Confession*, 74 DENV. U. L. REV. 957, 959 (1997); Laurence Benner, *Requiem for* Miranda*: The Rehnquist Court's Voluntariness Doctrine in Historical Perspective*, 67 WASH. U. L.Q. 59, 116 (1989); Monrad G. Paulsen, *The Fourteenth Amendment and the Third Degree*, 6 STAN. L. REV. 411, 430 (1954); *see also* Kamisar, *supra* note 130, at 759 (arguing that "[t]he real reasons for excluding confessions have too long been obscured by traditional language"); Stephen J. Schulhofer, Jr., *Confessions and the Court*, 79 MICH. L. REV. 865, 869–78 (1981) (identifying six major flaws of the voluntariness standard).

172. Marcus, *supra* note 167, at 626, 643.

173. *See* Miller v. Fenton, 474 U.S. 104, 116 n.4 (1985) (citing scholars who condemn due process voluntariness jurisprudence variously as useless, perplexing, and "legal 'double-talk'").

174. Godsey, *supra* note 130, at 470; *see also* Pepson & Sharifi, *supra* note 94, at 1192 ("With such a low burden of proof as the norm, it should come as no surprise, then, that the vast majority of motions to suppress are denied.").

175. Marcus, *supra* note 167, at 620, 622, 643; *see also* Herman, *supra* note 169, at 752–54 (observing that over approximately thirty years, the Supreme Court granted review of thirty-five cases in which confessions were held to be voluntary, and citing five cases in which questionable police conduct contributed to a confession).

176. *See* Peter F. Nardulli, *The Societal Costs of the Exclusionary Rule: An Empirical Assessment*, 1983 AM. B. FOUD. RES. J. 585, 600 [hereinafter Nardulli, *Societal Costs*] (noting that only 5 out of 7,035—0.07%—cases were lost as a result of a confession being suppressed); Peter F. Nardulli, *The Societal Costs of the Exclusionary Rule Revisited*, 1987 U. ILL. L. REV. 223, 226–27 (finding that 0.6% of all cases were lost due to the three exclusionary rules combined out of the cases studied in Illinois, Michigan, and Pennsylvania).

177. *See* Marcus, *supra* note 167, at 605 (stating that "the substantive law in this area has not improved or become more definite over the past four decades").

178. To be sure, it can be argued that since one of the myriad historical purposes of the voluntariness test is preventing false convictions, the risk of false convictions is at least one factor implicitly considered by the Court in deciding what police conduct is coercive and what is not.

179. *See* Colorado v. Connelly, 479 U.S. 157, 167 (1986) ("We think the Constitution rightly leaves this sort of inquiry to be resolved by state laws governing the admission of evidence and erects no standard of its own in this area. A statement rendered by one in the condition of respondent might be proved to be quite unreliable, but this is a matter to be governed by the evidentiary laws of the forum . . . and not by the Due

due process voluntariness test therefore fails to provide the doctrinal foundation for a direct or effective safeguard against the admissibility of false confessions, a form of evidence that, as we have seen, creates a substantial risk of wrongful conviction when introduced into evidence at trial. It should not be surprising that although almost all the false confessors in the Garrett study had tried to suppress their confessions as coerced and involuntary, "courts ruled each of these confessions voluntary and admissible,"[180] as Garrett points out, "despite indicia of involuntariness in many of these cases."[181] To be sure, coercive interrogation techniques increase the risk of eliciting a false confession if misapplied to an innocent suspect.[182] But because voluntariness is not a proxy for reliability, the Fourteenth Amendment due process voluntariness test fails to directly provide the doctrinal screening mechanism necessary to prevent false confessions from going to the jury.

The current due process voluntariness test in theory offers protection only against the admission of coerced and involuntary confessions, which of course may be true or false. Even if it succeeds in practice in excluding coerced and involuntary confessions from evidence at trial—and Paul Marcus's 2006 study of tens of thousands of opinions in criminal cases suggests that it usually does not[183]—the due process voluntariness test is plainly inadequate to address the problem of contaminated/formatted false confessions and thus the admission of unreliable confession evidence. This is because coercion and contamination, though related, are entirely different phenomena: the former refers to exerting sufficient pressure such that a suspect comes to perceive that he has no meaningful choice but to comply with the demands or requests of his interrogator, whereas the latter refers to the leaking or disclosing of nonpublic crime facts. One psychological process (coercion) typically involves accusatory pressure

Process Clause of the Fourteenth Amendment."). The Supreme Court has made similar statements about the evidentiary reliability of eyewitness testimony and jailhouse informant testimony—two of the leading sources, along with false confessions, of wrongful conviction in America—being irrelevant as a due process concern. *See* Perry v. New Hampshire, 132 S. Ct. 716, 723 (2012) ("The Constitution . . . protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit."); Kansas v. Ventris, 556 U.S. 586, 594 (2009) (holding that unconstitutionally obtained confession can be used to impeach criminal defendant at trial). *See generally* Keith A. Findley, *Judicial Gatekeeping of Suspect Evidence: Due Process and Evidentiary Rules in the Age of Innocence*, 47 GEORGIA L. REV. 723 (2013).

180. Garrett, *supra* note 19, at 1092.

181. *Id.*

182. *See* Gross & Shaffer, *supra* note 90, at 57 (describing a study finding that sixty percent of confessions surveyed were "clearly coerced," while eleven percent "appear[ed] to have been voluntary"); Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 38 (2010) (describing situational and dispositional factors that put innocent people at risk of making false confessions).

183. Marcus, *supra* note 167, at 642. Brian Wallace and Saul Kassin report in a recent study that "three out of ten judges believed that an interrogation was *not* coercive in which the detective brandished his sidearm and threatened the death penalty for more than 15 h[ours] over the suspect's repeated denials—tactics that were said to have been captured on videotape and not in dispute." Wallace & Kassin, *supra* note 83, at 7. As Steven Duke comments, "suppression of confessions by trial judges on involuntariness grounds is almost as rare today as four-legged chickens." Steven B. Duke, *Does* Miranda *Protect the Innocent or the Guilty?*, 10 CHAP. L. REV. 551, 562 (2007).

designed to break down a suspect's will to resist and move him from denial to admission, while the other (contamination) involves information transfer that has the effect of assisting the suspect provide a more detailed and cohesive postadmission narrative. Although it increases the risk that a false confession will lead to a wrongful conviction, police contamination/formatting during interrogation is not likely by itself to exert sufficient pressure to overbear the will. To our knowledge, no trial court has ever suppressed a suspect's confession as involuntary prior to trial because police contaminated, rather than coerced, it.

Warney v. State,[184] a recent New York appellate decision, is the first to recognize the phenomenon of police contamination during interrogation. As discussed earlier,[185] in 1996 Warney confessed to the brutal stabbing and murder of William Beason.[186] Mr. Warney's contaminated confession was determined to be voluntary at his pretrial suppression motion, and at his criminal trial the prosecution asserted that there were at least nine nonpublic details, which the police claimed had originated with Mr. Warney, that corroborated the reliability of Mr. Warney's confession.[187] The jury convicted Warney of second-degree murder, and he was sentenced to twenty-five years to life.[188] In 2006, Mr. Warney's innocence was established through DNA testing, and he was exonerated and released from prison.[189] Because Mr. Warney's interrogation was not recorded, it was the DNA exoneration that ultimately established the police contamination during interrogation that made his entirely false confession seem both true and persuasive, cementing his wrongful conviction in 1997.[190] As Judge Smith explained in his concurring opinion:

> Now that his innocence has been established, Warney echoes the prosecutor's question: How indeed could he have known all these facts? It is hard to imagine an answer other than that he learned them from the police. In short, the details set forth in Warney's 41- page statement of his claim, with 58 pages of annexed exhibits, point strongly to the conclusion that the police took advantage of Warney's mental frailties to manipulate him into giving a confession that contained seemingly powerful evidence corroborating its truthfulness—when in fact, the police knew, the corroboration was worthless[191]

Although *Warney v. State* intimated a link between coercion and contamination, the case is not likely to have much impact on criminal cases because it arose in the unique context of a civil claim for damages.[192] Indeed, the appellate court did not take

184. 947 N.E.2d 639 (N.Y. 2011).

185. See *supra* notes 46–52 and accompanying text for an overview of the facts in *Warney*.

186. *Warney*, 947 N.E.2d at 642.

187. *Id.* at 641 n.1.

188. *Id.* at 641.

189. *Id.* at 642.

190. *Id.* ("At trial, Warney's signed confession was the primary evidence against him, although he testified that it was coerced and manufactured by police. The prosecutor emphasized that the confession contained details that, in his words during closing, 'only the killer would have known about.'").

191. *Id.* at 646 (Smith, J., concurring).

192. New York provides a statutory cause of action against the state for wrongfully convicted persons, but due to policy concerns, the statute requires that the plaintiff must not have taken actions to "cause or bring about his conviction." *See* N.Y. COURT OF CLAIMS ACT § 8-b(4). Thus, the Court of Appeals was addressing

issue with the criminal court's decision to admit Warney's confession: "We . . . conclude that although the statement was admissible at the criminal trial, the judge there lacked many of the facts now stated in Warney's claim. Most importantly, the question of coercion must now be viewed in light of Warney's innocence."[193] In other words, the *Warney* decision arises in a context inapplicable to criminal proceedings, that is, one in which the judge knows the defendant is actually innocent.

In short, the Fourteenth Amendment due process voluntariness test fails to provide a meaningful safeguard against the admission of contaminated/formatted false confessions into evidence at trial and the corresponding risk that they will lead to the wrongful conviction of the innocent. In practice, the problem of contamination/formatting may even undermine an innocent defendant's argument that his confession should be suppressed as the involuntary product of police interrogation coercion. In Brandon Garrett's study, trial judges routinely credited the "inside knowledge" present in these false confessions—i.e., misleading specialized knowledge—as evidence of their voluntariness. As Garrett points out:

> Though the Supreme Court has ruled out reliance on reliability as an independent reason to exclude a confession, judges noted the perceived reliability when admitting these confessions and finding them to be voluntary.
>
> . . . .
>
> . . . Courts routinely . . . emphasize that there was not coercion by focusing on the apparent reliability of confession statements.[194]

Thus, the presence of misleading specialized knowledge in an innocent suspect's postadmission narrative—the hallmark of police contamination and formatting—may even prevent trial judges from excluding involuntary confessions under the due process voluntariness test.[195]

C. The Miranda *Diversion*

In 1966, the Supreme Court decided what would become its most well known opinion ever in a criminal case: *Miranda v. Arizona*.[196] Reaching back seven decades to the long-forgotten *Bram* decision, the Court found that the Fifth Amendment privilege against self-incrimination applied to custodial interrogation.[197] Specifically, the Court in *Miranda* held that in order to dispel the compulsion it believed to be inherent in police-dominated custody, investigators must (1) inform a suspect of his right to silence, appointed counsel, and notice that his words can be used against him, and (2) elicit from him a "voluntary[], knowing[], and intelligent[]" waiver before

the legal question of whether, by alleging that his confession was contaminated, he had stated a claim under this statute even though the confession was admitted at trial. *Warney*, 947 N.E.2d at 642–43 (majority opinion).

193. *Warney*, 947 N.E.2d at 644 n.4.

194. Garrett, *supra* note 19, at 1100–11.

195. *Id.* at 1094 (noting that many of the confessions in his study contained "significant indicia of involuntariness").

196. 384 U.S. 436 (1966); *cf.* Duke, *supra* note 183, at 551 ("*Miranda v. Arizona* is probably the most widely recognized court decision ever rendered.").

197. *Miranda*, 384 U.S. at 444, 461–63 (citing Bram v. United States, 168 U.S. 532, 542 (1897)).

interrogation may legally commence.[198] The state bears a "heavy burden" to demonstrate that suspects have waived their rights before statements could be admitted into evidence.[199] If police fail to provide proper *Miranda* warnings or elicit a proper *Miranda* waiver, any subsequent confession would be excluded from evidence at trial.[200] The *Miranda* analysis did not replace the Fourteenth Amendment due process voluntariness test, but instead created a separate test for the admissibility of confession evidence. Prosecutors must now demonstrate both that police interrogators complied with *Miranda*'s warning and waiver requirements and that police elicited a voluntary confession under the Fourteenth Amendment due process clause before it can be admitted at trial.

Yet *Miranda* offers little, if any, protection against the admission of false confessions—whether contaminated/formatted or not—into evidence at trial. For like the due process voluntariness inquiry, the purpose of the *Miranda* warning and waiver requirements is not to evaluate the reliability of confessions or to prevent false evidence from being used against criminal defendants. Although commentators[201]—as well as the Court itself[202]—have on occasion asserted that one of *Miranda*'s goals was to ensure the reliability of confession evidence, this is simply not true.[203] Rather, the purpose of *Miranda* has always been to protect suspects from the inherently compelling pressures of custodial interrogation by assuring "that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process."[204] Like the post-*Connelly* due process voluntariness test, the *Miranda* analysis has never been concerned with the issue of a confession's reliability. Put

198. *Id.* at 444–45.

199. *Id.* at 475.

200. *Id.* at 444–48.

201. *See, e.g.*, Milhizer, *supra* note 26, at 27 ("Although *Miranda* ostensibly had reliable confessions as a goal, its approach was ill designed to achieve this objective.").

202. Withrow v. Williams, 507 U.S. 680, 692 (1993).

203. *See Miranda*, 384 U.S. at 447 (noting that the use of "third degree" in custodial interrogation involved the dangers of false confessions and that "it tends to make police and prosecutors less zealous in the search for objective evidence").

204. *Id.* at 469. Even this purpose of *Miranda* has been thrown into doubt by the recent case, *Berghuis v. Thompkins*. 130 S. Ct. 2250 (2010). There, the Court held that a waiver of *Miranda* warnings is not necessary before questioning begins. *Id.* at 2264. All that is required is that the warnings be recited. However, once a defendant starts to confess, a waiver is required. But a knowing, voluntary, and intelligent waiver can be implied—including from the suspect's apparent understanding of the warnings and his three hours of silence because that gave him time to contemplate the wisdom of his speaking. *Id.* at 2259–60. In reaching this decision, which seems to fly in the face of much express language in *Miranda*, the Court in *Berghuis* declared early in its opinion: "The *main purpose* of *Miranda* is to ensure that an accused is advised of and understands the right to remain silent and the right to counsel." *Id*. at 2261 (emphasis added). Later, in interpreting its earlier holding in *North Carolina v. Butler*, 441 U.S. 369 (1979), and in explaining why post–*Miranda* warnings interrogations can proceed without first obtaining a waiver, the Court again said: "This holding also makes sense given that 'the primary protection afforded suspects subject[ed] to custodial interrogation *is the Miranda warnings themselves*.'" *Berghuis*, 130 S. Ct. at 2263 (alteration in original) (emphasis added) (quoting Davis v. United States, 512 U.S. 452, 460 (1994)). This position is starkly different—and less protective of suspects' rights—than *Miranda*'s focus on the compulsion inherent in custodial interrogation. Whether *Berghuis* heralds a complete switch in the rest of *Miranda* doctrine from a Fifth Amendment focus on compulsion to a due-process-like focus on adequate notice remains to be seen.

differently, *Miranda* is irrelevant to the problem of false confessions and wrongful conviction.[205]

Moreover, as more than four decades of empirical research has now shown,[206] even *Miranda*'s procedural protections are largely illusory.[207] Many interrogations do not require *Miranda* warnings or waivers because police tell suspects they are not in custody and/or that they are free to leave;[208] these alternative "admonishments" have sometimes been referred to as *Beheler* warnings, after one of the Supreme Court cases that legitimated this end-run practice.[209] Even when police are legally required to provide *Miranda* warnings, they have developed multiple strategies to minimize the likelihood that suspects will terminate questioning by invoking their right to silence or counsel.[210] Moreover, the Supreme Court has so watered down the *Miranda* waiver requirement,[211] that if a suspect says almost anything other than "I want a lawyer" after being read the *Miranda* rights, he will be deemed to have implicitly waived those rights.[212] Not surprisingly, empirical studies have consistently shown that approximately eighty to ninety percent of custodial suspects waive their *Miranda* rights, and thus legally consent to the interrogation process.[213] There is now empirical evidence that innocent suspects in particular are more likely to waive their rights than guilty ones.[214] And, as we have pointed out elsewhere,[215] after the warning and waiver moments have passed, *Miranda* does not prohibit police interrogators from using aggressive, manipulative, or even contaminating police interrogation techniques and strategies.[216]

205. Richard A. Leo, Miranda *and the Problem of False Confessions*, *in* THE MIRANDA DEBATE: LAW, JUSTICE AND POLICING 271, 271–82 (Richard A. Leo & George C. Thomas, III. eds., 1998).

206. *See* Richard A. Leo & K. Alexa Koenig, *The Gatehouse and Mansions: Fifty Years Later*, 6 ANN. REV. L. & SOC. SCI. 323, 330–35 (2010) (summarizing results of empirical studies).

207. *See* Charles D. Weisselberg, *Mourning* Miranda, 96 CALIF. L. REV. 1519, 1521 (2008) (arguing that recent Supreme Court decisions have "gutted" *Miranda's* core protections).

208. LEO, *supra* note 3, at 124–25.

209. *See* California v. Beheler, 463 U.S. 1121, 1124–25 (1983) (holding that *Miranda* warning is not required when suspect is not formally in police custody); Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (holding that *Miranda* warning is only required when law enforcement restricts person's freedom "as to render him 'in custody'").

210. *See* Richard A. Leo & Welsh S. White, *Adapting to* Miranda*: Modern Interrogators' Strategies For Dealing With The Obstacles Posed By Miranda*, 84 MINN. L. REV. 397, 431–50 (1999).

211. *See* Berghuis v. Thomkins, 130 S. Ct. 2250, 2262 (2010) (holding that "a suspect who has received and understood the *Miranda* warnings, and has not invoked his *Miranda* rights, waives the right to remain silent by making an uncoerced statement to the police"); North Carolina v. Butler, 441 U.S. 369, 375 (1979) (holding that under certain circumstances a suspect can implicitly waive his *Miranda* rights); Leo & Koenig, *supra* note 206, at 329 (arguing that certain Supreme Court cases have "so persistently watered down [*Miranda*] that it has failed to achieve the goals initially set out for it"); Weisselberg, *supra* note 207, at 1521 (arguing that recent Supreme Court decisions have "gutted" *Miranda's* core protections); Yale Kamisar, *The Rise, Decline, and Fall (?) of* Miranda, 87 WASH. L. REV. 965, 1021 (2012) (stating that *Miranda* "has been downsized and weakened in various ways").

212. LEO, *supra* note 3, at 125–26.

213. THOMAS & LEO, *supra* note 131, at 176–85.

214. *See* Kassin et al., *supra* note 182, at 22–23.

215. Leo et al., *supra* note 25, at 497.

216. *See* Welsh S. White, Miranda*'s Failure To Restrain Pernicious Interrogation Practices*, 99 MICH.

In short, *Miranda* fails to offer any meaningful protection against the elicitation of false confessions or the admission of false and unreliable confessions into evidence at trial. Not surprisingly, all of the false confessors in Garrett's study had waived their *Miranda* rights, and many had been interrogated and/or made admissions prior to being given *Miranda* rights because police did not deem them to be in custody and trial courts agreed.[217] What Garrett found replicates earlier studies showing that "in virtually all of the documented false confessions cases, the innocent suspects either explicitly or implicitly waived their *Miranda* rights."[218] As many have noted, *Miranda* has in practice often displaced the due process voluntariness test by shifting the trial courts' analysis from the voluntariness of the confession to the voluntariness of the *Miranda* waiver, an even lower standard of admissibility.[219]

D. Corroboration Rules

The common law of evidence developed an exclusionary rule for unreliable confessions known as the *corpus delicti* rule. The first state to adopt the *corpus delicti* rule was North Carolina in 1797;[220] by 1984, all fifty states had adopted some version of it,[221] though its form and application differs greatly among jurisdictions.[222] The orthodox *corpus delicti* rule requires corroboration—independent of the confession—that the crime charged was committed by someone. The rule does not require corroboration that the defendant committed the act or injury, only that a crime occurred.[223] The rule's original purpose was to protect individuals who falsely confessed to fictitious crimes, the paradigmatic example being the "dead alive" cases,[224] in which the murder victim showed up after the defendant has confessed.[225]

Such cases, however, are rare. Instead, virtually all false confessions typically involve a person admitting to a crime that did in fact happen, but in which he was not involved. The *corpus delicti* rule is thus meaningless as a safeguard against the

L. REV. 1211, 1232–46 (2001) (describing how *Miranda* does not protect against harsh interrogation techniques once rights are waived).

217. Garrett, *supra* note 19, at 1092–93.

218. Leo et al., *supra* note 25, at 498 (footnote omitted).

219. THOMAS & LEO, *supra* note 131, at 180; Leo, *supra* note 205, at 276; Leo et al., *supra* note 25, at 498; *see also* Missouri v. Seibert, 542 U.S. 600, 611–14 (2004) (considering whether or not a suspect had voluntarily waived her rights when an interrogator first elicited a confession from her, then recited the *Miranda* warnings, then had her repeat her earlier confession).

220. State v. Long, 2 N.C. (1 Hayw.) 455 (1797) (per curiam).

221. Leo et al., *supra* note 25, at 505.

222. Milhizer, *supra* note 26, at 42–43.

223. *E.g.*, State v. Parker, 337 S.E.2d 487, 490–91 (N.C. 1985).

224. *The Dead Alive* was a short story based on true events of man sentenced to death for murder of man who was still alive. WILKIE COLLINS, WILKIE COLLINS'S THE DEAD ALIVE: THE NOVEL, THE CASE, AND WRONGFUL CONVICTIONS (Rob Warden ed., 2005). Warden's edition provides an appendix that describes eleven other "dead alive" cases. *Id.* at 152–64.

225. 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, 399 (1993). Mullen points out that the *corpus delicti* rule developed in England in response to exactly this kind of case: "The corpus delicti rule developed in England in response to a narrow, practical problem: how to ensure that after a murderer was executed the supposed murder victim did not show up to cast doubt on the propriety of the execution." *Id*.

admission of false confessions into evidence at trial because it does not require any corroboration of the contents of the confession.[226] For this and other reasons, the *corpus delicti* rule has been severely criticized.[227]

In place of the *corpus delicti* rule, the Supreme Court in two decisions released on the same day in 1954—*Smith v. United States*[228] and *Opper v. United States*[229]—announced a new rule, dubbed the trustworthiness rule, which requires corroboration of the confession itself rather than the fact that a crime occurred.[230] Although it has only been adopted by the federal government and in a few states,[231] under the trustworthiness rule, the government may not introduce a confession unless it provides "substantial independent evidence which would tend to establish the trustworthiness of the [confession]."[232] The trustworthiness standard is, in theory, a substantial improvement over the *corpus delicti* rule because of its potential to prevent false confessions from entering the stream of evidence at trial. However, in practice the trustworthiness doctrine has not been effective at screening out false confessions. Without an electronic recording of the entire interrogation, courts thus must resolve a swearing contest between the suspect and the detective over the source of the details contained in the suspect's confession. As we have seen, because police detectives contaminate/format confessions and suspects incorporate misleading specialized knowledge into their final statements, many false confessions appear reliable and persuasive.[233] Even with a full recording of the interrogation, however, the quantum of corroboration in most jurisdictions that apply the trustworthiness rule is very low, allowing many unreliable confessions to go before the jury.[234] As a result, the

226. Corey J. Ayling, *Corroborating Confessions: An Empirical Analysis of Legal Safeguards Against False Confession*, 1984 WIS. L. REV. 1121, 1136.

227. *See, e.g.*, David A. Moran, *In Defense of the Corpus Delicti Rule*, 64 OHIO ST. L.J. 817, 835 (2003) (listing the three common criticisms of the *corpus delicti* rule, including that it is: "underinclusive because it does not apply to even the most unreliable confession to an actual crime; . . . overinclusive because it results in the suppression of reliable confessions; and . . . unnecessary because constitutionally-based doctrines provide adequate safeguards against the use of unreliable confessions"); Mullen, *supra* note 225, at 418 (arguing that the *corpus delicti* rule should be abolished).

228. 348 U.S. 147 (1954).

229. 348 U.S. 84 (1954).

230. *Opper*, 348 U.S. at 93–94; *Smith*, 348 U.S. at 154.

231. *E.g.*, United States v. Lopez-Alvarez, 970 F.2d 583, 592 (9th Cir. 1992); United States v. Johnson, 589 F.2d 716, 718 (D.C. Cir. 1978); United States v. Wilson, 436 F. 2d 122, 124 (3d Cir. 1971); Landsdown v. United States, 348 F.2d 405, 409 (5th Cir. 1965); Jacinth v. State, 593 P.2d 263, 266 (Ala. 1979); State v. Hafford, 746 A.2d 150, 173 (Conn. 2000); State v. Yoshida, 354 P.2d 986, 990 (Haw. 1960); People v. Brechon, 390 N.E.2d 626, 629 (Ill. App. Ct. 1979); State v. Parker, 337 S.E.2d 487, 495 (N.C. 1985); State v. George, 257 A.2d 19, 21 (N.H. 1969); State v. Lucas, 152 A.2d 50, 57–60 (N.J. 1959); State v. Paris, 414 P.2d 512, 514–15 (N.M. 1966); State v. Ervin, 731 S.W.2d 70, 72 (Tenn. Crim. App. 1986); Schultz v. State, 264 N.W.2d 245, 253 (Wis. 1978).

232. State v. Mauchley, 67 P.3d 477, 488 (Utah 2003) (alteration in original) (quoting *Opper*, 348 U.S. at 93).

233. See *supra* Part II.C for a discussion of contamination in confessions.

234. Leo et al., *supra* note 25, at 510. In 2006, we argued that such pretrial reliability hearings should be held separately from pretrial voluntariness hearings. *Id.* at 532. The Supreme Court's ruling in *Colorado v. Connelly* would seem to dictate such an outcome. But does it? Although the Court says that issues of confession reliability have no place in the constitutional test of voluntariness and should be governed by the

trustworthiness doctrine has been criticized as too "malleable"[235] and "permissive"[236] to present a meaningful safeguard against the admission of false and unreliable confession evidence at trial.

IV. THE LEGAL FRAMEWORK FOR PRETRIAL RELIABILITY ASSESSMENTS

A. Bringing Reliability Back In

In 2006, three of us published the first law review article that, to our knowledge, argued that trial judges should hold pretrial reliability hearings on confession evidence.[237] Based on more than two decades of empirical social science research in general, and what has come to be known as the Ofshe-Leo fit standard in particular,[238] we proposed a new test for judges to apply when assessing the reliability of confession evidence.[239] As Ofshe and Leo argued many years ago, absent preexisting knowledge or contamination, in many cases the reliability of a suspect's confession can be evaluated by analyzing the fit (or lack thereof) between the descriptions in his postadmission narrative and the crime facts in order to determine whether the suspect's postadmission narrative reveals the presence (or absence) of guilty knowledge and whether it is corroborated (or disconfirmed) by objective evidence.[240] Leo and Ofshe specifically pointed out that there are at least three indicia of reliability or reliability factors that can be evaluated to reach a conclusion about the trustworthiness of a confession. They conclude that a statement is more likely to be trustworthy if the statement (1) leads to the discovery of evidence unknown to the police, (2) includes identification of highly unusual elements of the crime that have not been made public, or (3) includes an accurate description of the mundane details of the crime which are not easily guessed and have not been reported publicly.[241] We noted that there is little

evidentiary laws of the forum, it does not insist that hearings on reliability be separate from hearings on voluntariness. Judges are accustomed to combining hearings on pretrial motions to suppress, even when there is overlap in evidence and different standards and burdens of proof may apply, as in the case where defendants file motions to quash arrest and suppress evidence on Fourth Amendment grounds and motions to suppress statements on *Miranda* and/or voluntariness grounds. The law assumes that judges can compartmentalize evidence and apply the law fairly, in these and other contexts. Moreover, combined hearings would preserve precious judicial resources and prevent the unnecessary inconvenience of police and citizen witnesses. For this reason, we prefer combined hearings or, if not, that the voluntariness hearing be conducted first, followed immediately by the reliability hearing, preferably on the same day. In the event that new evidence comes to light that is relevant to the reliability determination—for example, DNA or other forensic test results that exclude the defendant or match to another person—courts should liberally allow defendants to file motions to reconsider in light of the new evidence.

235. Moran, *supra* note 227, at 852.

236. Milhizer, *supra* note 26, at 46.

237. Leo et al., *supra* note 25, at 532; *see also* Davies, *supra* note 26, at 231–32, 241–43 (arguing that judges should act as gatekeepers that should decide whether a confession is trustworthy before it is presented as evidence at trial); Leo, *supra* note 205, at 278 (arguing that courts should not admit confessions into evidence that appear so unreliable that they will be unfairly prejudicial, confusing, or misleading to the jury).

238. *Id.* at 520–22.

239. *Id.* at 525–35.

240. Ofshe & Leo, *supra* note 24, at 990–97.

241. Leo & Ofshe, *supra* note 33, at 438–40.

dispute that the Ofshe-Leo factors should contribute to an assessment of a confession's reliability, and that these factors are routinely relied on by all parties—including law enforcement—in the criminal justice system to assess reliability.[242]

We also emphasized the importance of electronically recording interrogations in their entirety, but at the time we did not believe that the failure to record an interrogation should be an absolute bar to the admission of a confession on reliability grounds. We therefore suggested different tests of reliability depending upon whether the interrogation process was recorded. We argued that judges evaluating the reliability of confessions that are the product of a recorded interrogation should weigh three factors in deciding whether to admit or exclude the confession: (1) whether the confession contains nonpublic information that can be independently verified, would only be known by the true perpetrator or an accomplice, and cannot likely be guessed by chance; (2) whether the suspect's confession led the police to new evidence about the crime; and (3) whether the suspect's postadmission narrative fits (or fails to fit) with crime facts and existing objective evidence. We argued that if the state seeks to admit a confession that is not the product of a fully recorded interrogation, prosecutors must first demonstrate by clear and convincing evidence that it was not feasible for reasons that were not the fault of law enforcement, and that the confession must strongly link the suspect to the crime by leading law enforcement to evidence that was previously unknown to them.[243] If the prosecutor can meet this burden, the judge must still balance the remaining reliability factors outlined above in deciding whether to admit or exclude the confession.[244]

The substantive legal underpinning for our proposed reliability test in 2006 was Federal Rule of Evidence 403 (or its equivalent state analogue), which allows trial courts to exclude evidence whose probative value is substantially outweighed by its prejudicial effect because of the risk of misleading the jury and leading to an erroneous verdict.[245] By definition, a false confession—like any piece of completely false evidence—has no probative value. Confessions that contain indicia of unreliability, but cannot be proven false, are likely to have very little probative value. At the same time, as we have seen above, a false confession—especially a contaminated/formatted false confession—is a dangerous piece of evidence to place before a jury because of the high risk that it will lead to wrongful conviction. Confessions that contain indicia of unreliability, but cannot be proven false, create a risk of wrongful conviction. As a logical matter then, a false or unreliable confession—especially if it has been contaminated/formatted—contains little or no probative value but instead creates a substantial danger or risk of unfair prejudice to an innocent defendant. The Ofshe-Leo factors mentioned above, we argued, could be used by judges to assess whether a

242. Leo et al., *supra* note 25, at 520–28.

243. *Id.*

244. We proposed this higher standard because we believed that police failure to record an interrogation should carry some penalty because the absence of a recording makes it impossible for judges and juries to determine whether the details of the confession came from the suspect or were suggested by the police, thus impeding the truth-seeking function of the trial process. *Cf.* United States v. Leon, 468 U.S. 897, 916 (1984) (stating that purpose of exclusionary rule is "to deter police misconduct rather than to punish the errors of judges and magistrates").

245. *See* FED. R. EVID. 403.

confession contains sufficient indicia of reliability to be admitted into evidence under a 403 balancing analysis. If the disputed confession evidence did not meet a minimal threshold of reliability under 403, the trial judge could suppress it from evidence at trial, even if the confession was otherwise considered legally voluntary and complied with the *Miranda* requirements.[246] In many genuine false confession cases—in which there exists little or no corroborating evidence—this would likely lead prosecutors to dismiss charges against innocent defendants. In others, it would prevent a dangerous—perhaps the most dangerous—type of evidence from being placed before a jury, thereby substantially reducing the risk of wrongful conviction at trial.

Two points of clarification must be made. All admissibility decisions require proving foundational facts, often at a hearing on a motion in limine. There are two kinds of foundational facts under the Federal Rules of Evidence: conditionally relevant facts and those sometimes labeled "competency" facts.[247] Conditionally relevant facts, governed by Rule 104(b), require the hearing judge to find that there is sufficient evidence allowing a reasonable jury to find those facts by a preponderance of the evidence—a very low standard.[248] Moreover, the judge at the admissibility hearing assumes the truthfulness of the proponent's witnesses for these purposes, thus not hearing from contradicting witnesses.[249] Competency facts, governed by Rule 104(a), must be proven by the proponent to the hearing judge's personal satisfaction by a preponderance of the evidence.[250] Moreover, the hearing judge must hear from witnesses on both sides, resolving any credibility disputes.[251] Competency facts thus create a greater admissibility hurdle than do conditionally relevant facts. Because Rule 403 is labeled a "relevancy rule,"[252] many law professors, in our experience, assume that fact finding under 403 must be treated as involving conditionally relevant facts.[253]

246. Leo et al., *supra* note 25, at 531–32.

247. *See* STEVEN I. FRIEDLAND ET AL., EVIDENCE LAW AND PRACTICE 56–57 (2d ed. 2004) (explaining that it is the judge's role to determine both whether evidence is admissible and whether a reasonable jury could find that a fact exists such that it supports the relevance of other evidence). *See generally* Edward Imwinkelreid, *Judge Versus Jury: Who Should Decide Questions of Preliminary Facts Conditioning the Admissibility of Scientific Evidence*, 25 WM. & MARY L. REV. 577 (1984) (discussing competency facts).

248. Huddleston v. United States, 485 U.S. 681, 682 (1998).

249. FRIEDLAND ET AL., *supra* note 247, at 56.

250. Bourjailay v. United States, 483 U.S. 171, 176 (1987).

251. FRIEDLAND ET AL., *supra* note 247, at 56. In California, for instance, trial judges are required to evaluate evidence that "is too unreliable to be evaluated properly." CAL. EVID. CODE R. 405. cmt. (West 2013); *see, e.g.*, People v. Terry, 113 Cal. Rptr. 233, 239–40 (Cal. Ct. App. 1974) (holding that trial court determining voluntariness and admissibility of confession must consider all necessary facts). In California, Evidence Code Section 405 "'deals with evidentiary rules designed to withhold evidence from the jury because it is too unreliable to be evaluated properly' . . . Under § 405, the judge sits as a jury of one, and like jurors is entitled to consider the evidence pro and con, including the credibility of witnesses." MIGUEL MENDEZ, EVIDENCE: THE CALIFORNIA CODE AND THE FEDERAL RULES, A PROBLEM APPROACH 698 (5th ed. 2012).

252. FED. R. EVID. 403.

253. Federal Rules of Evidence 403 and 104(b) are both "relevance" concepts and in a sense one could conceive of our reliability assessment proposal as potentially related to "conditional relevance" under Rule 104(b). A confession is only relevant subject to the fulfillment of a particular condition—a finding of reliability—and credibility determinations are not the types of conditions that the Advisory Committee had in mind in drafting Rule 104(b) of the Federal Rules of Evidence. But our argument in this Article is different; confessions are not conditionally relevant. They are always relevant, but sometimes the risk of unreliability is

But there are good reasons to reject this categorization.

Rule 403 requires a trial court to balance primarily two things: probative value and unfair prejudice.[254] But Rule 403 assumes that the evidence in question is relevant.[255] Instead, probative value is a measure of how relevant: *how much* does the evidence change the likelihood that a matter of consequence (for example, the suspect in fact being the perpetrator) exists.[256] How much evidence tends to prove something is what lawyers often refer to as "weight."[257] "Unfair prejudice," on the other hand, is a measure of *how much* the evidence may mislead the jury, confuse it, or lead it to over- or underweigh the evidence.[258] The hearing judge must first make these two quantitative ("how much?") decisions—both of which also involve qualitative judgments (we need to know how trustworthy and complete evidence is before we can decide its weight)—and must next balance the two to see which outweighs the other. Only if unfair prejudice substantially outweighs probative value can the evidence be excluded.[259] The goal of all this measuring and balancing is to protect the jury from some evidence that may cause more harm than good to accurate fact finding.[260] But that is precisely the goal of designating some facts as involving "competency." Rules of relevance set minimal standards of logical connection to a case, leaving it to the jury to draw what conclusions it will. Rules of competency seek to protect the jury from error or, in some cases, to serve some policy goal extrinsic to fact-finding accuracy.[261] This protective function of competency facts is why they involve a higher standard of proof than conditionally relevant facts: to serve as a safeguard against jury error.[262] That is just what Rule 403 is meant to do,[263] and it is just what the application of that Rule to confessions argued for here is designed to accomplish.

Daubert v. Merrell Dow Pharmaceuticals[264] addressed an analogous question. There, the Court held that scientific evidence is admissible only if it is "relevant" and

a form of unfair prejudice/misleading information than can supersede the probative value, and judges therefore must analyze this under Rule 104(a).

254. FED. R. EVID. 403.

255. FED. R. EVID. 401; FED. R. EVID. 402; FED. R. EVID. 403.

256. FRIEDLAND ET AL., *supra* note 247, at 66.

257. Andrew Taslitz has provided a more theoretical discussion of the various meanings of "weight." *See* Andrew E. Taslitz, *Cyber-Surveillance Without Restraint? The Meaning and Social Value of the Probable Cause and Reasonable Suspicion Standards in Governmental Access to Third Party Electronic Records*, 103 J. CRIM. L. & CRIMINOLOGY 839, 898–905 (2013).

258. FRIEDLAND ET AL., *supra* note 247, at 66.

259. *See id.*

260. *See id.*

261. *See id.*; Andrew E. Taslitz, *Daubert's Guide to the Federal Rules of Evidence: A Not-So-Plain Meaning Jurisprudence*, 32 HARV. J. LEG. 3, 38–39 (1995) [hereinafter Taslitz, *Daubert's Guide*]; Andrew E. Taslitz, *Interpretive Method and the Federal Rules of Evidence: A Call for a Politically Realistic Hermeneutics*, 32 HARV. J. LEG. 329, 399–401 (1995) [hereinafter Taslitz, *Interpretive Method*].

262. Taslitz, *Daubert's Guide*, *supra* note 261, at 37–44; Taslitz, *Interpretive Method*, *supra* note 261, at 399–401.

263. *See* FED. R. EVID. 403 advisory committee's note (explaining that one purpose of Rule 403 is to protect against jury error).

264. 509 U.S. 579 (1993).

"reliable."[265] But "reliability," some commentators and advocates had argued, is a prerequisite for minimal relevancy, thus constituting a conditionally relevant fact.[266] Other commentators argued that reliability is designed to ensure sufficient evidentiary trustworthiness to guard against an undue risk of jury error, thus rendering the question one of competency.[267] This debate also centered on two sources for the reliability rule: Rules 403 and 702.[268] Yet the Court in *Daubert* ultimately held that sound policy required treating the reliability decision as a competency fact to be proven to the judge's satisfaction by a preponderance of the evidence after an adversarial hearing.[269] We make a similar argument here.

Yet that still leaves one puzzling question. Rule 403 does not mandate exclusion of evidence where unfair prejudice substantially outweighs probative value. Rather, under those circumstances, the hearing judge "may" exclude the evidence.[270] Admissibility is thus usually a question of trial judge discretion to be exercised case by case.[271] Such individualized discretion is arguably inconsistent with the approach that we advocate for here. Although we acknowledge discretion in the sense of finding whether reliability exists, we argue that confessions not proven by the state to be reliable by a preponderance of the evidence should be excluded, judges finding such facts having no discretion to act otherwise. But if, as we argue below, Rule 403 also operates as a sort of statutory version of "evidentiary due process,"[272] then Rule 403 can in exceptional cases generate per se rules to exclude entire categories of evidence deemed harmful to the fundamental purposes of having evidentiary rules. This perspective is, however, not without precedent. Most importantly, it is precisely the vision at least implicitly recently animating the Oregon Supreme Court decision in *State v. Lawson*.[273] There, the court, partly relying on Oregon's equivalent to Rule 403, held that Oregon courts may not admit unreliable eyewitness identification evidence, concluding that reliability requires considering all the teachings of modern social science about what eyewitness procedures best promote trustworthy outcomes.[274] Unreliable identifications arguably *must be* excluded. That is, in the court's view, apparently not a matter within the scope of judicial discretion:

> As a discrete evidentiary class, eyewitness identifications subjected to suggestive police procedures are particularly susceptible to concerns of unfair prejudice. Consequently, in cases in which an eyewitness has been

265. *Daubert*, 509 U.S. at 589.

266. Taslitz, *Daubert's Guide*, *supra* note 261, at 37–44 Taslitz, *Interpretive Method*, *supra* note 261, at 399–401.

267. Taslitz, *Daubert's Guide*, *supra* note 261, at 37–44.

268. *Id.*

269. *Daubert*, 509 U.S. at 592–93.

270. FED. R. EVID. 403 (using permissive, rather than mandatory, language).

271. FRIEDLAND ET AL., *supra* note 247, at 66.

272. The Oregon Supreme Court has distinguished evidentiary analysis from due process because the latter requires state action, whereas the former does not. State v. Lawson, 291 P.3d 673, 693 (Or. 2012). But the spirit of Lawson's discussion of Rule 403 as a generative rule otherwise has the feel of due process about it.

273. 291 P.3d 673 (Or. 2102).

274. *Lawson*, 291 P.3d at 691–94.

> exposed to suggestive police procedures, trial courts have a heightened role as an evidentiary gatekeeper because "traditional" methods of testing reliability—like cross-examination—can be ineffective at discrediting unreliable or inaccurate eyewitness identification evidence.[275]

The court's position on mandatory exclusion is admittedly a bit unclear because it later uses language that may be interpreted as vesting discretion in judges.[276] Still, the court's description of eyewitness identifications as a "discrete evidentiary class" "particularly susceptible to concerns of unfair prejudice" wisely suggests a categorical analysis rather than a case-by-case discretionary one.[277] At a minimum, the language suggests that admitting unreliable eyewitness identifications will frequently constitute an "abuse of discretion"—a near per se rule, functionally indistinguishable from a rule recognizing no discretion at all. Moreover, the court also views the importance of unconscious influences on eyewitness identifications as rendering them essentially "opinions," subject to Rule 701, which governs lay opinion testimony and mandates that it be "helpful to the trier of fact."[278] This helpfulness language is similar to language in Rule 702, governing expert testimony,[279] language best viewed as creating a question of competency, not conditional relevancy.[280]

Yet the *Lawson* court still recognizes something unusual, though not unique, about Rule 403: it requires the opponent of admission to prove that unfair prejudice substantially outweighs probative value, rather than the proponent doing the opposite.[281] Most evidentiary rules place the burden on the proponent,[282] but not Rule 403. If that is so, then in our circumstance, the defendant, not the state, would have to prove the confession's unreliability rather than the state's proving its reliability. That is a rule that we could live with but not one that we prefer. For this reason, we also attach as an Appendix to this Article a proposed new statutory admissibility rule placing the burden where it belongs.[283] So that the state will not have to prove reliability in the broad run of straightforward cases with corroborating evidence, however, the rule also requires the burden of production—that is, of demonstrating some evidence of

275. *Id.* at 695. It is worth noting that the *Lawson* court also held that reliability matters even if there is no state action causing suggestion. *Id.* at 688–89. *See generally* Sandra Guerra Thompson, *Daubert Gatekeeping for Eyewitness Identifications*, 65 SMU L. REV. 593 (2012) (discussing the role of trial courts as gatekeepers for eyewitness identification evidence).

276. *Lawson*, 291 P.3d at 694 ("When the opponent of the evidence succeeds in that regard, the trial court can either exclude the evidence or fashion a remedy to restore a permissible balance between the probative value of the evidence and the countervailing concerns set out in OEC 403."); *Id.* at 697 ("If the state's administration of one or more of the system variables (either alone or combined with estimator variables) results in suggestive police procedures, that fact can, in turn, give rise to an inference of unreliability that is sufficient to undermine the perceived accuracy and truthfulness of an eyewitness identification—only then *may* a trial court exclude the eyewitness identification under OEC 403." (emphasis added)).

277. *Id.* at 694.

278. *Id.* at 692.

279. FED. R. EVID. 702.

280. *See* FRIEDLAND ET AL., *supra* note 247, at 292.

281. *Lawson*, 291 P.3d at 697.

282. *See, e.g.*, FED. R. EVID. 404(b) (allowing proponent to use character evidence if they can articulate legitimate reason).

283. See *infra* Appendix for a discussion of several ways to reach this result: via a new statute or via an amendment to the Federal Rules of Evidence.

unreliability—be placed on the defense, only then triggering the state's burden of persuasion to show reliability by a preponderance.

In addition to elucidating the substantive underpinnings of our proposed reliability test in 2006, we also suggested logistically how our proposed reliability test would work in practice.[284] As in the case of voluntariness hearings, challenges to the reliability of confession evidence would commence upon the filing of a motion to exclude by the defense, which could be styled as a motion in limine under local rules of evidence that track Federal Rule of Evidence 403. Defendants would bear the burden of production on the issue of reliability, and need only marshal some evidence that the confession is unreliable based upon the Ofshe-Leo factors identified above. The ultimate burden of persuasion, however, we suggested should fall on the prosecution—as it does in pretrial motions to suppress confessions on either voluntariness or *Miranda* grounds—and the standard of admissibility of the confession should be by a preponderance of the evidence. We argued that the trial court should be required to rule on the voluntariness of the confession before the issue of its reliability is litigated—assuming defense counsel raise both bases for suppression—so that a judicial finding of reliability does not improperly sway the court to conclude, with no further or independent analysis, that the confession must necessarily be voluntary as well. We further added that pretrial assessment of the reliability of confession evidence need not turn into lengthy contested hearings: in most cases, the defense could submit its reasons for why the confession is not reliable in its pleadings, the state could reply, and the judge could view and analyze the recorded interrogation and confession and rule on the pleadings after argument.

B. Developments Since 2006 and Their Implications

Our thinking about the need for pretrial reliability assessments, their legal grounding and substantive requirements, and the form they should take has evolved in response to new developments since 2006. First, and most significantly, the groundbreaking empirical research on contaminated/formatted false confessions in the last seven years by Brandon Garrett[285] and others[286] has demonstrated that false confessions are a more dangerous and risky piece of evidence to place before a jury than previously known. The findings and insights from these studies have revealed a more urgent need for evidentiary reforms to prevent judges from admitting false confessions into evidence at trial, where they are highly likely to lead to the wrongful conviction of the innocent. The traditional safeguards for screening out unreliable confession evidence have been plainly inadequate to address the problem of police contaminated/formatted false confessions in particular. Whether on voluntariness or *Miranda* grounds, confessions are suppressed only in unusual or extreme circumstances even if there are indications that the confession was not voluntary or there was a

284. Leo et al., *supra* note 25, at 531–35.

285. Garrett, *supra* note 19, at 1051.

286. *E.g.*, LEO, *supra* note 3, at 181; Richard A. Leo & Steven A. Drizin, *The Three Errors: Pathways to False Confession and Wrongful Conviction*, *in* POLICE INTERROGATIONS AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY RECOMMENDATIONS 9, 9–30 (Daniel Lassiter & Christian Meissner eds., 2010); Appleby et al., *supra* note 108, at 2–3.

Miranda violation.[287] Although the search for the truth is the primary purpose of a criminal trial, too often trial judges simply "kick" the confession to the jury, letting the jury be the arbiter of "credibility," rather than acting as proactive gatekeepers and excluding manifestly unreliable evidence. If, as the Supreme Court has said, the central purpose of a criminal trial "is to decide the factual question of the defendant's guilt or innocence,"[288] then false and unreliable confession evidence has no legitimate place in a criminal trial. It is now more clear than ever that a legal mechanism—other than the constitutional doctrines of criminal procedure, which do not require trial court to assess the reliability of confessions—is necessary to screen false and unreliable confession evidence from going to the jury.

Second, as the new wave of empirical research since 2006 has revealed, contaminated/formatted false confessions are so counterintuitive and difficult to detect that they routinely fool police, prosecutors, judges, trial juries, and even appellate courts into believing that completely false confessions are persuasively and verifiably true. In 2006, we argued that there should be a penalty for police failure to record interrogations in their entirety, but that the failure to record the interrogation should not be an absolute bar to the admissibility of a confession on reliability grounds.[289] We therefore suggested two separate tests for the admissibility of confession evidence at pretrial reliability hearings, setting the threshold higher when police fail to record interrogations in their entirety but still making it possible for confessions that are the product of unrecorded interrogations to be admitted into evidence on reliability grounds. The recent empirical research of Garrett and others has persuaded us that this view is simply no longer feasible. Like trace evidence, interrogations must be properly preserved to prevent the contamination of confessions and the risk that such tainted evidence creates for convicting the innocent. The full electronic recording of an interrogation is essential to accurate fact finding about a confession's reliability. In the absence of a full recording of the entire interrogation from start to finish, there is simply no way for third parties such as prosecutors, judges, juries, and appellate courts to detect whether police interrogators have contaminated/formatted the suspect's false confession, and thus no meaningful way for the traditional safeguards of the criminal justice system to prevent the contaminated/formatted false confession from leading to a wrongful conviction. As a result, we now believe that police investigators must be required to record their (custodial and noncustodial) interrogations from start to finish in order for a trial court to meaningfully conduct any reliability review of a disputed piece of confession evidence. Barring exigent circumstances, in the absence of a full recording of the entire interrogation, any resulting confession should be presumed unreliable and automatically excluded from being entered into evidence at trial. In other words, because the risk of wrongful conviction from an unrecorded interrogation is too high, we are now advocating a *per se* exclusion, on reliability grounds, for all disputed confession evidence that is the product of either wholly or partially

287. Duke, *supra* note 183, at 564; Nardulli, *Societal Costs*, *supra* note 176, at 599; Pepson & Sharifi, *supra* note 93, at 1191–92, 1242.

288. Colorado v. Connelly, 479 U.S. 157, 166 (1986) (quoting Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986)).

289. *See* Leo et al., *supra* note 25, at 534.

unrecorded interrogations.

Third, in the fall of 2010 the Uniform Law Commission (also known as the National Conference of Commissioners on Uniform State Laws[290]) ratified a uniform statute on the electronic recording of interrogation for consideration by the states.[291] Drawing on the analysis of pretrial reliability hearings first published in our 2006 article,[292] as well as other research and writing by us,[293] the Uniform Law Commission created two remedies for police failure to electronically record interrogations when required by the statute: suppression of confessions deemed unreliable, and cautionary jury instructions.[294] Although the Uniform Law Commission statute does not mandate the exclusion of evidence as a remedy for violation of the statute and although it does not include a judge assessing the reliability of confession evidence when police did record the full interrogation, it does recommend that failure to record should be given consideration by trial judges when adjudicating a motion to suppress on other grounds, such as involuntariness or unreliability.[295] As Andrew Taslitz notes, "the Act can and should be understood as creating a *statutory* ground for suppression of a confession on grounds of involuntariness (if bracketed language is adopted, also on grounds of unreliability)."[296] The theory behind the limited suppression remedy in the recommended (i.e., bracketed) language of the statute was to provide law enforcement with an incentive for compliance with the recording statute and to prevent wrongful convictions by suppressing confession evidence that was untrustworthy.[297]

Although the Uniform Law Commission statute recognizes the unreliability of confession evidence as a separate, stand-alone basis for suppression, it does not discuss how such a remedy would work in practice, nor does it direct trial judges to evaluate the reliability of confession evidence when there is a full recording of the interrogation. In the remainder of this Section, we address this issue by providing a more detailed explanation of the basis for pretrial reliability assessments in confession cases than we did in our 2006 article, while updating and modifying some of our earlier arguments as well as responding to criticisms of these ideas. First, we discuss the role of judicial gatekeeping in precluding unreliable evidence from going to the jury, including the many other evidentiary contexts in which trial judges routinely hold pretrial hearings to assess whether evidence is reliable before allowing it to go to the jury. We argue that there is nothing extreme or extraordinary about having trial judges play a gatekeeping role in excluding untrustworthy confession evidence from juries as well; indeed, this is consistent with the Supreme Court's mandate in *Colorado v. Connelly* that unreliable confession evidence is to be screened "by the evidentiary laws of the forum,"[298] and it

290. UNIFORM LAW COMMISSION, http://www.uniformlaws.org/ (last visited Oct. 26, 2013).

291. UNIF. ELEC. REC. CUST. INTERR. ACT (2010); *see also* Taslitz, *supra* note 25, at 400–08 (documenting how the Uniform Law Commission sent a proposed statute to the states for consideration).

292. Leo et al., *supra* note 25, at 531–33.

293. LEO, *supra* note 3, at 1, 3, 14, 20, 37, 43, 50; Kassin et al., *supra* note 70, at 14; Leo & Drizin, *supra* note 286, at 40–41; Ofshe & Leo, *supra* note 24, at 38.

294. UNIF. ELEC. REC. CUST. INTERR. ACT § 13 (2010).

295. *Id.* § 13 cmt. A.

296. Taslitz, *supra* note 25, at 416.

297. *Id.* at 413–16.

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

is also consistent with the primary purpose of the rules of evidence law.[299] Second, we provide a more robust discussion and analysis of Federal Rule of Evidence 403 as a possible doctrinal basis for the balancing test we propose than we did in 2006, while also exploring other possible legal bases for such hearings. Finally, we specify how we envision a pretrial reliability hearing unfolding, including specific criteria that trial judges could evaluate in assessing the reliability of confession evidence.

C. Pretrial Reliability Assessments to Exclude Unreliable Confession Evidence

Upon a motion by the defense, courts in criminal cases should evaluate the reliability of confession evidence, which could be undertaken at the same pretrial hearing in which they assess voluntariness. Confessions that do not possess sufficient indicia of reliability should be excluded from evidence at trial. There are several possible bases for such assessments of the reliability of confession evidence. As we argued in 2006, and will argue in more detail below, trial courts can draw on existing principles and rules of evidence—as the Supreme Court instructed in *Connelly*—for such hearings. Alternatively, federal and state rules of evidence could be amended to create a specific rule for addressing the reliability of confession evidence in pretrial hearings. Another possibility would be for legislators to draft a statute for assessing the reliability of confession evidence at pretrial suppression hearings, ideally also providing guidance to judges—either in the legislative history or the text of the statute itself—on the criteria or factors they should look to when making these screening determinations. In the Appendix to this Article we provide a possible statute. Three states—Illinois, North Carolina, and Montana—currently have statutes that recognize unreliability (in addition to involuntariness) as a possible ground for suppressing confession evidence.[300] However, the usefulness of these statutes is limited for several reasons. First, like the statute proposed by the Uniform Law Commission, they do not direct trial judges to assess the reliability of confession evidence when an interrogation has been fully recorded. Second, each of these statutes fails to require the full electronic recording of the interrogation as a predicate to the reliability review of any subsequently disputed confession evidence. As we have argued above, the electronic recording of an interrogation is essential to accurate fact finding about a confession's reliability because otherwise prosecutors, judges, juries, and appellate courts will simply be unable to detect whether police interrogators have contaminated/formatted the suspect's confession.[301] And third, these statutes fail to provide trial judges with any guidance about which factors they should consider or weigh in determining when a threshold showing for exclusion has been met. As we have previously argued, this

299. As Sandra Guerra Thompson has pointed out:

> The principal role of the rules of evidence is to safeguard the search for truth by ensuring the reliability of evidence. This reliability paradigm underlies virtually every evidentiary rule and advance the main objective of the rules. To those ends, most of the rules require some form of reliability gatekeeping by the trial court as a condition precedent to the admissibility of evidence.

Thompson, *supra* note 275, at 596.

300. 725 ILL. COMP. STAT. 5/103-2.1(f) (West 2013); MONT. CODE ANN. § 46-4-409 (West 2013); N.C. GEN. STAT. § 15A-211 (West 2013).

301. See *supra* Part II.C for a discussion of the advantages of electronic recording of interrogation.

determination can be informed by advances in the last two decades in empirical social science research studying the indicia of false and unreliable confessions.[302]

As we argued in 2006, Federal Rule of Evidence 403 (or its state analogue) provides trial courts with the authority to exclude confession evidence whose probative value is substantially outweighed by the danger of unfair prejudice to the defendant, confusion of the issues, or misleading the jury.[303] Under Rule 403, at any point during a criminal case, the trial judge enjoys the broad discretion to assess the probative nature of any proposed evidence (including confession evidence), weigh its prejudicial effect, and exclude it from evidence. The Federal Rules of Evidence, of course, favor admissibility: under Rule 402, all relevant evidence is admissible unless some other rule, statute, or constitutional provision specifically precludes its admission.[304] As discussed earlier,[305] assuming the relevance of the proposed evidence, the Rule 403 balancing analysis should be governed by Rule 104(a), which authorizes courts to determine preliminary questions of fact for almost all types of evidence—including confessions—for the purpose of evidentiary admissibility.[306] Still, the presumption underlying Rule 403 is that relevant evidence will be admitted: that is why the probative value of relevant evidence must be *substantially* outweighed by the risks of prejudice, confusion, or misdirection of the jury to be excluded under Rule 403. Most relevant evidence should therefore not be excluded under Rule 403.

Despite the presumption in favor of admissibility, we and others believe Rule 403 to be an adequate and proper judicial mechanism for considering unreliable confession evidence.[307] Rule 403 grants trial courts broad discretion to exclude unreliable evidence that would mislead juries into rendering inaccurate verdicts. Operating more like a general principle than a specific rule, the underlying purpose of Rule 403 is to protect the accuracy and fairness of the fact-finding process at trial by shielding jurors from relevant evidence that they will overvalue or from which they will draw erroneous or improper inferences.[308] As Sandra Guerra Thompson has noted, "Rule 403 holds a central place in evidence law because it modifies nearly every other evidence rule. . . . In other words, even if another rule would admit evidence, a court may still exclude the evidence based on its authority under Rule 403."[309] Rule 403 is foundational; it has

302. Leo et al., *supra* note 25, at 514–20.

303. Forty-two states have adopted evidence codes based on the Federal Rules of Evidence. 6 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE, at T-1 (Joseph M. McLaughlin ed., 2d ed. 1997).

304. *See* FED. R. EVID. 402.

305. See *supra* notes 247–63 and accompanying text for a discussion of the interaction between Federal Rules of Evidence 104(a) and 403.

306. *See* FED. R. EVID. 104(a).

307. Leo et al., *supra* note 25, at 531–32; Taslitz, *supra* note 25, at 425; Thompson, *supra* note 26, at 335.

308. Edward J. Imwinkelreid, *The Meaning of Probative Value and Prejudice in Federal Rule of Evidence 403: Can Rule 403 Be Used to Resurrect the Common Law of Evidence?*, 41 VAND. L. REV. 879, 895 (1988).

309. Sandra Guerra Thompson, Judicial Gatekeeping of Police-Generated Witness Testimony 54 (unpublished manuscript) (on file with authors); *see also* Victor J. Gold, *Federal Rule of Evidence 403: Observations on the Nature of Unfairly Prejudicial Evidence*, 58 WASH. L. REV. 497, 497 (1983) (characterizing Rule 403 as the cornerstone of the Federal Rules of Evidence).

been described as "a cornerstone of the Federal Rules."[310] In the rules of evidence, it is akin to a due process principle that assures that they will not be applied in a manner resulting in a fundamentally unfair and inaccurate outcome.[311] As we will discuss and illustrate later in this Article, trial courts have routinely relied on Rule 403 (or its state equivalent) in multiple other contexts—such as child witness testimony,[312] hearsay evidence,[313] and hypnotically refreshed testimony[314]—to exclude unreliable evidence in pretrial hearings and thereby prevent it from reaching the jury at trial.[315] Indeed, as we discussed earlier,[316] the Supreme Court in *Daubert v. Merrill Pharmaceuticals* invoked Rule 403 in directing trial courts as part of their gatekeeping role to assess the reliability of scientific expert testimony based on Federal Rule of Evidence 702.[317]

Rule 403 (and its state equivalents) both in theory and in application provides courts with the authority to exclude unreliable confession evidence. As the Rule 403 balancing test is currently construed, however, it offers only a weak protection against unreliable confession evidence because the Rule 403 balance presumptively weighs so strongly in favor of admissibility. After all, even unreliable confession evidence—unless it is viewed by the judge to be absolutely false, which is rare—arguably has some probative value. A confession that is in fact false but that appears even minimally probative to a judge could easily survive a Rule 403 balancing test because the minimal probative value would have to be *substantially* outweighed by its prejudicial effect (or other dangers or concerns) in the judge's determination. We therefore believe that the traditional Rule 403 balancing test is too permissive for unreliable confession evidence. As we have seen, the problem of contaminated/formatted false confessions is highly counterintuitive; even with a full recording of the interrogation, judges and juries are still likely to perceive a detailed confession as prima facie evidence of the confession's reliability. The uniquely prejudicial nature of confession evidence thus demands a stronger evidentiary safeguard. It is unlikely that the traditional Rule 403 balancing test will exclude many unreliable confessions, even ones that are subsequently proven to be false.

Because Rule 403 presents such a low bar for the exclusion of prejudicial evidence and thus favors the admission of relevant evidence even when its probative value is minimal, we propose amending the rule to have a special provision applicable to the admissibility of confessions. The amended provision would flip the burden of persuasion in a traditional Rule 403 balancing analysis to offer more meaningful protection for criminal defendants against the unique prejudice inherent in confession evidence. Our model for shifting the burden of persuasion is Federal Rule of Evidence 609(a)(1) for impeachment by prior convictions, specifically Rule 609(a)(1)(B) for a

310. Imwinkelreid, *supra* note 308, at 906.

311. Aviva Orenstein, *Deviance, Due Process, and the False Promise of Federal Rule of Evidence 403*, 90 CORNELL L. REV. 1487, 1517–18 (2005).

312. See *infra* Part IV.E.2.c for a discussion of child witness testimony.

313. See *infra* Part IV.E.2.d for a discussion of hearsay evidence.

314. See *infra* Part IV.E.2.f for a discussion of hypnotically refreshed testimony.

315. See *infra* Part IV.D for a discussion of the gatekeeping role of judges.

316. See *supra* notes 264–68 and accompanying text for a discussion of *Daubert*.

317. Daubert v. Merrill Dow Pharm., 509 U.S. 590, 595 (1993).

witness who is a criminal defendant (as opposed to other witnesses, to which Rule 609(a)(1)(A) applies).[318] Rule 609(a)(1) creates two separate Rule 403 balancing tests for the admissibility of impeachment evidence of a prior criminal conviction, one for a criminal defendant (Rule 609(a)(1)(B)) and one for all other witnesses (Rule 609(a)(1)(A)). The one for all other witnesses is the usual Rule 403 balancing test in which relevant evidence is admitted unless the probative value of the evidence substantially outweighs its risk of unfair prejudice (or other dangers or concerns).[319] However, under the test for a witness who is a criminal defendant, the court may admit the evidence *only* if it determines that "the probative value of the evidence outweighs its prejudicial effect to that defendant."[320] Notice the change in formulation—from a presumption of admissibility if the probative value of the relevant evidence is not substantially outweighed by risk of prejudice (the traditional Rule 403 test) to a presumption of exclusion unless the probative value outweighs its prejudicial effect (the flipped Rule 403 test per Rule 609(a)(1)(B)). This latter test for criminal defendants under Rule 609(a)(1)(B) puts the burden of admitting the proposed evidence on the proponent (prosecution)—as opposed to the traditional Rule 403 test (i.e., the Rule 609(a)(1)(A) test for all other witnesses), which places the burden of excluding the evidence on the opponent (criminal defendant)—and is therefore more protective of the accused. Put differently, whereas the traditional application of the Rule 403 balancing test favors the admissibility of relevant evidence (consistent with the main clause of Rule 402[321]), the special Rule 609(a)(1)(B) balancing test for the criminal accused favors exclusion.[322] Dan Medwed has called this as a "reverse modified 403 test";[323] we will refer to it as a reverse modified presumption. Shifting the burden of persuasion to the prosecution in this manner for pretrial reliability hearings on confession evidence—after the defense has met its burden of production—is appropriate in light of the unique prejudicial nature of confessions in general, and the risk of wrongful conviction created by the problem of contaminated/formatted false confessions in particular. Shifting the burden of persuasion is also appropriate because, as the Supreme Court affirmed in *In re Winship*,[324] our society has made a fundamental value determination that the risk of wrongful conviction of the innocent is worse than the risk of wrongful acquittal of the guilty.[325] The burden of persuasion for admitting evidence at trial that potentially creates so high a risk of wrongful conviction should reflect this value choice.

In addition to flipping the burden of persuasion under the traditional Rule 403 balancing test, Rule 609 contains another feature that we believe is helpful as a model

318. FED. R. EVID. 609(a)(1)(A)–(B).

319. FED. R. EVID. 403.

320. FED. R. EVID. 609(a)(1)(B).

321. FED. R. EVID. 402.

322. FED. R. EVID. 609(a)(1)(B).

323. Email from Daniel Medwed to author (October 13, 2012, 5:21 PM) (on file with authors) ("It reverses the burden, from opponent to proponent of the evidence, and modifies through the omission of 'substantially.'").

324. 397 U.S. 358 (1970).

325. *Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) ("[A] fundamental value determination of our society [is] that it is far worse to convict an innocent man than to let a guilty man go free.").

in crafting an evidentiary framework for trial judges to evaluate the admissibility of confession evidence in pretrial suppression hearings. Unlike with most other rules of evidence, appellate courts have identified a nonexhaustive list of balancing factors as helpful to trial judges in determining the degree of prejudice when admitting evidence of a prior felony conviction.[326] These include: (1) the degree to which the crime reflects on credibility, (2) the nearness or remoteness of the prior conviction, (3) the similarity of the prior offense to the offense charged, (4) the extent to which the defendant's testimony is necessary for fair adjudication of the trial, and (5) whether the defendant's credibility is central to the case.[327] In the context of pretrial reliability assessments of confession evidence, we have also proposed a framework based on the Ofshe-Leo fit test to assist judges in determining the probative value of the proposed confession evidence.[328] As we will describe in more detail below, our proposed test is based on a totality of the circumstances approach that allows judges in each case to determine what weight to put on various factors or potential indicia of unreliability.[329] Regardless of the approach one takes to pretrial reliability assessments—whether a more robust interpretation of Rule 403 (and its state law equivalent) with a burden-shifting mechanism (i.e., a reverse modified presumption) as we have described, amending state or federal rules of evidence to create a specific rule to address exclusion of unreliable confession evidence, or a legislatively drafted statute to create unreliability as a basis for exclusion at a pretrial suppression hearing—commentators should provide guidance to judges about what factors would help them in making such determinations.

We believe that in using a modified Rule 403 balancing test to assess whether the probative value of the proposed confession evidence outweighs the risk of prejudice (and other dangers), trial courts should consider relevant factors that enhance or undermine a confession's reliability. These factors, or indicia of reliability/unreliability, include but are not limited to:

(1) Whether the statement led to the discovery of new evidence previously unknown to the police (e.g., the murder weapon, property stolen from a victim, etc).

(2) Whether the statement includes an accurate description of the held-back and/or mundane details of the crime that are not easily guessed, have not been reported publicly, and can be independently corroborated.[330]

(3) Whether the suspect's postadmission narrative "fits" with the crime facts and existing objective evidence.

(4) In the case of multiple defendants, whether the codefendants' statements

326. *See* Gordon v. United States, 383 F.2d 936, 939 (D.C. Cir. 1967) (listing factors); Luck v. United States, 348 F.2d 763, 769 (D.C. Cir. 1965) (same).

327. FRIEDLAND ET AL., *supra* note 247, at 157. For a critical discussion of the origins of this five factor analytical framework, see Jeffrey Bellin, *Circumventing Congress: How the Federal Courts Opened the Door to Impeaching Criminal Defendants with Prior Convictions*, 42 U.C. DAVIS L. REV. 289, 307–19 (2009).

328. Leo et al., *supra* note 25, at 525–31.

329. See *supra* notes 166–69 and accompanying text for a discussion of the totality of the circumstances approach.

330. In cases in which DNA evidence exists and has the potential to confirm or disprove the reliability of the defendant's confession statement, we believe that reliability hearings should not be conducted unless and until the DNA evidence has first been analyzed.

are consistent with one another.

Also, the court would consider the extent to which the statement contains: nonpublic details that originated with the suspect that were not likely to have been guessed; errors, inconsistencies, or contradictions with case evidence; or admission of facts the police believed to be true at the time of the interrogation, but later learned were false.[331] At the same time, trial judges could consider evidence of police contamination/formatting to determine whether the confession evidence is so tainted that it simply has no probative value at all. Had a complete factual record of the interrogation been available, this would have been the correct ruling in thirty-eight of the forty false confession cases in the Brandon Garrett study. Interestingly, one scholar has suggested that courts evaluate contamination rather than reliability at pretrial suppression hearings.[332]

D. Improved Pretrial Reliability Assessments for Confession Evidence

Under the law as envisioned, at the pretrial suppression hearing, in addition to raising questions about the voluntariness of confessions and any *Miranda*-related issues, defense counsel could also raise concerns about the reliability of the proposed confession evidence. It is important to note that this change in law can only work in a jurisdiction where police are required to electronically record the entire interrogation preceding the climactic confession.

For reasons that should be obvious by now, without an electronic recording,

331. For example, in the case of DNA exoneree Christopher Ochoa, police saw a photograph of the deceased, highlighting rectal tearing. The police claimed that when Mr. Ochoa confessed, he volunteered to having anally raped the victim. Later, it was learned that the tears were due to life-saving measures taken at the scene as opposed to sexual penetration. Although the act to which Mr. Ochoa confessed *never occurred*, the police believed it to be true at the time of the interrogation. Thus, it was more likely that the police suggested the act of anal sodomy, rather than it having originated with Mr. Ochoa. *See* LEO, *supra* note 3, at 260–63 (detailing Ochoa's confession and the coercion of the police in obtaining it); Christopher Ochoa, *My Life is a Broken Puzzle*, *in* SURVIVING JUSTICE: AMERICA'S WRONGFULLY CONVICTED AND EXONERATED 13, 13–46 (Lola Vollen & Dave Eggers eds., 2005) (detailing Ochoa's version of the events); *Know the Cases: Christopher Ochoa*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Christopher_Ochoa.php (last visited Oct. 26, 2013) (detailing the facts of the rape and murder of Nancy DePriest and the questioning of Mr. Ochoa).

332. Email from Andrew Ferguson to author (Sept. 28, 2012, 1:20 PM) (on file with author). Ferguson writes:

> I think the argument for a "contamination hearing" could be very powerful if it could be shown that most confessions involve some level of contamination. The emphasis on contamination, as opposed to reliability, does a few things for your argument. First, it focuses on police action. This moves it from courts divining reliability in some abstract truth sense, from reliability because it is free of police error. It also gets you out of the Colorado v. Connelly trap where reliability is no longer the focus. The [C]ourt wasn't faced with a contamination issue. Second, it takes it out of a direct equivalence between "reliability" of confessions and "reliability" of evidence. There is just so much discussion in the rules of evidence about reliability. . . . [J]udges use that term so loosely that I fear that courts will think that if they agree with you that a confession was not reliable (as an evidentiary matter) because of contamination, that might affect other reliability determinations in other contexts. Giving them a new term of art avoids that problem. Finally, a focus on contamination is not divorced from a reliability consideration. . . . The reason for examining contamination is reliability, but the focus is on the purposeful (or accidental) actions of the police in shaping the confession.

Id.

judges, prosecutors, and defenders cannot assess whether the details in the confession originated with the suspect or were suggested to the suspect through police contamination (and developed through police formatting). Electronic recordings must be produced to the defense well in advance of trial and prior to any suppression hearings. This would be required under existing law.[333]

The reliability issue will be triggered by a written motion from the defense, which will highlight the errors in the confession, the evidence of contamination, the lack of corroboration, and any other facts that it believes undercut the reliability of the confession, pointing specifically to the portions of the transcript of the electronic recording that underscore these problems. If the defendant so chooses, he or she will be able to take the stand to challenge the confession's reliability without waiving his right against self-incrimination at trial. The burden of production will be on the defense to demonstrate a prima facie case that the confession is unreliable. The prosecution may file a response, citing to portions of the recording that demonstrate the confession is reliable. Both parties may submit affidavits and other proffers.

As in the voluntariness context, the ultimate burden of proof to demonstrate that the confession is sufficiently reliable to be admitted into evidence will be on the prosecution. The burden on the prosecution, in this instance, however, should be set relatively low so as not to exclude potentially reliable confessions and not to subvert the jury's role as ultimate fact finder of the defendants' guilt. For this reason, we believe the standard should be set at a "preponderance of the evidence."

In other words, at this preliminary stage of the proceedings, the prosecution need only prove that it is more likely than not, under the totality of the circumstances, that the confession is reliable. In most cases, this will be a relatively easy hurdle for the prosecution to meet. A court has the inherent power to delay its ruling and give the prosecutor additional time to meet its burden. It will be the rare case—perhaps a case built exclusively on a confession, with little or no corroboration, and evidence of errors and contamination—that will lead a trial court to exclude a confession. Further, if the prosecution believes that the ruling on the motion to suppress is erroneous, in most states it will have the same right of interlocutory appeal as it currently possesses in the voluntariness/*Miranda* context.

Potential objectors may argue that it is the rare confession that is entirely truthful and that errors may abound in true confessions as well as false confessions. Our proposed test is flexible enough to deal with confessions that contain both correct and incorrect facts. A perpetrator can lie and falsely minimize his involvement in the crime; yet if he reveals nonpublic details that can be corroborated or otherwise corroborates the suspect's admission with possession of the murder weapon or contraband from the crime, the low burden of proof on the prosecutor will easily be met. It is important to emphasize that this is a totality of the circumstances test. Because no single factor is determinative in the totality of the circumstances test, prosecutors are free to argue that little or no weight should be given to errors in the reliability test in appropriate cases.

There may be some additional burdens to the parties and the court from this procedure but these burdens flow naturally from a system in which all custodial

333. *See* FED. R. CRIM. P. 16(a)(1)(B).

interrogations are electronically recorded. All parties will have to review selected portions of the electronically recorded interrogations prior to the hearing. Reviewing these tapes and designating portions to be played for the court, however, will already have to be done as preparation for a challenge to the voluntariness of the confession at the same suppression hearings. Playing portions of the recordings during the hearing might add some additional length to the hearings, although the time to play the recordings will be offset by the time saved by eliminating the current swearing contest between detectives and the suspects about what happened during the interrogation. Moreover, there is no reason why the judge can't simply review the tape—alerted to key portions by opposing counsel—alone in chambers. The benefit of giving the judge an objective record from which to determine the ground truth of questions relating to voluntariness and reliability far outweighs any additional burdens placed on the parties and the court.

E. The Importance of Judicial Gatekeeping

1. Introduction

The requirement that the evidence presented to the jury has sufficient indicia of reliability as a threshold to admissibility is neither new nor novel. Historically, judges, as gatekeepers of reliable evidence, were charged with assessing the extent of corroboration before allowing confession evidence to go to the jury. Our proposed test simply seeks to define the indicia of reliability more appropriately. It is grounded in longstanding concerns with excluding unreliable evidence, but also reflects newer understandings in the past two decades about how to differentiate reliable from unreliable confessions. Moreover, it accounts for the modern view of trial judges—announced in Supreme Court decisions like *Daubert* and its progeny (most notably *General Electric Co. v. Joiner* and *Kumho Tire Co., Ltd. v. Carmichael*[334])—as gatekeepers charged with the responsibility of excluding unreliable evidence.[335]

The reliability rule we propose for confession evidence is a logical extension of the trial judge's role as gatekeeper. State judges are routinely counted on to decide whether certain evidence lacks sufficient indicia of reliability such that the jury should exclude it from consideration. What is more, as we have seen above, federal judges and trial courts in several states have been making a threshold determination about a confession's reliability for half a century under the trustworthiness doctrine.[336]

334. *See* Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 141–42 (1999) (holding that judges must review all expert testimony, not just scientific or novel expert testimony, prior to admissibility); Gen. Electric Co. v. Joiner, 522 U.S. 136, 146–48 (1997) (holding that judges have the discretion to determine whether admit or exclude scientific evidence).

335. Leo et al., *supra* note 25, at 487 n.49.

336. See *supra* Part III.D for a discussion of the trustworthiness doctrine.

2. State Judges Evaluate the Reliability of Evidence When Determining Its Admissibility in a Variety of Other Situations

a. Introduction

It is axiomatic that judges act as gatekeepers of evidence because the law of evidence is based on this very premise.[337] At their base, rules of evidence are the "concrete applications [that have] evolved for particular situations" of the weighing of probative value against unfair prejudice.[338] That balancing often involves an inquiry into the reliability of a piece of evidence. State court judges pass on issues of reliability when determining the admissibility of a variety of types of evidence[339]: in court identifications in cases where there had been an unduly suggestive out of court identification,[340] hypnotically induced testimony,[341] child witnesses in sex abuse cases,[342] hearsay evidence because it is presumptively unreliable,[343] and for expert testimony and novel scientific evidence under *Frye* and *Daubert*.[344] In federal courts and in states that use the trustworthiness standard as a corroboration requirement for the admissibility of confessions, judges are already ruling on the reliability of confessions as they have been doing for more than fifty years.[345]

Such reliability determinations are commonplace and are considered an essential mechanism for screening out unreliable evidence. It would be a mistake to equate our

337. JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 1–2 (1898) ("Here, a great mass of evidential matter, logically important and probative, is shut out . . . by an imperative rule, while the same matter is not thus excluded anywhere else. English-speaking countries have what we call a 'Law of Evidence.'" (footnote omitted)).

338. FED. R. EVID. 403 advisory committee's note.

339. In addition to the listed areas, the State of Illinois has instituted pretrial reliability hearings for the admissibility of jailhouse informant ("snitch") testimony in capital cases. See 725 ILL. COMP. STAT. ANN. 5/115-21 (West 2013). The States of Nevada, Oklahoma, and Florida have also considered reliability hearings whenever the government seeks to use the testimony of a jailhouse snitch, as has Canada. *See* D'Agostino v. State, 823 P.2d 283, 285 (Nev. 1992) (holding that before "jailhouse incrimination" testimony is admissible the "trial judge [must] first determine[] that the details of the admissions supply a sufficient indicia of reliability"); Dodd v. State, 993 P.2d 778, 785 (Okla. Crim. App. 2000); Jan Pudlow, *What to Do About Jailhouse Snitches with Reason to Lie?*, FLA. B. NEWS (March 15, 2012), https://www.floridabar.org /DIVCOM/JN/JNNews01.nsf/Articles/71F2C335ADD91602852579B800465917. Although it does not require pretrial reliability hearings, the State of Texas does require that informant testimony be corroborated in order to be admissible. *See* TEX. CODE CRIM. PROC. ANN. art. 38.141 (West 2013) (stating that conviction cannot be based on testimony working on behalf of law enforcement who is not a licensed officer). *See generally* ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE 192–95 (2009); Alexandra Natapoff, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 GOLDEN GATE U. L. REV. 107, 113–15 (2006).

340. See *infra* Part IV.E.2.b for a discussion of eyewitness identification.

341. See *infra* Part IV.E.2.f for a discussion of hypnotically induced testimony.

342. See *infra* Part IV.E.2.c for a discussion of child witness testimony in sex abuse cases.

343. See *infra* Part IV.E.2.d for a discussion of hearsay evidence.

344. Daubert v. Merrell Dow Pharm, Inc., 509 U.S. 590, 594–95 (1993); Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923). See *infra* Part IV.E.2.e for a discussion of admissibility of expert testimony.

345. "Most jurisdictions that have adopted this standard recognize that it is the responsibility of the trial judge to determine as a matter of law whether a defendant's confession is sufficiently trustworthy or reliable to be admitted into evidence." State v. Mauchley, 67 P.3d 477, 483 (Utah 2003) (citing United States v. Dickerson, 163 F.3d 639, 642 (D.C. Cir. 1999); State v. George, 257 A.2d 19, 21 (N.H. 1969)).

proposal to constitutional-style exclusionary rules. While exclusionary rules are crafted to deter constitutional violations, we do not seek such a rule.[346] There is a clear distinction to be made here between exclusionary rules and *reliability rules*, which have been developed as a means to test evidence before it goes to a jury.[347] While both types of rules may end in eventual suppression of evidence, they serve entirely different purposes. Exclusionary rules, such as those that require suppression when state actors have illegally searched or seized items or have failed to properly administer *Miranda* warnings, are aimed at deterring or punishing actors by suppressing otherwise ostensibly reliable and probative evidence. Reliability rules, on the other hand, are not concerned with sanctions for constitutional violation, but instead with ensuring that the evidence that goes before a jury is reliable.[348] It is this latter type of rule that we propose here, a rule that is aligned with many other instances in which a judge acts as a gatekeeper of evidence because unreliable evidence has no place in a courtroom. The judge makes a threshold determination of reliability while the jury determines credibility, which goes to whether the speaker is believable and what weight to place on the evidence. It is hardly controversial to point out that judges have broad discretion when considering the reliability of evidence, and have ultimate control over whether that evidence is admitted.[349]

b. Eyewitness Identification Evidence

State judges routinely make determinations of reliability in the context of eyewitness identification testimony. The Supreme Court has declared that "reliability is the linchpin in determining the admissibility of identification testimony."[350] Like federal courts, many state courts have adopted a two-pronged test to guide the determination of whether to admit in-court eyewitness identification testimony.[351] Courts first assess whether impermissibly suggestive police identification procedures were used to obtain an identification.[352] If the court finds that the procedures employed were unnecessarily suggestive,[353] then it must make a determination as to whether an in-court identification can nevertheless be permitted based on the eyewitness's

346. We recognize that some evidentiary rules are designed to encourage or discourage certain types of behavior outside the courtroom for reasons having nothing to do with fact-finding accuracy. *E.g.*, FED. R. EVID. 408, 409, 410. But our focus is on rules having accuracy as their primary goal.

347. Thompson, *supra* note 275, at 602–14 (arguing that a "reliability paradigm" underlies the rules of evidence, and that most evidence rules require reliability gatekeeping by trial courts).

348. See *supra* Part IV.A for a discussion of reliability.

349. Although our rule is a reliability rule, not an exclusionary rule, it may have the effect of deterring police officers from contaminating confessions.

350. Manson v. Brathwaite, 432 U.S. 98, 114 (1977).

351. *See Commonwealth v. Johnson*, 650 N.E. 2d 1257, 1265–66 (Mass. 1995) (Nolan, J., dissenting) (noting that almost every state has adopted the *Manson* reliability test under their state constitutions); *see also* Sandra Guerra Thompson, *Judicial Blindness to Eyewitness Misidentifications*, 93 MARQ. L. REV. 639, 641 (2009) (reporting the findings of a year-long empirical study of state appellate court decisions on eyewitness identification due process cases).

352. *Brathwaite*, 432 U.S. at 114.

353. When a court makes such a determination, it is finding, in essence, that the impermissibly suggestive police procedures may have tainted the identification, in other words, that the procedures may have rendered the identification unreliable.

independent recollection of the incident and not on the suggestive procedure.[354] A finding that such a sufficient independent recollection of the incident exists is, at its core, a determination of the reliability of a witness's identification.[355] In making such reliability determinations, state courts apply the well-established *Neil v. Biggers* factors in order to determine if an eyewitness's identification is reliable.[356] The following five factors guide courts' consideration of independent reliability:

(1) opportunity of the witness to view the criminal at the time of the crime;
(2) witness' degree of attention;
(3) accuracy of his prior description of the criminal
(4) the level of certainty demonstrated at the confrontation; and
(5) the length of time between the crime and confrontation.[357]

A reliability determination is made upon assessing the totality of the circumstances; no single factor is dispositive on the reliability analysis.[358] As such, state courts have recognized that under certain circumstances, judges must make reliability determinations in order to prevent juries from reviewing evidence that lacks objective indicia of unreliability.

c. Pretrial Reliability Hearings with Child Witnesses

State courts have recognized that they possess inherent power to hold pretrial hearings concerning the reliability of statements made by alleged child abuse victims. For example, in the case of *People v. Michael M.*, the New York Superior Court held that "in an appropriate case a hearing should be held [by the trial court] to determine whether the witness was subjected to unduly suggestive or coercive questioning . . . and whether the potential trial testimony was thereby rendered unreliable."[359] The court went on to note that the authority to hold such a hearing is rooted in the trial court's power to admit or exclude evidence and is accordingly "inherent in its power to function as a court."[360] Since *Michael M.*, New York courts have gone on to

354. *Brathwaite*, 432 U.S. at 113.

355. *Id.*

356. Neil v. Biggers, 409 U.S. 188, 199–200 (1972).

357. *Id*. These five factors, however, leave much to be desired, as modern social science offers a broader and more helpful array of factors. See the recent unanimous decision by the New Jersey Supreme Court declaring the Manson/Biggers factors unsupported by scientific research over the last 30 years. State v. Henderson, 27 A.3d 872, 878 (N.J. 2011) (revising the reliability test); *see also* State v. Lawson, 291 P.3d 671, 693–94 (Or. 2012) (finding that current reliability factors do not reflect current scientific research); Gary I. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 LAW & HUM. BEHAV. 1, 5 (2009) (observing that scientific research that led to the *Manson* reliability factors has been criticized).

358. *Neil*, 409 U.S. at 199.

359. People v. Michael M., 618 N.Y.S.2d 171, 178 (N.Y. Sup. Ct. 1994) (holding such a pretrial reliability hearing). In so doing, the court explained that New York trial courts have long had the power to determine evidentiary matters at pretrial hearings, including the admissibility of prehypnotic recollections, prior uncharged crimes and convictions, tape recordings, and breathalyzer test results. *Id.*; *see also* Jelinek v. Costello, 247 F. Supp. 2d 212, 279 (E.D.N.Y. 2003) (finding that in spite of an absence of express authority in the New York penal law or criminal procedure, courts may still exercise their discretion to order pretrial taint hearings in appropriate cases).

360. *Michael M.*, 618 N.Y.S.2d at 175.

successfully determine the necessity for such hearings on a case-by-case basis. The use of child victim testimony raises concerns similar to those raised by police contaminated confessions. When young children are questioned about possible victimization, research has shown that overly zealous and suggestive questioning can cause children to make false allegations of sexual assault.[361] The *Michael M.* court's recognition that the reliability of certain out-of-court statements can, and at times should, be determined pretrial is equally applicable to confession cases, in which a defendant's statement may have been the product of suggestion such that it may be rendered similarly unreliable.

d. Hearsay Evidence

The prohibition on the introduction of hearsay evidence represents a wholesale discounting of the value of a certain type of evidence because of its inherent unreliability.[362] "However, exceptions to this general exclusion have arisen in instances where there is a genuine necessity for the evidence and the circumstances surrounding the out-of-court statement assure its trustworthiness."[363] State courts, such as those in New York, must also independently review hearsay evidence for its reliability before admitting it under an exception.[364] What is more, each exception requires a court to pass on factual issues when determining the applicability of an exception.[365]

In addition to finding that an exception applies to a piece of hearsay evidence, state courts must also determine that such "evidence is reliable."[366] Any hearsay

361. *See* Stephen J. Ceci & Richard D. Friedman, *The Suggestibility of Children: Scientific Research and Legal Implications*, 86 CORNELL L. REV. 33, 71 (2000) (summarizing data showing broad consensus that young children are highly suggestible and vulnerable to strongly suggestive questioning); Jean Montoya, *Something Not So Funny Happened on the Way to Conviction: The Pretrial Interrogation of Child Witnesses*, 35 ARIZ. L. REV. 927, 933–40 (1993) (addressing social science research showing that suggestive pretrial "interrogation" of child witnesses can unwittingly manufacture false accusations); John E.B. Myers, *Taint Hearings for Child Witnesses? A Step in the Wrong Direction*, 46 BAYLOR L. REV. 873, 880–84 (1994) (noting a prevalence of overzealousness and excessive use of leading questions in interviews of children regarding possible sexual assault).

362. Laurence H. Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957, 958 (1974) ("In the absence of special reasons, the perceived untrustworthiness of such an out-of-court act or utterance has led the Anglo-Saxon legal system to exclude it as hearsay despite its potentially probative value.").

363. People v. Edwards, 392 N.E.2d 1229, 1231 (N.Y. 1979). As the Federal Rules Advisory Committee states: "The present rule proceeds upon the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of *trustworthiness* sufficient to justify nonproduction of the declarant in person at the trial even though he may be available." FED. R. EVID. 803 advisory committee's note (emphasis added).

364. "Out-of-court statements offered for the truth of the matters they assert are hearsay and 'may be received in evidence only if they fall within one of the recognized exceptions to the hearsay rule, *and then only if the proponent demonstrates that the evidence is reliable*.'" Nucci v. Proper, 744 N.E.2d 128, 130 (N.Y. 2001) (emphasis added) (quoting People v. Brensic, 509 N.E.2d 1226, 1228 (N.Y. 1987)).

365. *See, e.g.*, People v. Johnson, 804 N.E.2d 402, 405 (N.Y. 2003) ("Stating the rule is simple. Determining a declarant's mental state—that is, whether at the time the utterance was made a declarant was in fact under the stress of excitement caused by an external event sufficient to still his or her reflective faculties—is considerably more difficult."). In several exceptions to the hearsay rule—such as the present sense impression, spontaneous declarations, and business records exceptions—trustworthiness is specifically listed as a consideration. *Id*.

366. *Nucci*, 744 N.E.2d at 130 (quoting *Brensic*, 509 N.E.2d at 1228); *see also* People v. Ennis, 900 N.E.2d 915, 922 (N.Y. 2008) ("To qualify under [the declarations against penal interest exception], the

determination inherently requires that a trial court address legal questions as applied to the particular facts surrounding the statement,[367] and *only after a determination of reliability* is made may the jury assess the credibility of the third-party witness whose statement has been introduced.[368]

Finally, federal courts and those state courts that have adopted the federal rules of evidence in some form have applied Federal Rule of Evidence 807 since its adoption in 1975.[369] This residual or catchall exception to the hearsay rule is "designed to allow the admission of hearsay evidence which has a high indicia of reliability, but does not fit under any other specific exceptions."[370] A court is to analyze "whether the proffered evidence has trustworthiness equivalent to that of enumerated hearsay exceptions."[371] Again, the court looks to particular facts surrounding the out-of-court statement to determine whether the statement is reliable.

As such, judges have long been entrusted with making the same sort of pretrial reliability determinations we are suggesting here.

e. Expert Testimony and Novel Scientific Evidence

Judges have substantial latitude to determine the admissibility of novel scientific evidence and expert testimony, making a threshold assessment of relevance and reliability before the evidence is presented to the jury.[372] In states that follow the *Frye* Rule, judges must determine whether the procedure and the results are generally accepted as *reliable* in the scientific community.[373] Some courts have specifically noted that the admissibility of novel scientific evidence requires a threshold determination as

declarant must be unavailable, must have competent knowledge of the facts and must have known at the time the statement was made that it was against his or her penal interests. Even if these criteria are met, the *statement cannot be received in evidence unless it is also supported by independent proof indicating that it is trustworthy and reliable*." (emphasis added)); People v. Brensic, 509 N.E.2d 1226, 1228 (N.Y. 1987) ("As with all forms of hearsay evidence, a determination of the admissibility of a declaration against penal interest, focusing on the circumstantial probability of its reliability, must be made before it is received; *the trial court must determine, by evaluating competent evidence independent of the declaration itself, whether the declaration was spoken under circumstances which renders it highly probable that it is truthful*." (emphasis added)).

367. People v. Nieves, 492 N.E.2d 109, 115 (N.Y. 1986) (determining "whether . . . statements qualified as excited utterances require factual determinations"); People v. Edwards, 392 N.E.2d 1229, 1231 (N.Y. 1979) ("[A]dmissibility of an excited utterance is entrusted in the first instance to the trial court."); People v. Marks, 160 N.E.2d 26, 31 (N.Y. 1959) (admissibility of an excited utterance is a "preliminary question of fact").

368. *E.g.*, *Brensic*, 509 N.E.2d at 1235. In the Federal Rules of Evidence, the exceptions that do require a specific showing of trustworthiness are FED. R. EVID. 803(6), 803(8), and 807.

369. *See* David A. Sonenshein, *The Residual Exceptions to the Federal Hearsay Rule: Two Exceptions in Search of a Rule*, 57 N.Y.U. L. REV. 867, 868–75 (1982) (explaining judicial and legislative development of original two residual exceptions).

370. Osterneck v. E.T. Barwick Indus., Inc., 106 F.R.D. 327, 334 (N.D. Ga. 1984).

371. F.T.C. v. Figgie Int'l, Inc., 994 F.2d 595, 608 (9th Cir. 1993).

372. In *Daubert*, the United States Supreme Court established the role of federal judges as gatekeepers of expert testimony and evidence. Daubert v. Merrell Dow Pharm, Inc., 509 U.S. 579, 597 (1993). In 1999, the Supreme court further emphasize the gatekeeping role of federal judges in *Kumho Tire Co.*, extending the gatekeeping obligations of federal judges to all expert testimony, not just scientific or novel expert testimony. Kumho Tire Co. v. Carmichael, 526 U.S. 137, 158 (1999).

373. Frye v. United States, 293 F. 1013, 1014 (D.C. Circ. 1923).

to its reliability.[374] As such, under the *Frye* standard, state court judges frequently assess—and if need be suppress—evidence lacking sufficient indicia of reliability.[375] In states that follow *Daubert* (as well as in federal courts), pursuant to Federal Rule of Evidence 702, trial courts must also determine the relevancy and reliability of expert witness testimony before allowing it to be presented to a jury. The Supreme Court in *Daubert* set forth a nonexhaustive list of factors for trial courts to consider when evaluating the reliability of expert witness testimony. These include whether the theory or technique underlying the testimony can be tested, whether it has been subjected to peer review and publication, whether there is a known or potential error rate, whether there are standards and controls, and whether the theory or technique has been generally accepted in the scientific community.[376] Based on this framework, trial courts that determine the relevant expert witness testimony is not sufficiently reliable will preclude it from being allowed into evidence at trial.

f. Hypnotically Refreshed Testimony

Trial courts in many jurisdictions have the latitude to determine whether to permit hypnotically induced or refreshed witness testimony to go to the jury.[377] In these jurisdictions, trial courts take one of two approaches, both of which direct the trial judge to ensure the reliability of the proposed evidence before allowing it to be admitted into evidence at trial. In what is sometimes referred to as the "procedural safeguards" approach, trial courts are instructed to evaluate whether certain safeguards were used to provide an adequate record for evaluating the reliability of the hypnotic procedure, and to ensure the reliability of the proposed testimony.[378] The seminal case for this approach is *State v. Hurd*, which held that in order to ensure a minimal level of reliability, the hypnotic procedures that were used must follow certain procedural safeguards.[379] These *Hurd* factors include that the hypnotist must be an experienced psychologist or psychiatrist; that the hypnotist must be independent of police, prosecution or the defense; and that any information that the given to the hypnotist by law enforcement or the defense must be recorded, as must all contacts between the hypnotist and the subject, preferably on videotape.[380] The recording and documentation requirements, of course, reflect a concern for the possibility of contaminating the witness. The state bears the burden of demonstrating the reliability of the proposed

374. *See, e.g.*, People v. Wesley, 633 N.E.2d 451, 453–54 (N.Y. 1994) (discussing the application of *Frye* test).

375. *See* People v. Taylor, 552 N.E.2d 131, 139 (N.Y. 1990) (holding that although evidence of rape trauma syndrome passed the *Frye* test in New York state, its prejudicial impact far outweighs its probative value).

376. *Daubert*, 509 U.S. at 593–94.

377. Daniel R. Webert, *Are the Courts in a Trance? Approaches to the Admissibility of Hypnotically Enhanced Witness Testimony in Light of Empirical Evidence*, 40 AM. CRIM. L. REV 1301, 1307 (2003).

378. *See* State v. Hurd, 432 A.2d 86, 92 (N.J. 1981) ("[H]ypnotically-induced testimony may be admissible [under *Frye*] if the proponent of the testimony can demonstrate that the use of hypnosis in the particular case was a reasonably reliable means of restoring memory comparable to normal recall in its accuracy.").

379. *Hurd*, 432 A.2d at 91.

380. *Id.* at 96.

testimony by clear and convincing proof. As the *Hurd* court emphasized, "[h]ypnotically refreshed testimony must not be used where it is not reasonably likely to be accurate evidence."[381] The trial court must rule on the admissibility of the proposed testimony either at a pretrial hearing or at a hearing outside the presence of the jury.

The other approach—sometimes known as the "totality of the circumstances" approach—considers the procedural safeguards enumerated in *Hurd* to be among the factors in determining the admissibility of hypnotically refreshed witness testimony, but provides courts with more discretion to weigh and balance these and other factors in determining the reliability and thus admissibility of the testimony. The seminal case for this approach is *Borawick v. Shay*,[382] which ruled that courts should follow a case-by-case approach to determine whether the proposed hypnotically refreshed testimony is sufficiently reliable to be allowed into evidence at trial, including weighing the testimony's probative value against its prejudicial effect.[383] *Borawick* instructs that in conducting this analysis district courts should consider a nonexclusive list of factors, similar to the ones mentioned in *Hurd*, including whether a permanent record of the hypnosis had been memorialized (again preferably by videotape) as well as whether there is corroborating evidence to support the accuracy of the hypnotically refreshed memories.[384] The party attempting to admit the evidence bears the burden of persuading the court that "the balance tips in favor of admissibility."[385] State and federal courts that follow either the "procedural safeguards" or the "totality of the circumstances" approach only allow hypnotically enhanced testimony to be admitted into evidence after there has been an individualized pretrial determination of the reliability of the evidence.[386]

This is similar to the approach that the United States Supreme Court took in *Rock v. Arkansas*,[387] in which a criminal defendant, whose memory had been hypnotically refreshed, sought to testify at trial.[388] The trial judge held a pretrial reliability hearing and, applying a state per se rule of exclusion, limited the defendant's testimony to her prehypnosis memories.[389] The Supreme Court reversed the trial court's ruling, holding that the defendant had a constitutional right to testify under the due process clause of the Fourteenth Amendment, the compulsory process clause of the Sixth Amendment, and the Fifth Amendment privilege against self-incrimination.[390] Significantly, the Court supported a case-by-case judicial evaluation of reliability to determine the admissibility of hypnotically refreshed testimony, stating that: "The State would be well within its powers if it established guidelines to aid trial courts in the evaluation of

381. *Id.* at 97.

382. 68 F.3d 597 (2d Cir. 1995).

383. *Borawick*, 68 F.3d at 607–08.

384. *Id.* at 608.

385. *Id.* at 608–09.

386. *See id.* at 605–06 (stating benefits of the "totality of the circumstances" test that federal courts most frequently use).

387. 484 U.S. 44 (1987).

388. *Rock*, 484 U.S. at 46–47.

389. *Id.*

390. *Id.* at 49–53.

posthypnosis testimony and it may be able to show that testimony in a particular case is so unreliable that exclusion is justified."[391]

The Court in effect endorsed the "procedural safeguards" approach to evaluating hypnotically refreshed testimony by a criminal defendant. As Sandra Guerra Thompson has put it, "[t]he Supreme Court found that the preferred approach is for courts to conduct pretrial reliability screening to ensure that the evidence has been generated by professionals following accepted protocols."[392]

F. Excepting Contaminated/Formatted Confessions from the Party Admissions Rule of 801(d)(2) and Requiring That Their Admissibility Be Contingent on a Showing of Their Reliability

When the prosecution seeks to introduce into evidence a defendant's confession, invariably it relies upon the state's evidentiary rules regarding admissions of a party opponent. Under the rules of evidence, party admissions are admissible without regard to whether they are reliable.[393] Unlike other exceptions to the hearsay rule,[394] the prosecution need not provide any evidence of corroborating circumstances that indicate the admission is trustworthy.

The rationale for treating party admissions differently from other exceptions to the hearsay rule is a function of the adversary system. One reason for the rule against hearsay concerns the dangers of admitting out-of-court statements that are not under oath or were not subject to cross-examination at the time they made. Hearsay evidence is flawed because the adversary is denied the opportunity to test the reliability of an out-of-court statement through the crucible of cross-examination. When the adversary is the party who made the statement, however, he "can hardly object that he had no opportunity to cross-examine himself or that he is unworthy of credence save when he is speaking under sanction of oath."[395] In its simplest form, the theory boils down to "you said it, and you're stuck with it."[396] You can deny the statement if you take the stand, you can try to explain it away at trial, but it's coming into evidence.[397]

But the rationale for party admissions is not justified in the case of contaminated/formatted confessions that are the product of police interrogations. Under Rule 801(d)(2)(A), the confession is admissible if it is "made by the party in an individual or representative capacity."[398] The process of police contamination/formatting raises questions about the identity of the maker of the statement. In the most extreme cases, the confession is literally scripted by the interrogator and force fed to the suspect. Here the confession belongs more to the interrogator than to the suspect. Without an electronic recording of the entire interrogation, it is impossible for a judge to know whether the details that give the

391. *Id.* at 61.

392. Thompson, *supra* note 26, at 368.

393. FED. R. EVID. 801(d)(2).

394. For the purposes of this Article, we are classifying "admissions" as exceptions to the hearsay rule.

395. EDMUND M. MORGAN, BASIC PROBLEMS OF EVIDENCE 266 (4th ed. 1963).

396. Roger Park, *The Rationale of Personal Admissions*, 21 IND. L. REV. 509, 511 (1988).

397. JON R. WALTZ, INTRODUCTION TO CRIMINAL EVIDENCE 80 (2d ed. 1983).

398. FED. R. EVID. 801(d)(2)(A).

statement the ring of truth originated with the suspect or the interrogator. In short, it is impossible to know whether the confession actually is the "party's own statement."

For similar reasons, the practice of contamination/formatting can make it impossible to know whether the final confession is "one the party manifested that it adopted or believed to be true."[399] Police officers are trained to craft statements to make them appear as if the party not only made the statement, but that he has read the statement, made corrections to the statement, and vouched for its accuracy. Such tactics as "the error insertion trick"—in which the officer intentionally misspells words or misstates information, crosses out the errors, and then gets the suspect to initial the changes[400]—obscure the truth rather than resolve the question of whether the suspect adopts a belief in the statement's truth. Again, without a recording of the entire interrogation, it is impossible to know whether the suspect even read the statement before signing it, let alone adopted it in its entirety.

The entire rationale of the admissions rule is based upon the idea that the confession is personal to the defendant. Evidence of police contamination/formatting destroys that rationale. If the confession is not personal to the defendant—if it does not clearly belong to the defendant—there is no reason to automatically stick the defendant with the statement at trial. Confessions that are the product of police contamination/formatting should be treated like all other statements that are offered in a criminal case and which "tends to expose the declarant to criminal liability."[401] They should be presumed to be inadmissible *unless corroborating circumstances clearly indicate the trustworthiness of the statement*.[402]

One way to modify or amend the party admissions rule in order to require pretrial admissibility hearings for statements that are the product of police contamination/formatting would be to add a new category under Rule 801(d) that reads as follows:

> 801(d) Statements Which Are Not Hearsay. A Statement is not Hearsay if:
>
> > 801(d)(3) the prosecution seeks to introduce a statement of a defendant under this Rule to expose the declarant to criminal liability, and there is evidence that the statement was contaminated or formatted by an agent

399. FED. R. EVID. 801(d)(2)(B).

400. LEO, *supra* note 3, at 175–76.

401. FED. R. EVID. 804(b)(3)(B).

402. In the case of contaminated confessions, a rule that bars the admission of hearsay statements unless the adversary party seeking to admit the statements can demonstrate that the statement has circumstantial guarantees of reliability is much more in keeping with the presumption of innocence that cloaks the criminal defendant from the moment he is arrested until the day he is convicted than a rule of automatic admission of confessions. Given the power of confession evidence to juries and the risk that an innocent defendant who confesses—even if his confession is clearly contaminated or at odds with the crime facts—will be wrongfully convicted, automatic admission of the defendant's confession all but erodes the presumption of innocence even before the trial has even started. Moreover, there appears to be no sound reason for requiring a reliability analysis as a condition for admitting statements against penal interest under Federal Rule of Evidence 804(b)(3)—which concern inculpatory statements made by non-parties who are unavailable at trial—but not requiring one before admitting a party's confessions. Indeed, there is more reason to require assurances of reliability in the case of a party's confessions. The stakes are so much higher for the presumed innocent defendant who admits to a crime than they are for the declarant who is not on trial once his confession is admitted.

> of the State [so that it is either unclear whether the statement is the party's "own statement" or that the "party" has manifested an "adoption or belief" in its truth] or no such evidence of contamination/formatting exist because the interrogation preceding the statement was not electronically recorded, the statement must be presumed to be inadmissible unless it is supported by corroborating circumstance that clearly indicate its trustworthiness.

The second way to modify the party admissions rule would be to add a subsection (G).[403]

> 801(d) Statements which are not Hearsay. A statement is not hearsay if:
>
> (2) Admission of a Party Opponent
>
> (G) Confessions of a Party Opponent which are obtained by law enforcement during interrogations and expose the party opponent to criminal liability if offered in a criminal case against the party opponent, are considered hearsay statements and are to be treated the same as statements against penal interest under 804(b)(3). That is, party confessions are not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.[404]

V. POTENTIAL OBJECTIONS TO PRETRIAL RELIABILITY ASSESSMENTS

Following the publication of our 2006 article,[405] numerous legal scholars have

403. One of our colleagues, Northwestern University law professor Robert Burns, thinks that we should not require the defendant to demonstrate contamination. He believes there is no good reason to treat a party confession any differently than a statement against penal interest by a nonparty declarant. In fact, he would argue that there is even more reason to require a reliability analysis for party defendants, at least in the case of criminal confessions that are the product of police interrogations. It is the defendants who are on trial and whose life and liberty are at stake, not a nonparty declarant. Moreover, if such confessions are admissible without regard for their reliability, it provides an incentive for police officers to coerce and/or contaminate confessions. If the voluntariness test was effective, perhaps that would be a sufficient deterrent, but police officers know that the test is toothless. And of course, the argument for requiring reliability tests for party confessions is much stronger today than it was at the time the rule was drafted. Today, we know that the problem of false confessions and wrongful convictions is very real and the evidence rules should seek to prevent, not encourage, wrongful convictions.

404. The Commentary to this amendment could read: The drafters of this exception to the party admissions rule have been concerned with the numbers of false confessions that have surfaced since the advent of DNA evidence and with the problem of police contamination in false confession cases. In addition, the drafters recognize that the traditional "totality of the circumstances" test used to determine whether a confession should be admitted into evidence concerns only whether the confession is voluntary and not whether it is reliable. *See* Colorado v. Connelly, 479 U.S. 157, 176 (1986) (Brennan, J. dissenting) (stating that the "requirement that a confession be voluntary reflects a recognition of the importance of free will and of reliability in determining the admissibility of a confession, and thus demands an inquiry into the totality of the circumstances surrounding the confession"). Moreover, the drafters take note that in virtually every DNA exoneration involving a false confession, trial courts found the defendant's confessions to be voluntary and appellate courts affirmed these decisions on appeal. In short, the voluntariness test is ineffective at excluding false confessions before trial. The drafters are also concerned that the party admissions rule, at least in the case of confessions, may actually encourage police contamination or coercion during the interrogation process. As long as such confessions are admissible without concern for their reliability, police officers have a powerful incentive to coerce and to contaminate confessions.

405. *See generally* Leo et al., *supra* note 25.

voiced their support for pretrial reliability hearings to screen unreliable confession evidence.[406] Nevertheless, there are several possible objections that can be made in response to the ideas that underlie our proposal.[407] These objections include: (1) that pretrial reliability assessments are not necessary, (2) that pretrial reliability assessments will hamstring law enforcement, (3) that pretrial reliability assessments invade the province of the jury, and (4) that pretrial reliability assessments will not work in practice. We have implicitly responded to some of these criticisms in this article, but will address them explicitly and more systematically in the remainder of this Section.

A. Pretrial Reliability Assessments Are Not Necessary

There are at least three ways to make the argument that pretrial assessments for unreliable confession evidence are not necessary: one is to suggest that the phenomenon of false confession occurs too infrequently to merit the required expenditure of judicial resources. A second is to argue that existing legal protections are sufficient to prevent false confessions from being admitted into evidence and/or leading to wrongful conviction. These two arguments are related insofar as they deny or minimize the significance of the problem of false confessions and the accompanying risk of wrongfully convicting the innocent. A third argument that pretrial reliability hearings are unnecessary would not deny the significance of the false confession problem, but would, instead, suggest that other policy reforms can more effectively prevent unreliable confession evidence from leading to the conviction of the innocent.

No one knows the rate or frequency of false confessions (or for that matter the rate at which any other type of erroneous evidence, such as mistaken eyewitness identification) occurs. Moreover, there is presently no way to provide a meaningful or

406. *See, e.g.*, Margaret A. Berger, *False Confessions—Three Tales from New York*, 37 SW. U. L. REV. 1065, 1069 (2008) (citing the Leo et al.'s reliability test as an example of the type of reform that is needed to avoid more instances of convictions based on false confessions); Duke, *supra* note 183, at 567 n.81 ("I support pretrial reliability hearings . . . ."); George C. Thomas III, *Regulating Police Deception During Interrogation*, 39 TEX. TECH. L. REV. 1293, 1298 (2007) (stating he "would adopt Richard Leo's very good idea that courts should examine confessions for indicia of unreliability"); GARRETT, *supra* note 12, at 40 (agreeing that pretrial reliability hearings are a good vehicle for courts to question a confession's reliability); Simon, *supra* note 117, at 215 (endorsing bringing reliability back into the courts for confessions); Taslitz, *supra* note 25, at 423 (arguing that it is "wise to craft . . . mechanisms for making suppression on the grounds of reliability *alone* a basis for suppression"); Thompson, *supra* note 26, at 363 (extensively discussing and building on Leo et al.'s "new reliability test" for confession evidence).

407. In 1997 Richard Ofshe and Richard Leo argued the reliability of a suspect's confession can be evaluated by analyzing the fit (or lack thereof) between the descriptions in his postadmission narrative and the crime facts in order to determine whether the suspect's postadmission narrative reveals the presence (or absence) of guilty knowledge and whether it is corroborated (or disconfirmed) by objective evidence. Ofshe & Leo, *supra* note 24, at 990–92. Ofshe and Leo also argued that based on this fit test, trial courts should insist on a minimum standard of reliability, and thus independent corroboration, before admitting a confession into evidence. Richard J. Ofshe & Richard A. Leo, *The Social Psychology of Police Interrogation: the Theory and Classification of True and False Confessions*, 16 STUD. L. POL. & SOC'Y 189, 219 (1997). In 1998 the late Welsh White criticized the Ofshe-Leo fit test as administratively infeasible means of evaluating a confession's reliability for the purpose of admissibility. White, *supra* note 130, at 2024–28. Because we have previously rebutted in detail each of White's five separate criticisms of the Ofshe-Leo fit test as a means of evaluating a confession's reliability for the purpose of admissibility, we do not repeat White's criticisms or our point-by-point responses here. *See* Leo et al., *supra* note 25, at 520–25.

scientific estimate. The most fundamental problem is that no organization collects information on all cases involving police interrogations and/or confessions. As a result, there is no way to randomly sample a representative universe of known interrogation cases to determine what percentage involves confessions, let alone false confessions. Moreover, even if there were a comprehensive database or registry of interrogation case files from which to take a random sample, it would be difficult, if not impossible, to determine the ground truth in all the cases in which defendants alleged they had falsely confessed. Although an alleged false confession may bear indicia of unreliability, proving it false—which, strictly speaking, involves proving the negative—is no easy matter.[408] For these reasons, an estimate of the frequency or rate of false confessions would be pure guesswork. We also do not know the frequency or rate at which false confessions lead to wrongful conviction.[409]

Nevertheless, false confessions, and wrongful convictions based on false confessions, occur with troubling frequency and regularity in the American criminal justice system. Hundreds of proven (i.e., indisputable) false confessions have been documented in recent decades,[410] the vast majority of them for murder and other serious felony cases.[411] And, as we have seen, seventy-three to eighty-one percent of the time when false confessions are introduced at trial, the defendant has been wrongfully convicted.[412] More than twenty-five percent of the now more than 300 postconviction DNA exonerations since 1989 involved cases with false confessions. Because they are rarely publicized or reported in the media and because of the difficulty of unequivocally establishing the ground truth when they are, the hundreds of proven false confessions that have been documented in the last two decades are believed to be the tip of a much larger iceberg,[413] as many have pointed out. The proverbial iceberg may be shockingly large if, as Sam Gross and his colleagues have speculated based on what we do know, the number of wrongfully convicted prisoners in the last fifteen years is in the "tens of thousands."[414]

But perhaps the best argument is not in the aggregate numbers. No one disputes that interrogation-induced false confessions occur or that they create a risk of wrongful conviction of the innocent. Perhaps the best argument is the normative one that our society has made a fundamental value determination "that it is far worse to convict an

408. Leo and Ofshe introduced the concept of a "proven false confession" into the literature to demonstrate that there are only four nonexclusive ways—no crime occurred, physical impossibility, scientific exoneration and true perpetrator identified—to prove a confession false to near or absolute certainty and whether an innocent person can do this is based on luck, i.e., the facts and evidence of the crime surrounding a false confessor's criminal case, over which a suspect has no control. Leo & Ofshe, *supra* note 33, at 449–55.

409. *See* Leo, *supra* note 97, at 332 (highlighting epistemological problems with identifying erroneous convictions).

410. Drizin & Leo, *supra* note 60, at 900; Ofshe & Leo, *supra* note 407, at 191.

411. *See* Drizin & Leo, *supra* note 60, at 946 (concluding that eighty-one percent of the proven false confessions in the Drizin and Leo 2004 study involved homicides).

412. *Id.*

413. LEO, *supra* note 3, at 246–48.

414. Samuel R. Gross et al., *Exonerations in the United States, 1989 through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 551 (2005) ("Any plausible guess at the total number of miscarriages of justice in America in the last fifteen years must be in the thousands, perhaps tens of thousands.").

innocent man than to let a guilty man go free."[415] There is no worse error in the American criminal justice system than the wrongful conviction of an innocent man or woman. When the innocent are erroneously convicted, the criminal justice system wrongfully incarcerates and deprives liberty; wrongfully destroys lives, families and careers; wrongfully wastes millions in the cost of litigation, incarceration, and compensation; and wrongfully allows violent perpetrators to go free and, in some instances, to continue to commit murders, rapes and assaults.[416] Even one false confession leading to a wrongful conviction creates substantial social harm.

If the wrongful conviction of the innocent truly is the worst type of criminal justice system error we create, then it is morally incumbent upon us to strategically intervene at key decision points in the criminal justice system to prevent these predictable miscarriages of justice from occurring in the first place. As we have seen, false confessions are uniquely prejudicial: because they are presumed to be true and because they often are contaminated/formatted to appear verifiably corroborated, false confessions create a high risk of wrongful conviction if entered into the stream of evidence at trial. As empirical studies have shown, the trial is the key decision point in predicting whether a false confession will lead to the erroneous conviction of the innocent. Pretrial reliability assessments may significantly reduce this risk by preventing potent and damning, but nevertheless erroneous and tainted, confession evidence from going before a jury in some unknown (and unknowable) number of "innocent man" cases every year.

The second argument that pretrial reliability assessments are not necessary is that existing rules of constitutional criminal procedure—namely, the Fourteenth Amendment due process voluntariness test and the *Miranda* prophylactic rules—and their attendant exclusionary rules already provide sufficient protection against the admission of unreliable or untrustworthy confessions into evidence in criminal trials. This argument apparently held sway in 2010 with the Uniform Law Commissioners, who recommended but did not mandate pretrial reliability hearings for confession evidence. As Andrew Taslitz notes:

> Opponents of the suppression remedy, however, argued that there are already constitutional grounds for excluding involuntary confessions. Furthermore, in their view, voluntary confessions are still trustworthy, meaning that they are unlikely to create an unacceptable risk of convicting the innocent. To the extent that trustworthiness is in doubt, they saw cautionary jury instructions as an adequate corrective. Opponents viewed exclusion as a harsh sanction, particularly where the police have done no "wrong," that is, not engaged in tactics sufficiently coercive to overcome the accused's will. Furthermore, the

415. *In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

416. In the thirty-six of DNA false confession alone, the true perpetrator went on to commit, and were convicted of, additional subsequent rapes and/or murders. This happened in the DNA exoneration cases of: Jeffrey Deskovic, Byron Halsey, David Allen Jones, Robert Miller, Curtis Jasper Moore, Frank Sterling, Jerry Townsend, David Vasquez, Douglas Warney, Earl Washington, Rolando Cruz, Alejandro Hernandez, Dennis Fritz, Ronald Williamson, Travis Hayes, Ryan Matthews, Christopher Ochoa, Richard Danziger, Verneal Jimmerson, Paula Gray, Kenneth Adams, Willie Rainge, Dennis Williams, Terrell Swift, Harold Richardson, Michael Saunders, Vincent Thames, Jonathan Barr, James Harden, Robert Veal, Shainne Sharp, Yusef Salaam, Antron, McCray, Korey Wise, Raymond Santana, and Kevin Richardson. Email from Emily West to author (Dec. 19, 2012, 9:18 AM). (on file with authors).

> constitution provides other remedies for suppressing confessions that are not involuntary, including violation of the *Miranda* warnings and the right to counsel. In their opinion, to add another independent ground for suppression seemed like overkill.[417]

But as we have seen, this argument has no merit, either theoretically or empirically.[418] Neither the voluntariness test nor the *Miranda* rules call for or require trial courts to prevent false confessions from being admitted into evidence; it would therefore be a logical and empirical fallacy to treat the voluntariness or *Miranda* doctrines as if they somehow constitute a proxy for judicial scrutiny of the reliability of confession evidence. They quite clearly contemplate other concerns. Paraphrasing what the Supreme Court said in *Lego v. Twomey*[419] forty years ago, the purpose that voluntariness and *Miranda* hearings are designed to serve have nothing whatsoever to do with considering or improving the reliability of jury verdicts.[420] Moreover, the Supreme Court in *Colorado v. Connelly* explicitly instructed that trial courts treat the reliability of confession evidence as a controlling matter as an evidentiary issue, not a constitutional one.[421] The reliability of confession evidence is thus no longer even an independently protected or adjudicated constitutional value. Indeed, it would be improper under the voluntariness or *Miranda* doctrines for a trial judge to suppress a confession because he or she concluded that it bore heavy indicia of unreliability and therefore created a grave risk of wrongful conviction. There is no "overkill" because there is no overlap.

But the Uniform Law Commissioners' quoted comments move us to the third argument why pretrial hearings are unnecessary: other reforms can more effectively prevent unreliable confession evidence from leading to the conviction of the innocent. To be sure, many other policy reforms have been suggested to minimize false confessions and their attendant risks, including: mandatory electronic recording of interrogations;[422] tighter regulation of risk-inducing interrogation techniques;[423] improved police training on the causes, consequences and indicia of false confessions;[424] special protections for vulnerable suspects such as juveniles, the cognitively impaired and the mentally ill;[425] expert witness testimony;[426] and, as the

417. Taslitz, *supra* note 25, at 412 (footnotes omitted).

418. See *supra* Section III for a discussion of the inadequacy of criminal procedure in the context of determining whether a confession is voluntary.

419. 404 U.S. 477 (1972).

420. *Lego*, 404 U.S. at 486 ("[T]he purpose that a voluntariness hearing is designed to serve has nothing whatever to do with improving the reliability of jury verdicts.").

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

422. *See, e.g.*, Thomas P. Sullivan & Andrew W. Vail, *The Consequences of Law Enforcement Official's Failure to Electronically Record Custodial Interviews as Required By Law*, 99 J. CRIM. L. & CRIMINOLOGY 215, 220–23 (2009) (discussing changes the authors would make to a model bill encouraging use of electronic testimony); *see also* Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY, 266, 291–305 (1996) (examining effectiveness of interrogation techniques used by law enforcement).

423. *E.g.*, Kassin et al., *supra* note 182, at 16–19.

424. *E.g.*, LEO, *supra* note 3, at 305–07.

425. *E.g.*, Kassin et al., *supra* note 182, at 19–22; Leo *supra* note 3, at 312–14.

426. *E.g.*, Solomon Fulero, *Tales from the Front: Expert Testimony on the Psychology of Interrogations and Confessions Revisited*, *in* POLICE INTERROGATIONS AND FALSE CONFESSIONS: CURRENT RESEARCH,

Uniform Law Commissioners mention, cautionary jury instructions.[427] Although an analysis of the strengths and weaknesses of each of these policy reforms is beyond the scope of this article, we have surveyed and analyzed them elsewhere.[428] While we agree that many of them could help ameliorate the risk of interrogation-induced false confession and wrongful conviction, we do not believe that any one policy reform will solve this seemingly intractable problem. Moreover, some of these suggested reforms, such as the cautionary jury instructions mentioned by the Uniform Law Commissioners, occur too late in the process to undo the damage once an unreliable confession—especially if it has been contaminated/formatted—has entered the stream of evidence at trial.[429] The substantial empirical evidence demonstrating the uniquely potent and prejudicial nature of confession evidence should not be surprising since it essentially restates the prevailing legal view for centuries about the damning and decisive nature of confessions. [430] If the central purpose of the criminal trial is to find the truth, as the Supreme Court has stated on numerous occasions, it is a moral abdication of the proper gatekeeping role of trial judges to allow juries to place weight on false or untrustworthy confessions in adjudicating the guilt of the accused, regardless of whether any other types of (before-the-fact or after-the-fact) reforms may be in place. Other policy reforms may be a meaningful supplement to, but are not a replacement for, pretrial reliability hearings on confession evidence.

B. Pretrial Reliability Assessments Will Hamstring Law Enforcement

Another argument against pretrial reliability assessments for confession evidence is that they will hamstring law enforcement by preventing some, perhaps many, otherwise reliable confessions from being introduced at trial against a defendant. In some number of cases, this will prevent guilty defendants—defendants whose case relies solely or near exclusively on a confession—from being convicted and punished.

There are several things to note about this argument. First, it is important to place this argument in historical perspective. Whenever serious reforms have been introduced to more carefully regulate and improve the quality of police interrogation practices or confession evidence, the standard response from mainstream American law

PRACTICE, AND POLICY RECOMMENDATIONS 211, 211–24 (G. Daniel Lassiter & Christian Meissner eds., 2010); *see also* Leo, *supra* note 3, at 314–16.

427. LEO, *supra* note 3, at 316–17.

428. *See generally id.* at 268–317.

429. Empirical evidence have often shown that jury instructions are either ineffective or operate in ways other than intended. Moreover, jurors frequently misunderstand instructions, even though they often believe the contrary. *See* James R.P. Ogloff & V. Gordon Rose, *The Comprehension of Judicial Instructions*, *in* PSYCHOLOGY AND LAW: AN EMPIRICAL PERSPECTIVE 407, 425 (Neil Brewer & Kipling D. Williams eds., 2005) (reviewing studies on the efficacy of judicial instructions); RANDOLPH JONAKAIT, THE AMERICAN JURY SYSTEM 203–04 (2003) ("[N]o matter how it is measured, jurors appear largely incapable of understanding judicial instructions as they are traditionally delivered by the judge. . . . [T]he overwhelming weight of the evidence is that the instructions are not understood and therefore cannot be helpful."); Michael J. Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?*, 6 S. CAL. INTERDISC. L. J. 1, 32 (1997) (explaining how the timing of jury instructions can affect jurors' understanding in cases).

430. *See, e.g.*, CHARLES TILFORD MCCORMICK, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE 316 (2d ed. 1972) ("[T]he introduction of a confession makes the other aspects of a trial in court superfluous.").

enforcement has been to oppose such reforms on the grounds that they will "handcuff" police investigators, diminish their ability to successfully elicit confessions, and therefore let many guilty criminals go free. This argument was made in the 1920s and 1930s when progressive reformers sought to abolish "third degree" (physical and psychological torture) interrogation practices; in the 1960s and 1970s after the Supreme Court imposed *Miranda* warning and waiver requirement on preinterrogation custody; and in the 1990s and 2000s (and to some extent still today) when and where progressive reformers have sought to establish mandatory electronic recording requirements.[431] In each instance, the predictions of law enforcement never materialized.[432] There is no credible evidence that any of these reforms decreased the ability of police investigators to effectively elicit admissions and confessions of guilt.[433] Arguably, in each instance, the reforms professionalized and improved police interrogation practices without decreasing confession or conviction rates.[434] As we will discuss in more detail later, we believe that pretrial reliability assessments for confession evidence will have the same salutary effect of improving and further professionalizing current police interrogation practices.

The second thing we note is that pretrial reliability assessments should not affect the ability of police to use legitimate interrogation methods or to effectively elicit admissions and confessions. In fact, pretrial reliability assessments are consistent with

431. LEO, *supra* note 3, at 318–27.

432. *Id.*

433. Paul Cassell argued in the 1990s that *Miranda* requirements had cost American law enforcement hundreds of thousands of lost confessions every year and tens of thousands of lost convictions. Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda's Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055, 1107–09 (1998); *see also* Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of* Miranda*'s Defenders*, 90 NW. U. L. REV. 1084, 1087–91 (1996) (responding to criticism of Cassell's evaluation of *Miranda*'s impact). Numerous social scientists and legal scholars refuted Cassell's speculative and partisan claims at the time, criticizing him for, among other things: partisan bias; reliance on flawed methods, studies, and data; arbitrary, speculative, and exaggerated statistical estimates; and indefensibly selective reporting of the data. *See, e.g.*, John J. Donohue III, *Did* Miranda *Diminish Police Effectiveness?*, 50 STAN. L. REV. 1147, 1157–59 (1998) (discussing problems with Cassell's and Fowler's methodology and inferences); Floyd Feeney, *Police Clearances: A Poor Way to Measure the Impact of* Miranda *on the Police*, 32 RUTGERS L.J. 1, 107–10 (2000) (listing his concerns with the Cassell-Fowles analysis); Richard A. Leo & Richard J. Ofshe, *Using the Innocent to Scapegoat* Miranda*: Another Reply to Paul Cassell*, 88 J. CRIM. L. & CRIMINOLOGY 557, 558 (1998) (noting that Cassell's method for examining the frequency of wrongful convictions from false confessions "amounts to no more than grand speculation masquerading as a reasoned estimate of fact"); Stephen J. Schulhofer, Miranda*'s Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 Nw. U. L. Rev. 500, 502 (1996) (criticizing the accuracy and use of Cassell's statistics). As Professor Stephen Schulhofer noted in 1996:

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

Stephen J. Schuhofer, *Pointing in the Wrong Direction*, LEGAL TIMES, Aug. 12, 1996, at 21.

434. Richard A. Leo, *The Third Degree and the Origins of Psychological Interrogation in America*, *in* INTERROGATIONS, CONFESSIONS AND ENTRAPMENT 37, 37–84 (Daniel Lassiter ed., 2004); Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 664–67 (1996); Sullivan & Weil, *supra* note 422, at 220–23.

existing best police practices. For at least a half century, if not longer, American police detectives have been trained not to inadvertently or intentionally leak or disclose nonpublic crime facts—details that only the true perpetrator(s) and the police themselves would otherwise know—to suspects under interrogation.[435] This elementary law enforcement principle is widely accepted in American police work. Indeed, the primary way to verify the validity of a general acknowledgement of guilt is to see whether the suspect possesses personal knowledge about the crime known only to the perpetrator or the police, or "inside" or "guilty" knowledge. If the interrogator contaminates the suspect by supplying him with these nonpublic crime facts, however, there is no way of knowing whether a suspect's confession (containing such details) is accurate or whether it is merely the product of disclosure by police. Contamination is therefore both improper and counterproductive during interrogation because it prevents police from testing and corroborating the reliability of the admissions and confessions they elicit—because both true confessions from the guilty as well as false confessions from the innocent will contain "guilty" knowledge—and thus separating true from false confessions. For this reason, law enforcement trainers and leaders across the board agree that contamination has no legitimate place in American interrogation.[436] As we have seen, Joseph Buckley, the President of Reid & Associates, has emphasized that "it is imperative that interrogators do not reveal details of the crime so that they can use the disclosure of such information by the suspect as verification of the confession's authenticity."[437] In the 2004 edition of their training manual, Buckley and his coauthors write that:

> After a suspect has related a general acknowledgment of guilt, the investigator should return to the beginning of the crime and attempt to develop information that can be corroborated by further investigation, and should seek from the suspect full details of the crime and information about the suspect's subsequent activities. What should be sought particularly are facts that would be known only by the guilty person (e.g., information regarding the location of the murder weapon or the stolen goods, the means of entry into the building, the type of accelerant used to start the fire, or the type of clothing on the victim).
>
> When developing corroborative information, the investigator must be certain that the details were not somehow revealed to the suspect through the questioning process, news media, or the viewing of crime scene photographs. In this regard, it is suggested that early during an investigation, a decision be made by the lead investigator as to what evidence will be withheld from the public [and press], as well as from all suspects. This information should be documented in writing in the case file so that all investigators are aware of what information will be withheld.[438]

Moreover, contamination is simply not necessary for effective interrogation and

435. FRED INBAU ET AL., ESSENTIALS OF THE REID TECHNIQUE: CRIMINAL INTERROGATION AND CONFESSIONS, at vii–viii, 217 (4th ed. 2004).

436. *Id.* at 354–62.

437. Joseph P. Buckley, *The Reid Technique of Interviewing and Interrogation*, *in* INVESTIGATIVE INTERVIEWING: RIGHTS, RESEARCH AND REGULATION 204 (Tom Williamson ed., 2006).

438. INBAU ET AL., *supra* note 435, at 216.

the elicitation of true and reliable confessions. As we have seen, police interrogators receive training in a number of psychologically sophisticated interrogation techniques and strategies that are designed to move guilty suspects from (expected) denial to (desired) admission and, ultimately, confession. Many police detectives also learn or perfect these interrogation methods on the job. These standard techniques and strategies—which (for the most part) rely on legally acceptable forms of pressure and persuasion—are highly effective.[439] None of them require contaminating a suspect with nonpublic crime facts in order to successfully elicit confessions. Rather, the feeding of nonpublic crime facts serves no useful purpose in achieving the goal of eliciting accurate and reliable admissions and confessions. It is therefore never necessary to reveal nonpublic facts during interrogation: many other standard tactics can and should be used to secure accurate and reliable confessions.

As discussed earlier, police contamination of nonpublic crime facts during interrogation is not merely unnecessary and counterproductive, it is also dangerous. As numerous empirical researchers have now demonstrated, police contamination during interrogation causes innocent suspects to incorporate those details into their confessions, which in turn creates the illusion that the suspect's false confession is true because it appears corroborated by the kind of specific and contextual crime knowledge—misleading specialized knowledge—that it is believed only the true perpetrator would know. As we have seen, these inside details are among the "content cues" that give confessions verisimilitude and cause third parties (such as prosecutors, defense attorneys, judges and jurors) to erroneously conclude that false confessions are true. Police contamination of nonpublic crime facts during interrogation thus creates a substantial risk that a false confession will not only will be perceived as reliable (despite the suspect's factual innocence), but also that the criminal justice system will fail to filter it out of the stream of evidence that gets presented against a defendant at trial.

Our third observation is that for several reasons we believe it is highly likely that pretrial reliability assessments in practice will result in a statistically small percentage of confessions being suppressed. First, confessions are rarely suppressed when police violate *Miranda* requirements or coerce involuntary confessions, except in extreme and unusual cases.[440] For political and psychological reasons, it is almost certainly difficult for criminal trial court judges—many of whom are former prosecutors and must periodically stand for reelection—to suppress confessions, especially in serious felony and/or high profile crimes. [441] Second, presumably most confessions are true and thus

439. George C. Thomas III, *Plain Talk About the* Miranda *Empirical Debate: A "Steady-State" Theory of Confessions*, 43 UCLA L. REV. 933, 935–36 (1996) ("In the Salt Lake County study, Cassell and Hayman conclude that '42.2% of the suspects who were questioned gave incriminating statements,' a figure that is substantially lower than the 55%–60% range they use for the pre-*Miranda* studies. . . . I think a range of 45%–53% is a better estimate of the pre-*Miranda* confession rate." (footnote omitted) (quoting Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of* Miranda, 43 UCLA L. REV. 839, 872–83, 917 (1996))).

440. Marcus, *supra* note 167, at 606–07; Nardulli, *Societal Costs*, *supra* note 176, at 599–600.

441. For example, in capital cases, judges are less likely to follow reliable procedures, broadly defined, out of fear of being publicly blamed by prosecutors (and victims and their families) for losses based on perceived technicalities. Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding*

contain objective indicia of reliability.[442] Third, even with the flipped presumption in our suggested Rule 403 balancing test, we believe that prosecutors will be able to demonstrate in most cases that the probative value of the confession evidence substantially outweighs the risks of prejudicial effect and misleading the jury. Even if parts of the suspect's confession do not fit with the objective physical evidence, it is merely one factor in the test we are proposing. If the overwhelming majority of the confession is a lie, but the small minority that is accurate includes nonpublic details that are unlikely to be guessed correctly, were held back by the police, and volunteered by the suspect, then the prosecutor has met his or her burden under our proposed test. And even if a careless detective inadvertently revealed several nonpublic facts to the suspect, as long as there were other held-back details that originated with the suspect and could not likely be guessed by chance, the confession would be admissible. In short, under our proposed test, pretrial reliability assessments should only lead to suppression for highly unreliable confession evidence.[443]

Finally, we believe that far from hamstringing law enforcement, pretrial reliability assessments in practice will likely have the effect of motivating police investigators to do a better job of corroborating confessions and of improving interrogation training on the indicia of false and unreliable confessions. For one thing, pretrial reliability assessments will expand the basis for discovery requests, allowing criminal defense attorneys more latitude in seeking case evidence that is consistent and/or inconsistent with the contents of a confession. Police investigators will be put on notice that they must scrutinize more carefully the reliability of the confessions they elicit or else risk the possibility of suppression. As a result, sustained focus on the indicia of reliability is more likely to become a staple of police interrogation training, as will judicial analyses of confession reliability as the case law on this subject develops. It may also require prosecutors to more closely scrutinize confessions for reliability before trial, and may lead prosecutors to demand that police continue to search for corroborating evidence. Ultimately, we believe that pretrial reliability assessments, and the greater judicial scrutiny of confession evidence they lead to, will improve and further professionalize police interrogation practices, decreasing the likelihood of contamination/formatting, and increasing police interrogators' working knowledge of the indicia of false and unreliable confessions.[444]

C. Pretrial Reliability Assessments Invade the Province of the Jury

A third critique of pretrial reliability assessments is that they blur the discrete and clearly defined roles of judge and jury, thereby redirecting questions of fact (which are traditionally reserved for the jury) to the judge. A related critique is that there is no

Between the Bill of Rights and the Next Election in Capital Cases, 75 B.U. L. REV. 759, 834–35 (1995).

442. Leo, *supra* note 434, at 302–03; *see also* BARRY C. FELD, KIDS, COPS, AND CONFESSIONS: INSIDE THE INTERROGATION ROOM 251–52 (2012) (finding that most juveniles cannot comprehend the effect of waiver of *Miranda* rights).

443. Thompson, *supra* note 25, at 336.

444. *See id.* at 377 ("By holding hearings on reliability, courts will incentivize the police and prosecutors to adopt practices that promote reliability: avoiding contamination of witness testimony; using less coercive or suggestive tactics . . . and properly documenting interviews, preferably through videotaping.").

reason to believe that judges are better equipped than a jury to determine the reliability of a confession.

The idea that pretrial reliability assessments invade the province of the jury misunderstands the proper role of trial judges as gatekeepers of unreliable evidence. The proposed reliability hearing is a logical application of the trial judge's role as gatekeeper.[445] As we have seen, state court judges are routinely counted on to decide *in a number of different contexts* whether certain evidence lacks sufficient indicia of reliability such that it should be excluded from consideration by the jury. These include pretrial determinations of the reliability of eyewitness identifications, child victim testimony in sexual assault cases, hearsay evidence, expert witness testimony, and hypnotically refreshed testimony.[446] What is more, federal judges and trial courts in several states have been making a threshold determination about a confession's reliability for half a century under the trustworthiness doctrine. Such reliability determinations are commonplace and not seen as implicit attacks on the jury system; instead they are considered an essential mechanism for screening out unreliable evidence.

Under the trustworthiness standard, federal judges have been making a threshold determination about a confession's reliability for half a century. Ever since the United States Supreme Court's ruling in *Opper v. United States*,[447] prohibiting convictions on the basis of uncorroborated confessions, federal courts have acted as gatekeepers of confession evidence, applying the rule that a jury cannot rely on an extrajudicial, postoffense confession, even when voluntary, in the absence of "substantial independent evidence which would tend to establish the trustworthiness of the statement."[448] Thus, for the past half century or so, federal judges have been responsible for determining whether a confession is sufficiently trustworthy before allowing it to go to the jury. Given the ease with which their federal counterparts have applied a trustworthiness rule, there is every reason to think that state court judges will have no problems assessing the reliability of confession evidence. Our proposal is really an updated and more rigorous version of this trustworthiness rule, with the benefit of recent social science research into false confessions and the careful study of proven false confessions revealing the role of police contamination/formatting of the suspect's postadmission narrative in most of the wrongful convictions that involved

445. It is possible that a trial judge assessing the reliability of disputed confession evidence would rule the confession admissible on the grounds that the reliability of the confession statement is an issue for the jury that goes to weight rather than admissibility. *See* Crane v. Kentucky, 476 U.S. 683, 688 (1986) (noting that circumstances surrounding confession bear on both voluntariness and credibility, and that weight of confession can be argued at trial). While trial judges may be loathe to enforce exclusionary rules which punish police conduct at the risk of keeping from the jury powerful and reliable evidence of guilt, we believe this is less likely here since we are not advocating for an exclusionary rule but rather for the traditional gatekeeping function of excluding unreliable (confession) evidence. Moreover, even if trial judges are reluctant to exclude on disputed confession evidence that appears facially unreliable, there are other reasons to endorse the kind of reliability assessment proposed in this Article, including that it may influence police and prosecutors to improve case screening, continue investigating cases even after they have obtained incriminating statements, and be mindful and proactive about the dangers of confession contamination.

446. See *supra* Part IV.E for a discussion of pretrial reliability assessments.

447. 348 U.S. 84 (1954).

448. *Opper*, 348 U.S. at 93.

false confessions.

Federal courts apply the doctrine in the same way that they routinely rule on other evidentiary questions. Court opinions that discuss the doctrine present it as a straightforward evidentiary issue. For instance, in *United States v. Doe*,[449] the trial judge determined that the defendant's confession to several traffic-related offenses was admissible on the basis of a single witness's assertions, which sufficiently corroborated elements of the confession.[450] In *United States v. Jones*,[451] the trial judge determined that the defendant's confession to drug use was inadmissible in her trial for possession of a firearm by an unlawful user of controlled substance because the Government failed to introduce evidence to show that the essential facts of the confession were borne out by the evidence.[452] In *United States v. Reynolds*,[453] the court determined that the defendant's uncorroborated postarrest admission to "always" carrying a gun could not by itself sustain a weapons charge.[454]

There is a noticeable trend in state courts away from the *corpus delicti* rule and towards adoption of the trustworthiness doctrine. The doctrine has been adopted in state courts in Washington,[455] Maryland,[456] Arizona,[457] Florida,[458] New Jersey,[459] Hawaii,[460] North Carolina,[461] and Connecticut,[462] among others. When North Carolina first abandoned its *corpus delicti* rule in favor of the trustworthiness doctrine, it was hailed as an opportunity to enhance protections for defendants.[463] The North Carolina

449. 92 F. Supp. 2d 554 (W.D. Va. 2000).

450. *Doe*, 92 F. Supp. 2d at 558.

451. 232 F. Supp. 2d 618 (E.D. Va. 2002).

452. *Jones*, 232 F. Supp. 2d at 622.

453. 367 F.3d 294 (5th Cir. 2004).

454. *Reynolds*, 367 F.3d at 297.

455. *See* State v. Aten, 900 P.2d 579, 585 (Wash. Ct. App.1995) (holding that numerous statements by a defendant "cannot corroborate one another").

456. *See* Duncan v. State, 494 A.2d 235, 239 (Md. Ct. Spec. App.1985) ("It is not necessary that the corroborative evidence be full and complete or that it establish the truth of the *corpus delecti* beyond a reasonable doubt or even by a preponderance of proof. . . . Even a slight amount of evidence may be sufficient . . . the necessary quantum being dependent upon the facts of the particular case.").

457. *See* State v. Nieves, 87 P.3d 851, 857 (Ariz. Ct. App. 2004) (holding that a defendant's confession was inadmissible where there was neither direct nor circumstantial evidence to corroborate the defendant's confession or to show that a crime had even occurred).

458. *See* Geiger v. State, 907 So. 2d 668, 674 (Fla. Dist. Ct. App. 2005) (holding that a confession is admissible "if sufficient corroborating evidence is presented that tends to establish the trustworthiness of the confession").

459. *See* State v. Reddish, 859 A.2d 1173, 1211–13 (N.J. 2004) (affirming that the State must introduce corroborating evidence demonstrating the trustworthiness of a confession to sustain introduction of the confession).

460. *See* State v. Kalani, 649 P.2d 1188, 1195–96 (Haw. Ct. App. 1982) (holding that the trial judge has the discretion to determine whether a confession should be admissible).

461. *See* State v. Parker, 337 S.E.2d 487, 495 (N.C. 1985) (holding that proof of *corpus delicti* is not necessary in noncapital cases if the confession is supported by "substantial independent evidence tending to establish trustworthiness").

462. *See* State v. Hafford, 746 A.2d 150, 174 (Conn. 2000) (adopting the trustworthiness doctrine for admission of confessions).

463. Brian C. Reeve, Note, State v. Parker*: North Carolina Adopts the Trustworthiness Doctrine*, 64

Supreme Court noted that the historical justifications for the *corpus delicti* rule are no longer applicable, and that the trustworthiness doctrine better addresses modern concerns in the criminal justice system, such as the increasing prevalence of crimes for which there is no tangible *corpus delicti*.[464] More recently, the Colorado Supreme Court abolished the *corpus delicti* rule and replaced it with the trustworthiness standard, though it characterized this rule as one of sufficiency of proof rather than one of admissibility.[465]

Like federal courts, state courts apply the trustworthiness doctrine as they would any other evidentiary question. In *Geiger v. State*,[466] a Florida appellate court excluded the defendant's confession where the state presented no evidence to corroborate it, finding that no independent evidence existed to show that the defendant's statements were trustworthy or that the crime occurred.[467] In *State v. Shook*,[468] the North Carolina Supreme Court found a confession to be admissible where there was evidence to show that the confession was trustworthy, even where there was no independent proof establishing the *corpus delicti* of the crime.[469] Further, in *State v. Parker*,[470] the same court found that the defendant's confession to homicide was trustworthy in part because the condition of the bodies matched the defendant's description.[471] In *State v. Housler*,[472] the Tennessee Supreme Court dealt with a confession that contained many known falsehoods, but still found that it was admissible because the State had sufficiently corroborated the true portions of the confession and did not attempt to corroborate the known falsities that the confession contained.[473]

Not only has the trustworthiness rule adopted by federal courts and some state courts posed few problems for judges tasked with applying it, it has also posed little difficulty for prosecutors seeking to admit confessions. Under the federal corroboration rule, confessions are rarely suppressed, in part, because the corroboration requirement is minimal. Although our proposed rule is specifically tailored to prevent unreliable evidence from getting before the jury and requires a more specific review than that demanded by the federal corroboration rule, the rule should pose little difficulty for judges who are used to applying and balancing multiple factors in traditional "totality of the circumstances" tests.[474]

The second critique of the judicial role suggested by pretrial reliability

N.C. L. REV. 1285, 1286 (1986).

464. *Parker*, 337 S.E.2d at 494.

465. People v. LaRosa, 293 P.3d 567, 578 (Colo. 2013) (en banc) (noting that unreliable confessions will still get before the jury but defendants can use the doctrine to argue for directed verdicts at the close of the State's case).

466. 907 So. 2d 668 (Fla. Dist. Ct. App. 2005).

467. Geiger v. State, 907 So. 2d 668, 669 (Fla. Dist. Ct. App. 2005).

468. 393 S.E.2d 819 (N.C. 1990).

469. *Shook*, 393 S.E.2d at 822.

470. 337 S.E.2d 487 (N.C. 1985).

471. *Parker*, 337 S.E.2d at 495.

472. 193 S.W.3d 476 (Tenn. 2006).

473. *Housler*, 193 S.W.3d at 490.

474. In particular, in assessing such a motion, a trial court would consider relevant factors that enhance or undermine a confession's reliability.

assessments is that judges are not likely to be any more competent to screen the reliability of confession evidence in pretrial hearings than juries would be at trial. We believe that this critique is likely wrong for at least two reasons. As Sharon Davies has pointed out, judges, unlike jurors, can receive training on the social science research on the causes, indicia, characteristics and consequences of false confessions through judicial conferences,[475] perhaps allowing them to become "superior assessors of the truth or falsity of confessions."[476] Moreover, judges are repeat players in the criminal justice system and therefore are likely to acquire superior knowledge of the false confession than jurors (classic "one-shotters"[477]), even with the occasional provision of expert witness testimony. As Sandra Guerra Thompson concisely puts it, "[a]s an institutional matter, judges through training and experience can develop the required expertise that jurors—who are not regular participants in the trial process—cannot."[478]

D. Pretrial Reliability Assessments Will Not Work

No statute has yet to authorize, nor has any state yet to adopt through case law, pretrial reliability hearings for confession evidence. Nevertheless, supporters and critics have already expressed skepticism that the idea—at least as initially expressed in our 2006 article—will likely succeed. Professor Lawrence Rosenthal, a critic, has suggested, by analogy, that if the voluntariness test has failed to weed out coerced confessions, there is no reason to suspect that reliability hearings or assessments will succeed at weeding out unreliable confessions, pointing out that the discretion inherent in a balancing test offers little guarantee that the judicial screening of confessions will improve.[479] Professor Steven Duke, a supporter, flatly declares that the pretrial hearings will not work, but points to other possible benefits: "I support pretrial reliability hearings not because I think they will result in exclusion of unreliable confessions—they will not—but because they will provide pretrial discovery that will help the defendant attack the reliability of the statement before the jury."[480] Duke's assertion implicitly raises additional questions: How should the success of pretrial reliability hearings be measured? What are the collateral benefits to pretrial benefits to pretrial reliability hearings?

Whether pretrial hearings or assessments will work at screening unreliable confessions and thus preventing their admission into evidence, of course, is an empirical question. Because this idea has not yet been tested, we do not know how often pretrial reliability assessments of the kind we envision will succeed at excluding some facially unreliable confessions that threaten to convict the innocent. We have

475. Davies, *supra* note 26, at 250–52.

476. *Id.* at 251.

477. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculation on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97 (1974).

478. Thompson, *supra* note 26, at 336; *see also* Findley, *supra* note 179, at 750 ("Assigning that screening role to judges may thus be more than just paternalism; it may be a reflection of greater institutional capacity.").

479. Lawrence Rosenthal, *Against Orthodoxy:* Miranda *is Not Prophylactic and the Constitution is Not Perfect*, 10 CHAP. L. REV. 579, 610–14 (2007).

480. Duke, *supra* note 183, at 567 n.81.

already explained why we believe pretrial reliability assessments will result in a statistically small percentage of confessions being excluded from evidence. But this Article is not so much an empirical demonstration of the success of pretrial reliability assessments as it is an empirically informed argument, based on recent social science research on the corrupting risk of police contamination/formatting of confessions, for the need for pretrial reliability assessments to instantiate our criminal justice system's historic concern for ascertaining accurate trial verdicts and preventing the wrongful conviction of the innocent, with specific doctrinal and practical suggestions about how pretrial reliability assessments can be accomplished.

That there currently is no mechanism or doctrine in our constitutional criminal procedure—the body of law that primarily governs the admissibility of confession evidence—to screen, *let alone even address*, the reliability of confession evidence is a glaring failure in a system that elevates the search for truth as the primary goal of criminal trials.[481] Brandon Garrett appropriately calls this "perverse," pointing out not only that criminal procedure fails to regulate the reliability of confession evidence, but also that the problem of contamination undermines the determination of voluntariness in false confession cases because trial judges regularly cite to the "inside knowledge" supposedly volunteered by the suspect during interrogation as evidence of the (false) confession's voluntariness and thus admissibility.[482] Of course, no one favors the admission of false confessions into evidence at trial, and there is no lobby for the wrongful conviction of the innocent.[483] Regardless of how frequently confessions would be suppressed at pretrial reliability assessments, there is a pressing need to create the institutional space and appropriate procedures for trial judges, acting in their historic role as gatekeepers of trustworthy evidence, to evaluate, scrutinize, and exclude unreliable confessions. In the last twenty-five years, empirical research has revealed the scale and depth of America's wrongful conviction problem,[484] as well as the substantial and persistent role played by interrogation-induced false confessions.[485] This problem shows no sign of abating. Absent more effective legal safeguards to prevent the admission of contaminated/formatted false confessions into evidence at trial, some number of wrongful convictions that *could have been prevented* will continue to occur.

Apart from creating the basis for trial judges to suppress false and unreliable confessions that threaten to convict the innocent, pretrial reliability assessments promise additional collateral benefits. As Professor Duke has noted, pretrial reliability hearings will expand the basis for defense discovery requests, creating fuller information disclosure with respect to case evidence directly bearing on the indicia of unreliability. As professor Sandra Guerra Thompson has emphasized:

> Any reform in the area of confessions . . . should begin with improved discovery mechanisms . . . . A reliability challenge necessitates that defense

481. As the Supreme Court has noted: "The basic purpose of a trial is the determination of truth." Tehan v. United States, 382 U.S. 406, 416 (1966).

482. Garrett, *supra* note 19, at 1110.

483. *But see* Michael L. Radelet & Hugo Adam Bedau, *Erroneous Convictions and the Death Penalty*, *in* WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE 269, 274 (Saundra Westervelt & John Humphrey eds., 2001) (describing Paul Cassell as "the nation's leading apologist for judicial errors").

484. Gross & Shaffer, *supra* note 90, at 524.

485. Kassin et al., *supra* note 70, at 5–6.

> counsel knows the circumstances under which the evidence was generated by the police. Thus, it necessarily encompasses a requirement that the government provide adequate discovery.[486]

In addition, as we have argued above, there are many reasons to believe that pretrial confession hearings will incentivize police interrogators to learn more about indicia of reliability and to work harder to avoid contamination/formatting and seek out independent corroboration.[487] Among other things, pretrial reliability assessments should lead to improved police interrogation training on how to avoid both pre- and postadmission contamination. Finally, the provision of pretrial reliability assessments will in some cases also create an appellate issue for review, providing an additional, albeit weak and delayed, legal safeguard that could be used to reverse the conviction of an innocent false confessor.

VI. CONCLUSION

Since 1989, postconviction DNA testing has freed more than three hundred innocent but wrongly convicted prisoners nationwide. False confessions played a role in at least seventy-eight—more than twenty-five percent—of those wrongful convictions.[488] In virtually all the false confessions in these cases, police contaminated and formatted the suspect's (false) postadmission narrative. Despite multiple constitutional safeguards at multiple steps of the criminal justice process, the law failed to recognize the confessions as false or prevent them from leading to wrongful convictions. Even more confessions have been proven false by non-DNA means since 1989, many of which also involved demonstrable police contamination/formatting and leading to wrongful convictions.[489] In this Article we have documented the pervasiveness of police contamination/formatting during interrogation, explaining why it occurs, why confession evidence is so inherently and uniquely prejudicial, and why it creates so high a risk of convicting the innocent if admitted at trial. The hundreds of

486. Thompson, *supra* note 26, at 378.

487. See *supra* Part V.B for a discussion of the probable effects of increased judicial scrutiny of confession evidence on police procedure and training.

488. *See DNA Exonerations Nationwide*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/DNA_Exonerations_Nationwide.php (last visited Oct. 26, 2013). As of this date, the seventy-eight names were: Kenneth Adams, Jonathan Barr, Larry Bostic, Marcellius Bradford, Ted Bradford, Dennis Brown, Keith Brown, Rolando Cruz, Richard Danziger, James Dean, Jeff Deskovic, John Dixon, Bobby Ray Dixon, James Edwards, Dennis Fritz, Bruce Godschalk, Kathy Gonzalez, Anthony Gray, Paula Gray, Byron Halsey, Dennis Halstead, James Harden, Nathaniel Hatchett, Travis Hayes, Eugene Henton, Alejandro Hernandez, Verneal Jimerson, Anthony Johnson, Ronald Jones, David Allen Jones, Kenneth Kagonyera, William Kelly, John Kogut, Barry Laughman, Steven Linscott, Eddie Joe Lloyd, Eddie James Lowery, Ryan Matthews, Antron McCray, Robert Miller, Curtis Jasper Moore, Bruce Nelson, James Ochoa, Christopher Ochoa, Larry Ollins, Calvin Ollins, Freddie Peacock, Willie Rainge, John Restivo, Kevin Richardson, Harold Richardson, Juan Rivera, Lafonso Rollins, Larry Ruffin, Yusef Salaam, Raymond Santana, Michael Saunders, Omar Saunders, Shainne Sharp, Debra Shelden, Walter Snyder, Frank Sterling, Terrill Swift, Ada JoAnn Taylor, Vincent Thames, Damon Thibodeaux, Jerry Frank Townsend, David Vasquez, Robert Lee Veal, Douglas Warney, Earl Washington, Joseph White, Arthur Lee Whitfield, Robert Wilcoxson, Dennis Williams, Ron Williamson, Thomas Winslow, and Korey Wise. *Browse the Profiles*, INNOCENCE PROJECT, http://www.innocenceproject.org/know/Browse-Profiles.php (last visited Oct. 26, 2013).

489. Drizin & Leo, *supra* note 60, at 946; Leo & Ofshe, *supra* note 33, at 440.

proven false confessions in the last twenty-five years—the proverbial tip of a much larger but ultimately unknown iceberg as wrongful conviction scholars agree—underscore the critical need for judges to assess the reliability of a defendant's statement before trial if we are to reduce the risk of future confession-based wrongful convictions.

Following the U.S. Supreme Court's invitation in *Colorado v. Connelly*, we have argued that trial courts should rely on the law of evidence, rather than existing constitutional doctrine, to evaluate the reliability of confession evidence in pretrial suppression hearings. Building on our earlier work, we have explained how and why trial court judges, acting in their traditional role as gatekeepers of trustworthy evidence *as they do routinely do in many other contexts*, can rely on Federal Rule of Evidence 403 (or its state equivalent) to screen out confession evidence that contains sufficient indicia of unreliability that its risk of misleading the jury substantially outweighs its probative value.[490] Because the Federal Rules of Evidence favor the admissibility of any relevant evidence, we have proposed that, for pretrial reliability hearings on confession evidence, courts should flip the traditional burden of admitting the proposed evidence onto the prosecution, as is done in Rule 609(a)(1) (impeachment by prior convictions). We have suggested Rule 609(a)(1) also supplies a model for how to apply the Rule 403 balancing test in pretrial reliability hearings because Rule 609(a)(1) provides a framework for trial judges to assess admissibility by enumerating factors to weigh and consider when deciding whether to admit or exclude prior crimes' evidence. Based on recent advances in social science research in the last two decades on indicia of unreliability present in false confessions, we too have suggested a comparable framework for trial judges, as well as specific factors, to consider balance in totality-of-the-circumstances test for pretrial reliability assessments of confession evidence.[491]

We believe that Rule 403 is one appropriate basis for pretrial reliability assessments of confession evidence because its purpose is to protect the accuracy and fairness of the fact finding process at trial by shielding jurors from relevant evidence from which they will draw erroneous or improper inferences, and thus grants trial courts broad discretion to exclude unreliable evidence that would mislead juries into rendering inaccurate verdicts. But this is not the only possible legal reform to prevent contaminated/formatted and otherwise unreliable confession evidence from being admitted at trial and creating a substantial evidence of convicting the innocent. We have also suggested that federal and state legislators could amend existing rules of evidence to create a specific rule that addresses, and creates procedures for, the exclusion of unreliable confession evidence prior to trial, and to that end we have proposed an exception for contaminated confessions to the party admissions rule of Rule 801(2)(d). Or state and federal legislators could draft a statute for judges to assess the reliability of confession evidence in pretrial reliability hearings, as we have done in the Appendix to this Article. Or, to take a different type of example, state appellate courts could, where appropriate, interpret the due process clauses of their state constitutions to include a concern for excluding untrustworthy—not merely

490. Leo et al., *supra* note 25, at 532–33; Taslitz, *supra* note 25, at 427.

491. Leo et al., *supra* note 25, at 520.

involuntary—confession evidence.[492] Although each of these suggestions is beyond the scope of this article, our proposal at its core merely seeks to enhance the fact-finding process of interrogations, and the reliability of the testimonial evidence they elicit, in order to increase the number of true positives while reducing false positives. There are several possible ways to accomplish this goal.

In 1987 Bruce Godschalk was convicted of raping two women he had never met in an apartment complex he had never visited. Yet his confession to both rapes contained numerous, highly specific nonpublic details that presumably only the true perpetrator could have known—including, for example, that prior to having sex with one of the victims he removed her tampon and tossed it to the side—as well as a motive for committing the assaults, expressions of remorse, an apology, and an acknowledgment that his admissions were voluntary. His wrongful conviction was foreordained from the moment he confessed; his real trial and conviction occurred in the interrogation room. Yet, like many of the contaminated and formatted false confessions in Brandon Garrett's recent study, Godschalk's account contained numerous indications of unreliability. Had police investigators recorded the entirety of his interrogation, and had his defense counsel been allowed to challenge the reliability of his confession at a pretrial confession hearing, Bruce Godschalk might not have spent fifteen years in prison for two crimes he did not commit before being exonerated by DNA testing.

492. Courts and legislatures could also fashion remedies short of exclusion, such as jury instructions on contamination, and exclusion of the contaminated portions of a recorded interrogation. *Cf.* Opper v. United States, 348 U.S. 84, 95 (holding that jury instruction to ignore codefendant's confession is sufficient to prevent prejudice because the American "theory of trial relies upon the ability of a jury to follow instructions").

APPENDIX

This possible statute is offered as one way to address the problem of unreliable confessions. In this Article, we have suggested other alternatives as well, including relying on an equivalent of Federal Rule of Evidence 403, modifying that rule, redefining what constitutes hearsay, and creating a new hearsay exception. This statute is not meant to exclude other remedies, such as offering a cautionary instruction or expert testimony to the jury, should the trial court decide to admit evidence challenged by the defense as unreliable. Indeed, it is within the spirit of our proposal that the jury be instructed not to consider any statement that it concludes by a preponderance of the evidence to be unreliable in its determination of guilt.

A Possible Statute[493]

Inadmissibility of Unreliable Defendant Statements in Criminal Cases

(A) Unreliable statements made by a defendant [to law enforcement or other state actors] are inadmissible at trial in any criminal case.

(B) A statement is unreliable if it was made under circumstances raising an undue risk that it is false [or that it will result in conviction of a factually innocent person].

(C) The defendant has the burden of producing some evidence that the statement is unreliable. If the defendant meets that burden, the statement is inadmissible unless the state proves by a preponderance of the evidence that the statement is reliable.

(D) In determining whether a statement is reliable or unreliable, the trial court shall consider all relevant evidence and assess the totality of the circumstances, including, at a minimum, the following:

> (1) the failure of the statement to lead to the discovery of evidence previously unknown to a law enforcement agency;
>
> (2) the failure of the statement to include unusual elements of a crime that have not been made public previously or details of the crime not easily guessed and not made public previously;
>
> (3) inconsistency between the statement and the facts of the crime;
>
> (4) whether any law enforcement officer educated the defendant about the facts of the crime rather than eliciting them;
>
> (5) the absence of corroboration of the statement by objective evidence;
>
> (6) the results of DNA testing, fingerprint analysis or other forensic testing that fail to identify the defendant as the perpetrator of the offense or identify someone else as a possible perpetrator of the offense[494]

493. Individual states may prefer to list the factors (i.e., indicia of unreliability) that may be considered in assessing the indicia of a confession's reliability in the preamble or legislative history of the statute rather than in the statute itself.

494. This is by no means an exhaustive list of factors that a court should weigh in assessing the reliability of the confession but these factors relate directly to the reliability of the substance of the confession itself. Other factors, relating to the personality of the defendant and the coercive nature of the interrogation increase the risk of false confessions and can also be considered by the courts as relevant evidence under the totality of circumstances. Such personality or internal factors include: the suggestibility and/or compliant nature of the defendant, youth, mental retardation, or other significant cognitive impairment(s). Similarly,

(E) [The trial court shall further consult [trustworthy][reliable][widely accepted] social scientific evidence in making its determination if presented to the court by any party, whether in the form of testimony or a legal brief or memorandum.]

(F) The question of the statement's admissibility is solely for the trial court.

numerous external circumstances relating to the interrogation have also been linked to an increased risk of eliciting false confessions and are worthy of consideration in appropriate cases. These include: whether officers used implied or direct promises or suggestions of leniency in exchange for confession; implied or direct threats or suggestions of harm in the absence of confession; deprivation of sleep, medicine, adequate food or drink, or other physical necessities; evidence that the defendant was in a state of drug or alcohol withdrawal at the time of interrogation; or evidence that the suspect was suffering from a mental breakdown at the time of interrogation.