

**BRINGING RELIABILITY BACK IN:
FALSE CONFESSIONS AND LEGAL SAFEGUARDS IN
THE TWENTY-FIRST CENTURY**

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I. INTRODUCTION¹

It was a crime that shocked the nation. In April 1989, a young woman was attacked while jogging in New York City's Central Park. She was dragged into a wooded area, beaten within an inch of her life, and raped. When her body was finally discovered, she had been beaten so severely that she had lost nearly 80 percent of her blood.² Her identity was scrupulously guarded by authorities and the media. To most of the world, she was known only as the "Central Park Jogger."³

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1. We thank the editors of the *Wisconsin Law Review* for their helpful comments and suggestions, especially Tricia Schulz, Bonnie Cosgrove, and Lola Velázquez-Aguilú. We dedicate this Article to Welsh White, a leading legal scholar in the area of false confessions and police interrogation and a great colleague, who passed away during the writing of this Article.

2. TIMOTHY SULLIVAN, UNEQUAL VERDICTS: THE CENTRAL PARK JOGGER TRIALS 50 (1992). For a fuller account of the Central Park Jogger case, see Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 894-900 (2004); see also HARLAN LEVY, AND THE BLOOD CRIED OUT: A PROSECUTOR'S SPELLBINDING ACCOUNT OF THE POWER OF DNA 67-68 (1999) (examining the history of DNA evidence in the courtroom).

3. In 2003, nearly fifteen years after the attack, Trisha Meili revealed herself as the "Central Park Jogger" in an inspirational autobiography about her struggles to overcome her injuries. TRISHA MEILI, I AM THE CENTRAL PARK JOGGER: A STORY OF HOPE AND POSSIBILITY (2003).

Because the jogger's survival was very much in doubt, Manhattan North homicide detectives soon took over the investigation.⁴ They focused their attention on a large group of teenage boys who had been in the park that night creating mayhem.⁵ These boys had entered the park near 110th Street in Harlem and went on a rampage as they walked from north to south through the park, assaulting and attempting to rob bicyclists and joggers.⁶ Some of the boys finally ended up at the north end of the reservoir near Ninety-seventh Street where they hid and jumped several other joggers before fleeing at the sound of police sirens.⁷ Two of the boys, fifteen-year-olds Steven Lopez and Raymond Santana, did not flee and were taken into police custody. A third, fourteen-year-old Kevin Richardson, was apprehended after a short chase.⁸

Lopez, Santana, and Richardson had been arrested and processed and were awaiting their release when officers at the Central Park Precinct were informed that a female jogger's body had been discovered in the park.⁹ This discovery led detectives to leap to the conclusion that the juveniles involved in the other assaults on joggers and bicyclists must have also assaulted the Central Park Jogger. Throughout the night and the next day, detectives interrogated Lopez, Santana, and Richardson and apprehended others whom they had named as accomplices.¹⁰ Antron McRay, age fifteen, was taken into custody at eleven o'clock the next morning, and Yusef Salaam, age fifteen, and Kharey Wise, age sixteen, were both brought in at ten o'clock that same night.¹¹

Ultimately, police obtained five confessions to the beating and rape of the Central Park Jogger. Four of the confessions—those of Wise, Santana, McCray, and Richardson—were captured on videotape by prosecutors. Although the confessions themselves were videotaped and most of the boys confessed on camera in the presence of their parents,¹² the hours of interrogation preceding the confessions were not recorded. The fifth defendant, Salaam, only gave an oral confession because his mother arrived at the station and instructed him not to speak to police or prosecutors anymore without an attorney.¹³

4. SULLIVAN, *supra* note 2, at 22.

5. *Id.* at 23.

6. *Id.*

7. *Id.*

8. *Id.* at 84-85.

9. *Id.* at 132.

10. *Id.*

11. *Id.* at 321; *see also* LEVY, *supra* note 2, at 67-68 (examining the history of DNA evidence in the courtroom).

12. Because Kharey Wise was sixteen at the time of this arrest, he was considered an adult under New York law and authorities did not have to attempt to locate his parents before interrogating him. SULLIVAN, *supra* note 2, at 42.

13. *Id.* at 27-28.

Precisely what happened before the confessions was a matter of great dispute both in pretrial motions and at trial. The boys and their parents claimed that the interrogations were highly coercive, alleging that officers slapped the boys,¹⁴ yelled and cursed at them, and called them liars. Several boys claimed they were told that they were being questioned as mere “witnesses” who would be released from custody if they confessed.¹⁵ At least one of the boys, Wise, claimed that police officers fed him details about the crime.¹⁶ The police officers denied using any coercive tactics, although one detective admitted that he lied to Salaam when he told him that his fingerprints would be found on the victim’s jogging shorts.¹⁷ At the end of the pretrial hearing, which took nearly seven weeks, Judge Thomas Galligan found that the police detectives were more credible than the defense witnesses and ruled that the defendants’ statements were voluntary, making them admissible at trial.¹⁸

Based largely on these statements, all five defendants who confessed were convicted of participating in the rape of the Central Park Jogger and the assaults on several cyclists and other joggers. They were convicted despite the fact that DNA testing of semen, taken from a cervical swab of the jogger and found on a sock near where she was discovered, excluded all five boys as the source.¹⁹ All of the boys who went to trial were sentenced to between five and fifteen years in prison.²⁰

14. Kharey Wise, for example, claimed that he was slapped by a detective in the head four times, causing a temporary hearing problem, and also testified that detectives promised him he could go home if he confessed. *Id.* at 80, 280–81.

15. At the trial of their son, Antron, both Bobby and Linda McCray testified that detectives yelled at their son, called him a liar, and told him he would be treated as a witness if he admitted his participation in the rape. *Id.* at 182–87. Richardson’s mother, Grace Cuffee, testified that she heard police curse at her son and accuse him of the rape. *Id.* at 268.

16. Central Park Jogger Case Panel Report, http://home.nyc.gov/html/nypd/html/dpci/executivesumm_cpjc.html (last visited Feb. 19, 2006); *see also* Phil Hirschhorn, *Police Panel Slams Decision to Absolve Men in Central Park Jogger Case*, CNN.COM, Jan. 28, 2003, <http://us.cnn.com/2003/LAW/01/27/nyjogger.report/> (noting the police department’s skepticism that the boys were not involved).

17. SULLIVAN, *supra* note 2, at 24. Detective Thomas McKenna later wrote about this ruse in a book about his life as a homicide detective in Manhattan. *See* THOMAS MCKENNA & WILLIAM HARRINGTON, *MANHATTAN NORTH HOMICIDE* 11 (1991).

18. MCKENNA & HARRINGTON, *supra* note 17, at 92-93.

19. *Id.* at 103.

20. *Id.* at 319–20. Lopez was never brought to trial for the rape but pled guilty to one of the assaults near the reservoir. Affirmation of Nancy E. Ryan, Assistant District Attorney, County of New York, in Response to Motion to Vacate Conviction, ¶ 12, *People v. Wise*, 612 N.Y.S.2d 117 (App. Div. 1994) (No. 4762/89) [hereinafter *Manhattan DA’s Report*].

Judge Galligan's decision to admit the confessions, and the boys' convictions and sentences, were later upheld on appeal.²¹

In January 2002, nearly thirteen years after the attack on the jogger, a convict named Matias Reyes contacted authorities and informed them that he, acting alone, had raped the Central Park Jogger.²² Reyes was one of New York City's most notorious serial rapists. Between June 1989 and his apprehension in August of that year, Reyes terrorized the Upper East Side, raping four women, including a pregnant woman whom he killed after raping her in front of her children.²³ In all of these attacks, Reyes acted alone. When Reyes's DNA matched DNA taken from semen recovered from the Central Park Jogger crime scene, the Manhattan District Attorney's Office (DA) launched a reinvestigation of the case.²⁴

The DA's office interviewed Reyes on several occasions. Reyes provided an accurate description of the assault and rape of the jogger. His story was rich in detail and included facts that none of the boys had mentioned. Unlike the boys, Reyes was clear about where the attack occurred, going so far as to draw a map of the area. Reyes described how he stalked the jogger at the 102nd Street traverse, how he was able to follow her because she was listening to a walkman, and how he picked up a stick off the road and struck her in the head. Reyes explained how the jogger had tried to run away after he dragged her off the road and how he caught, beat, and raped her in a second location. He told the investigators that he took her keys and planned to rob her apartment, but grew angry with her when she refused to tell him her address.²⁵ Reyes also provided police with information that they did not know, admitting to a sexual assault of a second woman in the park just two days before the attack on the jogger.²⁶ In his interviews with the DA's office and in

21. See, e.g., *People v. Salaam*, 629 N.E.2d 371 (N.Y. 1993); *People v. Wise*, 612 N.Y.S.2d 117 (App. Div. 1994); *People v. McCray*, 604 N.Y.S.2d 93 (App. Div. 1993); *People v. Richardson*, 608 N.Y.S.2d 627 (App. Div. 1994).

22. Manhattan DA's Report, *supra* note 20, ¶ 37.

23. LEVY, *supra* note 2, at 1–16. Levy, a former Assistant District Attorney for the Manhattan District Attorney's Office, describes Reyes's arrest, interrogation, and conviction in these assaults in the first chapter of his book about the power of DNA evidence. Ironically, Levy devotes a later chapter to the Central Park Jogger trial, describing how he and Elizabeth Lederer dealt with the bad news when DNA test results of semen taken from a vaginal swab and from the victim's socks did not match any of the teenage boys. *Id.* at 59–85.

24. Manhattan DA's Report, *supra* note 20, ¶¶ 40–42.

25. *Id.* ¶ 63(1)–(13).

26. *Id.* ¶¶ 56–61.

an interview aired on national television, Reyes insisted that he did not know any of the boys who were convicted of the rape.²⁷

Reyes's emergence forced prosecutors to take a closer look at the boys' confessions. First, prosecutors noted that all of the boys minimized their involvement in the crime, a fact that added some weight to the defendants' claims at trial that they had been told they would be viewed as witnesses rather than perpetrators if they spoke about the crime.²⁸ Second, when prosecutors compared the boys' confessions with each other, they found that the defendants' accounts differed on nearly "every major aspect of the crime—who initiated the attack, who knocked the victim down, who undressed her, who struck her, who held her, who raped her, what weapons were used in the course of the assault and when in the sequence of events the attack took place."²⁹ Third, while some of what the defendants told authorities was consistent with the objectively known facts of the crime (for example, one defendant claimed the jogger wore a white shirt and a second claimed she was struck by a pipe, the kind of blunt object that could have caused her head injuries), most of the details in their statements were "not corroborated by, consistent with, or explanatory of objective, independent evidence," and some of what they said was just plain wrong.³⁰ Significantly, none of the defendants correctly described where the attack on the jogger took place, a nonpublic piece of information that the true perpetrators surely would have known. All of the boys claimed the attack on the Central Park Jogger took place near the reservoir.³¹ Only Wise, in his second taped confession recorded after the police took him to the crime scene and prosecutors showed him crime scene photos, appeared to describe the crime scene.³²

In light of the credibility of Reyes's confession, the indisputable DNA link of Reyes to the crime, and the multiple problems with the boys' confessions, prosecutors conceded that the new evidence made it likely that the jury would have reached a different verdict. Accordingly, they supported the defendants' motions to vacate their convictions.³³ On December 19, 2002, Judge Charles Tejada granted the motion and

27. *Id.* ¶ 42. Reyes's interview aired on September 26, 2002 on ABC's evening news magazine show *Primetime Live*. *Primetime Live* (ABC television broadcast, Sept. 26, 2002).

28. Manhattan DA's Report, *supra* note 20, ¶ 82.

29. *Id.* ¶ 86.

30. *Id.* ¶¶ 91-93.

31. *Id.* ¶¶ 97.

32. *Id.*

33. Karen Freifeld, *Convictions Tossed: Judge Clears Verdicts of Central Park Five*, *NEWSDAY*, Dec. 20, 2002, at A03.

vacated all of the convictions of the original Central Park Jogger defendants.³⁴

In retrospect, perhaps it is not so surprising that all five Central Park Jogger defendants were erroneously convicted—in two separate jury trials—almost entirely on the basis of their confessions.³⁵ Although the Central Park Jogger case remains one of the most staggering miscarriages of justice in modern history, it is not unique. There are now over 170 DNA exonerations of convictions, approximately 20 to 25 percent of which resulted in whole or in part from police-induced false confessions.³⁶ Apart from the DNA exonerations, there are many more recently documented proven false confessions that have also led to wrongfully convicting the innocent.³⁷ When courts fail to dismiss these false confession cases at the pretrial stage, the overwhelming majority of defendants will be wrongfully convicted. In a 1998 study of sixty false confessions, 73 percent of the false confessors whose cases went to trial were wrongly convicted,³⁸ in a 2004 study of 125 false confessions, 81 percent of the false confessors whose cases went to trial were wrongfully convicted.³⁹ These results are consistent with the findings of mock jury studies in experimental psychology literature.⁴⁰

Confessions are among the most powerful forms of evidence introduced in a court of law, even when they are contradicted by other case evidence and contain significant errors. This is because police,

34. *People v. Wise*, 752 N.Y.S.2d 837 (Sup. Ct. 2002).

35. Richardson and McCray both made one written and one videotaped statement. Santana made two written statements, one of which was supplemented, and a videotaped statement. Wise made two written and two videotaped statements. Salaam made one oral statement that was neither signed nor recorded. Even though the defendants confessed their involvement in the attack, “none of them admitted actually raping the Central Park jogger, but each gave an account of events in which he made himself an accomplice to the crime.” Manhattan DA’s Report, *supra* note 20, ¶ 10. In essence, the people’s case boiled down to the five interrogation-induced statements against the defendants. At the time, the only physical evidence that appeared to link any of the defendants to the crime was three of nine hairs found on Richardson’s clothing that were microscopically examined and determined to be “consistent” with the jogger’s hair and one of twelve hairs found on Lopez’s clothing that was also determined to be “consistent” with the jogger’s hair. *Id.* ¶¶ 34-36. We know now that this so-called hair evidence turned out to be entirely false and misleading.

36. See Innocence Project, <http://www.innocenceproject.org/> (last visited Feb. 19, 2006).

37. See Drizin & Leo, *supra* note 2.

38. Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM L. & CRIMINOLOGY 429 (1998).

39. Drizin & Leo, *supra* note 2.

40. Saul Kassin & Katherine Neumann, *On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis*, 21 LAW & HUM. BEHAV. 469 (1997); Saul Kassin & Holly Sukel, *Coerced Confessions and the Jury: An Experimental Test of the “Harmless Error” Rule*, 21 LAW & HUM. BEHAV. 27 (1997).

prosecutors, judges, jurors, and the media all tend to view confessions as self-authenticating and see them as dispositive evidence of guilt.⁴¹ Juries tend to discount the possibility of false confessions as unthinkable, if not impossible. False confessions are viewed as contrary to common sense, irrational, and self-destructive. Moreover, police-induced false confessions tend to be facially persuasive because police make sure the confessor includes “elective statements” such as crime scene details, expressions of remorse, the confessor’s alleged motives for committing the offense, and acknowledgements of voluntariness.⁴²

Concerns with juror overreliance on confession evidence gave rise to a series of evolving rules designed to exclude unreliable confessions from being admitted at trial and prevent erroneous convictions. These doctrines, which developed both in the common law of evidence and under the Constitution, fell into two distinct sets of legal rules: the voluntariness rule and the corroboration rule. The voluntariness rule, which first developed at common law and is now a constitutional requirement, is premised in part on the idea that torture, threats of harm, promises of leniency, and other coercive police procedures used to obtain confessions could lead innocent suspects to confess.⁴³ By barring interrogations that involved such tactics, courts sought to reduce the possibility of wrongful convictions based on false confessions. The corroboration rule, by contrast, requires that confessions must be corroborated by independent evidence to be admissible. This rule was implemented to serve three primary purposes: to prevent false confessions, to provide incentives to law enforcement to seek additional evidence, and to protect against jurors’ tendency to view confession evidence uncritically (regardless of the circumstances under which a confession was given or the extent of corroboration).⁴⁴

In this Article, we point out the failures of the legal tests governing admissibility of confessions, tracing the historical development of these flawed standards. We propose a new standard that we believe reinvigorates the largely forgotten purpose of the rules—reliability of

41. Leo & Ofshe, *supra* note 38; Saul Kassin & Gisli Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 PSYCHOL. SCI. PUB. INT. 33 (2004).

42. Saul Kassin, *On the Psychology of Confessions: Does Innocence Put Innocents at Risk?*, 60 AM. PSYCHOL. 215, 223 (2005), available at <http://www.unc.edu/~kome/inls201/kassinPsychologyConfessions.pdf>.

43. Yale Kamisar, *What Is an “Involuntary” Confession? Some Comments on Inbau and Reid’s Criminal Interrogation and Confessions*, 17 RUTGERS L. REV. 728, 732 (1963); see also Welsh S. White, *What Is an Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001 (1998).

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

confession evidence—in part by requiring the electronic recording of custodial interrogations.

In Part II, we begin with a brief history of the voluntariness jurisprudence and the corroboration rules. We also analyze the Central Park Jogger case in light of both the voluntariness jurisprudence and corroboration requirements, demonstrating why these rules have failed to exclude unreliable confession evidence. We also pay homage to a prescient article written over twenty years ago by a third-year University of Wisconsin Law School student, Corey J. Ayling, published in this very law review,⁴⁵ and discuss how Ayling's analysis of the failings of the common law corroboration rules presaged the problem of false confessions in the post-DNA age.

In Part III, we analyze the social science research of the past twenty years and the nature and scope of the problem of false confessions in the post-DNA era.

In Part IV, relying on Ayling's work and the lessons learned from the post-Ayling developments, we argue that recording the entire custodial interrogation of suspects should be a prerequisite of any new legal test inquiring into the reliability of a confession. We also urge judges to hold pretrial reliability hearings separate from pretrial voluntariness hearings and propose a new standard for judges to apply when assessing the reliability of confessions. 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 the 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 United States Supreme Court decisions like *Daubert*⁴⁶ and its progeny (most notably *Joiner*⁴⁷ and *Kumho Tire*⁴⁸)—as gatekeepers charged with the responsibility of excluding unreliable evidence.⁴⁹ The

45. *Id.*

46. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

47. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

48. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997).

49. Perhaps the greatest legacy of the *Daubert* trilogy of cases is that it forever recast the role of trial judges as proactive gatekeepers of unreliable evidence. Although historically judges had the power to keep out evidence that was not relevant—or even if relevant, was nevertheless more prejudicial than probative—they were inclined to leave it to the jury to sort out. But with these three decisions, the Supreme Court instructed trial courts hence forward to assume the role of “gatekeepers” and actively screen all expert testimony for relevancy and reliability before permitting it to go to the jury. After

test we propose in the final section of this Article is consistent with the renewed emphasis on the importance of admitting only sufficiently relevant and reliable evidence before a jury at trial.⁵⁰

Part V is a brief conclusion.

II. TWO DOCTRINES OF CONFESSION ADMISSIBILITY

The common law of evidence developed two primary means of preventing convictions based on false confessions: the voluntariness and corroboration rules. Both act as exclusionary rules, respectively holding that neither an involuntary nor an uncorroborated confession may be admitted against a defendant in a criminal trial. Although these two distinct doctrines have been referred to as “first cousins” in the common law of evidence,⁵¹ they work in entirely different ways and have developed in different directions. Significantly, the voluntariness rule took on a constitutional role concerned with the relationship between citizen and state rather than its original goal of excluding unreliable confession evidence. In contrast, the corroboration rule remained true to its roots, but has been ineffective at accomplishing its goal of preventing unreliable confession evidence from causing wrongful convictions.

A. *The Voluntariness Rule*

For the better part of the past century, U.S. Supreme Court jurisprudence has governed the admissibility of confessions at trial, but the constitutional rule against the use of involuntary confessions

Daubert was decided, there was a split in the circuits as to whether the “gatekeeping” function was limited to testimony that relied on scientific principles as opposed to expert testimony that relied on a witness’s skill or experience based on observation. A unanimous court in *U.S. v. Kumho Tire* left no doubt that the court’s gatekeeping function extends to all expert testimony. 526 U.S. 137 (1999). A threshold showing of reliability, the Court reasoned, is equally important if the expert’s testimony is based on “technical” or “other specialized knowledge” as when it rests on hard science. *Id.* at 147; *see* FED. R. EVID. 702. The Court emphasized that the trial judge functioning as a gatekeeper must “make certain that an expert whether basing testimony upon professional studies or personal experience, employs in the court room the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.” *Kumho Tire*, 526 U.S. at 152.

50. The detective, schooled in professional methods of interrogation such as the “Reid Method,” vouching for the validity of a confession secured from the suspect, is no less relying on his or her professional experience and training than was the tire specialist in *Kumho Tire*. *See* 526 U.S. at 137.

51. *See* Emanuel Margolis, *Corpus Delicti: State of the Disunion*, 2 SUFFOLK U. L. REV. 44, 46 (1968).

developed only after a common law rule of evidence took firm hold in both England and the United States.⁵²

1. COMMON LAW VOLUNTARINESS

Until the late eighteenth century, out-of-court confessions were entirely admissible against criminal defendants, even when they were the involuntary product of coercion.⁵³ In 1783, recognizing the inherent untrustworthiness of involuntary confessions, *The King v. Warickshall*⁵⁴ established a rule that still permeates English and American evidence law to this day:

Confessions are received in evidence, or rejected as inadmissible, under a consideration whether they are or are not intitled [sic] to credit. A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt . . . but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape . . . that no credit ought to be given to it; and therefore it is rejected.⁵⁵

Warickshall established a clear exclusionary rule for involuntary confessions, and it did so based entirely on the broader goal of excluding unreliable evidence.⁵⁶ The doctrine took hold and many legal treatises of the late eighteenth and mid-nineteenth centuries recognized the rule barring involuntary confessions, usually citing the need to ensure reliability of confessions as the main justification.⁵⁷

In 1804, *Commonwealth v. Chabbock*⁵⁸ was the first American case to address the issue. There, the Massachusetts court held that a confession given after “promise of favor” was inadmissible.⁵⁹ Three years later, in *People v. Rankin*,⁶⁰ a New York court excluded a

52. See 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, 166-67 (1992).

53. See Steven Penney, *Theories of Confession Admissibility: A Historical View*, 25 AM. J. CRIM. L. 309, 314-20 (1998). Professor Penney concludes, “Given the myriad ways in which early modern Anglo-American criminal procedure compelled incriminating testimony from the accused, it is not surprising that confessions were considered admissible no matter how they were obtained.” *Id.* at 320.

54. 168 Eng. Rep. 234, 234-35 (K.B. 1783).

55. *Id.*

56. *Id.*

57. See Herman, *supra* note 52, at 160.

58. 1 Mass. (1 Will.) 144 (1804).

59. *Id.*

60. 2 Wheeler Crim. Cas. 467 (N.Y. Oyer & Term. 1807).

confession coerced through a threat of hanging.⁶¹ These cases were quickly followed by others and a common law rule against the use of involuntary confessions elicited through promises or threats developed in the United States by 1810.⁶²

In 1884, the U.S. Supreme Court decided its first case concerning the admissibility of a confession in *Hopt v. Utah*.⁶³ There, the Court cited *Warickshall* approvingly for the first time and went on to apply the rule from that case:

[T]he presumption upon which weight is given to such evidence . . . ceases when the confession appears to have been made either in consequence of inducements of a temporal nature, held out by one in authority, touching the charge preferred, or because of a threat or promise by or in the presence of such person, which, operating upon the fears or hopes of the accused, in reference to the charge, deprives him of that freedom of will or self-control essential to make his confession voluntary within the meaning of the law.⁶⁴

In the following years, the Supreme Court would similarly decide three more cases on the same grounds,⁶⁵ each based on the common law of evidence as it had developed from *Warickshall*.

2. CONSTITUTIONAL VOLUNTARINESS

The constitutional protection against involuntary confessions is based upon both the Fifth Amendment's privilege against compelled self-incrimination⁶⁶ and the Fourteenth Amendment's due process

61. *Id.* at 469.

62. *See* Herman, *supra* note 52, at 166-67.

63. 110 U.S. 574 (1884).

64. *Id.* at 585. Applying the test, the Court found that the defendant's confession was voluntary, and thus admissible. *Id.* at 587.

65. *See* *Sparf v. United States*, 156 U.S. 51, 55 (1895) (“[C]onfinement or imprisonment is not in itself sufficient to justify the exclusion of a confession.”); *Pierce v. United States*, 160 U.S. 355, 357 (1896); *Wilson v. United States*, 162 U.S. 613, 623-24 (1896).

66. *See* *Bram v. United States*, 168 U.S. 532, 542 (1897).

In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person “shall be compelled in any criminal case to be a witness against himself”

Id.

clause.⁶⁷ Perhaps not surprisingly, a number of justifications underlie the constitutional voluntariness rule.

a. History of Nemo Tenetur

The privilege against compelled self-incrimination is based upon the Latin maxim *nemo tenetur seipsum prodere*, which translates to “no one is bound to inform against himself.”⁶⁸ It appears to have originated in seventeenth century England where ecclesiastical courts often forced defendants to swear an official oath and then proceeded to question those defendants about their own wrongdoings.⁶⁹ The primary justification for *nemo tenetur* differed from that of the evidentiary voluntariness rule discussed above; rather than the reliability of evidence, *nemo tenetur* was based on the relationship between the citizen and the state and the protection of individual free will from state intrusion.⁷⁰

Medieval Christian theology recognized two justifications for the rule of *nemo tenetur*.⁷¹ The first was that all people had a natural duty of self-preservation, which applied even to the criminal defendant.⁷² To force a person to admit his guilt, thus ensuring his fate, directly contradicts this duty.⁷³ The second rationale was that compelled self-incrimination—at least when under oath—often presented the accused with the profound difficulty of having to choose between punishment on Earth and punishment in the afterlife.⁷⁴

67. See *Brown v. Mississippi*, 297 U.S. 278, 286 (1936). *Brown* was based upon due process grounds, which require

“that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.” It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process.

Id. (citing *Hebert v. Louisiana*, 272 U.S. 312, 316 (1926)).

68. See *Penney*, *supra* note 53, at 315.

69. L. LEVY, *ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION* 216-18 (1968). But see generally R. H. Helmholz, *Origins of the Privilege Against Self-Incrimination: The Role of the European Ius Commune*, 65 N.Y.U. L. REV. 962 (1990) (arguing that Levy’s explanation fails to account for the earlier development of *nemo tenetur* through *ius commune*, the continental European body of law merging Roman and canon law).

70. See *Penney*, *supra* note 53, at 315. But see *Herman*, *supra* note 52, at 163 (pointing out that “the maxim served the additional function of avoiding unreliable evidence”).

71. See *Penney*, *supra* note 53, at 315.

72. *Id.*

73. *Id.*

74. *Id.* For example, many believed that admitting one’s guilt might draw severe earthly consequences, whereas lying about innocence might not make God happy

Nemo tenetur was adopted in the colonies, and eventually incorporated into the Fifth Amendment to the U.S. Constitution.⁷⁵ But in the United States, as in England, the early doctrine had little practical impact because courts continued to employ a variety of methods to force criminal defendants to testify.⁷⁶ Moreover, unlike the common law voluntariness rule, nemo tenetur was unconcerned with incriminating statements made outside of court.⁷⁷ It sought only to prevent compelled self-incrimination under oath at trial, and seemed ineffectual even at accomplishing that goal.⁷⁸

The nineteenth century brought with it the widespread use of criminal defense counsel, who played a large role in expanding the protection offered by the privilege against compelled self-incrimination.⁷⁹ Then, in 1897, the doctrine changed dramatically as a result of *Bram v. United States*.⁸⁰

b. An Unlikely Mix: From Nemo Tenetur to the Fifth Amendment Privilege Against Self-Incrimination

In *Bram v. United States*, the U.S. Supreme Court linked the nemo tenetur doctrine to an out-of-court confession for the first time.⁸¹ The Court stated that in federal cases, “wherever a question arises whether [an out-of-court] confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person ‘shall be compelled in any criminal case to be a witness against himself.’”⁸²

Interestingly, however, *Bram* also discussed the *Warickshall* reliability rationale. The Court stated its understanding that “the generic language of the [Fifth] Amendment was but a crystallization of the doctrine as to confessions, well settled when the Amendment was

with them. *Id.* In other cases, an admission of guilt may have averted torture even though a false admission of guilt may have been seen as warranting punishment in the afterlife. *Id.*

75. See Herman, *supra* note 52, at 162-64. The Fifth Amendment states that “No person . . . shall be compelled in any criminal case to be a witness against himself.” U.S. CONST. amend. V.

76. See Penney, *supra* note 53, at 319.

77. See *id.* But see Herman, *supra* note 52, at 161 (“[T]he cases and treatises up to 1850 do not . . . address the question of whether nemo tenetur is applicable to police interrogation.”).

78. See Penney, *supra* note 53, at 316-19. For example, in light of the strong inference of guilt often placed upon silent defendants, “to rely on the privilege against self-incrimination was to commit figurative, and in capital cases actual, suicide.” *Id.*

79. See *id.* at 317.

80. 168 U.S. 532 (1897).

81. *Id.* at 544-45.

82. *Id.* at 542.

adopted.”⁸³ Thus, the court appeared to ground its holding in both the idea of reliability⁸⁴ and the idea of individual freedom.⁸⁵ But contrary to the Court’s language, “the doctrine as to confessions,” which excluded involuntary confessions, had nothing to do with *nemo tenetur*; it was grounded in the reliability rationale. As a result, *Bram* provoked considerable confusion and criticism by courts and academics alike, including most notably John Henry Wigmore, who lamented, “That the two rules should be supposed to have something of a common principle or spirit is not unnatural error. But that history should be rashly tampered with by asserting any common origin is inexcusable.”⁸⁶ Nevertheless, it was clear that *Bram* had combined the two voluntariness doctrines, apparently solidifying a constitutional protection under both the individual freedom and reliability rationales.⁸⁷

c. Due Process Voluntariness: The Fourteenth Amendment and Confessions

In the 1936 case of *Brown v. Mississippi*, three black tenant farmers who had been accused of murdering a white farmer were whipped, pummeled, and tortured until they provided detailed confessions.⁸⁸ The Supreme Court unanimously reversed the convictions of all three defendants.⁸⁹ The Court established the Fourteenth Amendment’s due process clause as the constitutional test for assessing the admissibility of confessions in state cases.⁹⁰ In addition to common law standards, trial judges would now have to apply a federal due process standard when evaluating the admissibility of confession evidence.

At first, the rationale behind *Brown* appeared to be that involuntary confessions are inherently less trustworthy, violating constitutionally protected principles of fundamental fairness.⁹¹ In subsequent cases

83. *Id.* at 543.

84. *Id.* at 541-44.

85. *Id.* at 544-45.

86. 3 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 823, at 337-38 n.2 (James H. Chadbourne ed., 1970).

87. *Bram*, 168 U.S. at 541-45.

88. 297 U.S. 278, 287 (1936).

89. *Id.*

90. *Id.*

91. See Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 112 (1997). This rule comports with Wigmore’s statement that “[t]he principle . . . upon which a confession may be excluded is that it is, under certain conditions, testimonially untrustworthy. . . . This theory . . . seems to have been generally accepted as the underlying and fundamental principle since the first introduction of any doctrine about the inadmissibility of confessions.” WIGMORE, *supra* note 86, § 822, at 329. Wigmore argued that confessions should not be excluded because of any illegality in the methods

however, such as *Lisenba v. California*,⁹² the Court made clear that trustworthiness was not the only issue. “[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, whether true or false.”⁹³ Thus, the Court sought to deter oppressive and unfair police interrogation methods, not simply to guard against erroneous convictions or protect the free will of defendants.⁹⁴

As these cases suggest, the Supreme Court relied on different and sometimes conflicting rationales, and the due process voluntariness decisions evolved throughout the twentieth century.⁹⁵ Initially, the dominant and preferred rationale was to promote reliability in the trial process by excluding confessions that were the product of police coercion or improper influence because they were likely to be false or untrustworthy.⁹⁶ However, the 1930s and 1940s saw the ascendance of another idea—that courts should only admit confessions into evidence that were the product of a free and independent will.⁹⁷ A third but subordinate rationale underlying the voluntariness test was that confessions elicited through fundamentally unfair police methods should be excluded so as to deter offensive police behavior, regardless of whether the suspect confessed involuntarily or his statements were likely to be trustworthy.⁹⁸ These underlying purposes—reliability, protecting free will, and fundamental fairness—roughly correspond to the three goals of the adversary system: promoting truth-finding, protecting individual rights, and checking state power.

used in obtaining them or because of any connection with the privilege against self-incrimination. *Id.* § 823, at 337. In his view, “[a] confession is not excluded because of any breach of confidence or of good faith which may thereby be involved,” “because of any illegality in the method of obtaining it,” or “because of any connection with the privilege against self-incrimination.” *Id.*

92. 314 U.S. 219 (1941).

93. *Id.* at 236.

94. Thus, in *Ashcraft v. Tennessee*, 322 U.S. 143 (1944), where a suspect was interrogated incommunicado continuously for thirty-six hours, the Court ruled that the defendant’s confession was involuntary on the principle that the law must protect a suspect’s ability to make free choices in the face of sustained police pressure. In *Malinski v. New York*, 324 U.S. 401 (1945), the Court excluded the confession of a defendant who had been stripped and kept naked for three before being provided a blanket, and who confessed after seven hours of intermittent and mild questioning.

95. White, *supra* note 43.

96. Kamisar, *supra* note 43, at 742-43 (“[W]hatever the *current* meaning of the elusive terms ‘voluntary’ and ‘involuntary’ confessions, *originally* the terminology was a *substitute* for the ‘trustworthiness’ or ‘reliability’ test.”); see also Penney, *supra* note 53, at 332-61.

97. Penney, *supra* note 53, at 332-61.

98. *Id.* at 339.

While the focus shifted away from the reliability rationale,⁹⁹ it was not always clear which of the three justifications the Court would rely on when evaluating a confession's voluntariness.¹⁰⁰ Nevertheless, the Court did appear to designate certain police interrogation methods—including physical force, threats of harm or punishment, lengthy or incommunicado questioning, solitary confinement, denial of food or sleep, and promises of leniency—as presumptively coercive and therefore unconstitutional.¹⁰¹ The Court also considered the individual suspect's personal characteristics, such as age, intelligence, education, mental stability, and prior contact with law enforcement, in determining whether a confession was voluntary.¹⁰² The template of the due process voluntariness test became a balancing analysis of whether the pressures and police techniques of the interrogation, as they interacted with the interrogated suspect's personal susceptibilities, were sufficient to render his confession involuntary.¹⁰³ However, there is no litmus test, and courts must still determine a confession's voluntariness on a case-by-case basis.¹⁰⁴

The due process voluntariness test continued to evolve in the 1950s and 1960s as the Supreme Court began to recognize that an entirely false or unreliable confession could, logically, be considered voluntary and thus admissible into evidence against a criminal defendant.¹⁰⁵ In *Rogers*

99. See, e.g., Charles T. McCormick, *Some Problems and Developments in the Admissibility of Confessions*, 24 TEX. L. REV. 239, 245 (1946) (arguing that “the predominant motive of the courts has been that of protecting the citizen against the violation of his *privileges* of immunity from bodily manhandling by the police, and from the other undue pressures . . . of the ‘third degree’”); Francis A. Allen, *Due Process and State Criminal Procedures: Another Look*, 48 NW. U. L. REV. 16, 19 (1953) (“[It is] doubtful that the ‘untrustworthiness’ rationale provides an adequate explanation for the confession rule. Thus, generally, the ‘coerced’ confession in the criminal case is deemed inadmissible despite the presence of corroborating evidence strongly tending to establish the reliability of the confession.”). Although in *Rogers v. Richmond* the Court indicated that a confession's admissibility should be determined “with complete disregard of whether or not petitioner in fact spoke the truth,” 365 U.S. 534, 544 (1961), two cases decided around the same time made clear that the Court was only referring to the admission of involuntary, yet trustworthy confessions, and that reliability remained a purpose of the voluntariness rule. See *Jackson v. Denno*, 378 U.S. 368 (1964); *Blackburn v. Alabama*, 361 U.S. 199 (1960).

100. Penney, *supra* note 53, at 337-61.

101. WELSH S. WHITE, *MIRANDA'S WANING PROTECTIONS* 46 (2001).

102. *Id.* at 45.

103. Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 867-69 (1981).

104. Penney, *supra* note 53, at 353 (“The task of the Court is to identify the circumstances in which the defendant's will is in fact overborne. Unfortunately, there is no litmus test for determining this question. In each case the relevant factors must be weighed anew.”).

105. Penney, *supra* note 53, at 341-61.

v. Richmond,¹⁰⁶ the Court held that a confession's admissibility must be determined by whether the police interrogation methods were 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."¹⁰⁷ Similarly, the Court's other confession cases during this era focused on whether the interrogation exerted sufficient pressure on a suspect to overbear his independent free will or capacity for autonomous choice.¹⁰⁸ While the Court displayed a concern for deterring improper police interrogation practices, the "overbearing of the will" standard became the primary consideration of the modern due process voluntariness test.¹⁰⁹

d. Miranda and Reliability: A Controversial Test for the Admissibility of Confessions

In the landmark case of *Miranda v. Arizona*,¹¹⁰ the Supreme Court held that statements given as a result of custodial interrogation are only admissible if the defendant was made aware of certain constitutional rights and knowingly waived those rights prior to questioning.¹¹¹ In the absence of a knowing waiver of rights, confessions violate the Fifth Amendment privilege against self-incrimination and are excluded whether reliable or not.¹¹²

Miranda provoked widespread criticism, not only by police and prosecutors,¹¹³ but also by academics, who argued that the case improperly interpreted the Fifth Amendment and earlier Supreme Court cases.¹¹⁴ Significantly, *Miranda* heavily relied upon *Bram*,¹¹⁵ despite the dissenting justices' argument that *Bram* had been incorrect in adopting both the individual freedom and reliability justifications for the

106. *Rogers v. Richmond*, 365 U.S. 534 (1961).

107. *Id.* at 543-44.

108. Penney, *supra* note 53, at 350-61.

109. *Id.*

110. 384 U.S. 436 (1966).

111. *Id.* at 444. Specifically, the Court held that:

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

Id.

112. *Id.* at 460-61.

113. See Paul G. Cassell, *The Statute That Time Forgot: 18 U.S.C. § 3501 and the Overhauling of Miranda*, 85 IOWA L. REV. 175, 194 (1999).

114. See JOSEPH D. GRANO, CONFESSIONS, TRUTH, AND THE LAW 119-43 (1993).

115. *Miranda*, 384 U.S. at 461.

voluntariness rule.¹¹⁶ Whether or not it was rightly decided, *Miranda* turned state courts' attention toward a new, easily administrable test of admissibility for confession evidence.¹¹⁷

The *Miranda* procedures (both the warnings and the exclusionary rule) are intended to protect the suspect's rational and voluntary decision-making ability during the interrogation process, but also, by implication, the reliability of a suspect's confession. Indeed, the Supreme Court has subsequently referred to *Miranda* as a decision that was designed to exclude unreliable statements.¹¹⁸ Yet in practice, *Miranda* offers little or no protection against eliciting false or unreliable confessions from innocent suspects or their admission into evidence.¹¹⁹ This is true for at least two reasons. First, the vast majority of suspects—approximately 80 percent or more—waive their *Miranda* rights and willingly submit to police interrogation.¹²⁰ Moreover, innocent suspects appear more likely to waive their rights than guilty ones.¹²¹ Second, once the interrogator recites the fourfold warnings and obtains a waiver, any protection that *Miranda* might have offered against the possibility of false confessions essentially evaporates. Once the rights have been issued and waived, *Miranda* does not restrict deceptive or suggestive police tactics, manipulative interrogation strategies, hostile or overbearing questioning styles, lengthy confinement, or any of the inherently stressful conditions of modern accusatorial interrogation that may lead the innocent to confess. Once police issue warnings and obtain a waiver,¹²² *Miranda* is virtually irrelevant to the subsequent interrogation process or as a safeguard against false confessions.¹²³ Not

116. *Id.*

117. *Id.* at 444.

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

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

120. Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266 (1996) [hereinafter, Leo, *Inside*]; Paul G. Cassell & Bret Hayman, *Police Interrogation in the 1990s: An Empirical Assessment of the Effects of Miranda*, 43 UCLA L. REV. 839, 859 (1996).

121. Kassin, *supra* note 42. Those suspects least likely to give a false confession—individuals who have prior criminal records and have been hardened by their earlier exposure to police and the criminal justice system—are most likely to invoke their *Miranda* rights to terminate police questioning. Conversely, those suspects who are most likely to give false confessions—individuals who do not have criminal records and are more vulnerable to suggestion—are least likely to invoke their *Miranda* rights to terminate police questioning. Leo, *Miranda*, *supra* note 119.

122. Very few suspects invoke their *Miranda* rights after first waiving them. Leo, *Inside*, *supra* note 120.

123. Leo, *Miranda*, *supra* note 119; Saul M. Kassin & Rebecca J. Norwick, *Why People Waive Their Miranda Rights: The Power of Innocence*, 28 LAW & HUM. BEHAV. 211 (2004).

surprisingly, in virtually all of the documented false confessions cases, the innocent suspects either explicitly or implicitly¹²⁴ waived their *Miranda* rights.¹²⁵

Miranda may have even undermined any protection the law might otherwise have offered because it has effectively displaced the due process voluntariness standard as the primary test of a confession's admissibility. The courts' analyses have shifted from the voluntariness of a confession to the voluntariness of the *Miranda* waiver.¹²⁶ Although the *Miranda* holding is logically independent of the due process voluntariness standard or any corroboration requirements, trial judges almost always declare a confession voluntary if the *Miranda* procedures appear to have been properly followed.¹²⁷ To put it differently, by focusing on the proper reading and waiver of the *Miranda* warnings, trial judges often appear to avoid the more difficult task of analyzing whether police pressures have overborne the suspect's decision-making capacity or whether the confession is, in fact, a reliable piece of evidence. Regrettably, neither the Fifth Amendment privilege against self-incrimination nor the prophylactic *Miranda* rules offer any significant protection against the elicitation or admission of false and unreliable confessions.

e. Colorado v. Connelly and the Death Knell of the Reliability Rationale for the Voluntariness Rule

Any remaining question about whether the Constitution is concerned with the reliability justification for the voluntariness rule was put to rest in 1986 in *Colorado v. Connelly*.¹²⁸ In that case, Connelly approached a police officer and stated that he had murdered somebody and wanted to talk about it.¹²⁹ The officer quickly read Connelly his *Miranda* rights, which Connelly waived before making further incriminating statements.¹³⁰ Later, psychiatric examinations showed that

124. An implicit waiver occurs when police interrogators read the suspect the fourfold *Miranda* rights to silence, notification, and appointed counsel, but do not ask whether the suspect understands these rights or wishes to act on them. See Richard A. Leo, *Questioning the Relevance of Miranda in the Twenty-First Century*, 99 MICH. L. REV. 1000, 1017-18 (2001).

125. See Leo & Ofshe, *supra* note 38 and Leo, *supra* note 124 for an explanation of implicit waiver.

126. Leo, *supra* note 124, at 1025-26.

127. *Id.*

128. 479 U.S. 157 (1986).

129. *Id.* at 160.

130. *Id.*

Connelly suffered from chronic schizophrenia and was following the “voice of God” in confessing.¹³¹

The Supreme Court ruled Connelly’s confession admissible, despite its apparent untrustworthiness,¹³² because there was no evidence of police coercion.¹³³ The Court explicitly recognized, “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 Process Clause of the Fourteenth Amendment.”¹³⁴

Thus, the Court made clear that the Constitution is not concerned with unreliable confession evidence, and does not require state courts to undertake a reliability analysis prior to admitting a confession at trial.¹³⁵ Moreover, it drew an unambiguous line between the definitions of voluntariness and reliability, a line that had perhaps been blurred since *Bram*. The problem, of course, was that the Constitution had taken the role of stepfather to the common law voluntariness doctrine. With *Connelly*, the Court abandoned the reliability rationale upon which that doctrine originally had been premised.

3. VOLUNTARINESS IS NOT ENOUGH: THE CENTRAL PARK JOGGER CASE

The Central Park Jogger case dramatically illustrates the failure of the voluntariness test to weed out unreliable confession evidence. Realizing that they had little chance of being acquitted if jurors viewed their videotaped confessions, all of the Central Park Jogger defendants filed pretrial motions to suppress their confessions.¹³⁶ The defendants made a number of arguments objecting to the voluntariness of their confessions. All were rejected.¹³⁷

Richardson, Santana, and McCray each raised arguments questioning the way their *Miranda* rights were given to them and the way the police manipulated their parents into pressuring their children to waive their rights and confess. Under New York law, the fifteen-year-

131. *Id.* at 161.

132. The trial court had excluded the confession, and the Colorado Supreme Court affirmed, based on the fact that the confession “was not the product of a rational intellect and a free will notwithstanding the fact that this statement was neither solicited by the officer nor was the result of any form of police action.” *People v. Connelly*, 702 P.2d 722, 729 (Colo. 1985).

133. *Id.* at 167.

134. *Id.*

135. *Id.*

136. SULLIVAN, *supra* note 2, at 77.

137. *Id.* at 77-94; *see also* Barbara Ross & Robert Ingrassia, *Judge Gave OK to Jogger Confessions*, N.Y. DAILY NEWS, Dec. 1, 2002, at 1.

old boys were entitled to have their parents with them during the interrogation process.¹³⁸ Salaam wanted his statements suppressed because his confession occurred before his mother was permitted to see him.¹³⁹ The court rejected all of these arguments, finding that the mere fact that the police “Mirandized” most of the boys in the presence of their parents indicated that police took “special care” in interrogating them.¹⁴⁰ In Salaam’s case, the court blamed him for deliberately misleading the police about his age—he claimed he was sixteen instead of fifteen—and refused to allow him to derive a benefit from his falsehoods. Regarding claims of police coercion, Judge Galligan sided with the police, finding that the parents’ claims that the police misled them were not credible.¹⁴¹

Wise, the only defendant who was sixteen and did not have a right to parental presence, raised more traditional voluntariness arguments, claiming that police used or threatened him with physical force, deprived him of food and sleep, and promised him that he would be released if he implicated himself in the assault on the jogger.¹⁴² Judge Galligan quickly dispensed with these claims, finding that Wise slept, ate, and was given milk when he requested it.¹⁴³ Judge Galligan noted that Wise’s behavior in the cell at the Twenty-fourth Precinct, particular his laughing and joking with his codefendants, belied any claims that he was under duress.¹⁴⁴ Judge Galligan found that Wise’s claims that he was promised leniency were similarly not credible.¹⁴⁵

Whether the police actually coerced the boys into confessing to the attack on the jogger and deceived their parents could not be objectively proven or disproven because the detectives failed to record the entire interrogation process on camera. Yet it is clear that most of the arguments raised by the boys had little to do with the reliability of their confessions. Whether a parent was present or whether *Miranda* rights were properly administered says very little about whether the boys’ confessions were reliable. Moreover, while Wise’s claims were certainly related to reliability concerns—threats of harm and promises of leniency increase the risk of false confessions—they did not directly address the truth or falsity of his confessions.

138. SULLIVAN, *supra* note 2, at 86-87.

139. *Id.* at 86-89.

140. *Id.* at 92-94.

141. *Id.*

142. *Id.* at 80-94.

143. *Id.*

144. *Id.*

145. *Id.* at 80-82, 94.

B. *The Corroboration Rule*

The corroboration rule developed at common law to protect against convictions based only on false confessions. As the U.S. Supreme Court stated in *Opper v. United States*,¹⁴⁶ it exists because,

[i]n our country the doubt persists that the zeal of the agencies of prosecution to protect the peace, the self-interest of the accomplice, the maliciousness of an enemy or the aberration or weakness of the accused under the strain of suspicion may tinge or warp the facts of the confession.¹⁴⁷

The corroboration rule requires that additional evidence, other than the confession, exists to support the crime. It encompasses both the *corpus delicti* rule (requiring evidence only of the crime itself) and the trustworthiness standard (requiring independent evidence supporting the confession).

1. HISTORY AND DEVELOPMENT OF THE CORPUS DELICTI RULE

The corpus delicti rule developed from the universally established common law principle that an out-of-court statement, such as a confession, is not readily admissible.¹⁴⁸ The orthodox version of the rule quite literally requires corroboration of the corpus delicti, or the body of the crime, but the term may more generally refer to independent evidence that the charged crime was committed.¹⁴⁹ Under the rule, independent evidence must corroborate that the crime occurred; it must “touch or concern[] the corpus delicti.”¹⁵⁰

The roots of the rule date back to seventeenth century England, when *Perry’s Case*¹⁵¹ demonstrated the potential danger of uncorroborated confessions:

One day in 1660, an elderly Gloucestershire man named William Harrison disappeared as he made his rounds to collect rents for his employer. After some of Harrison’s personal possessions were found on the highway, suspicion fell upon his

146. 348 U.S. 84 (1954).

147. *Id.* at 89-90.

148. *See Opper*, 348 U.S. at 90 (comparing out-of-court statements to hearsay because neither have the “compulsion of the oath nor the test of cross-examination”).

149. *See State v. Parker*, 337 S.E.2d 487, 491 (N.C. 1985) (citing *People v. Cobb*, 287 P.2d 752 (Cal. 1955) and *People v. Willingham*, 432 N.E.2d 861 (Ill. 1982)).

150. *Parker*, 337 S.E.2d at 490 (quoting *Lemons v. State*, 433 A.2d 1179, 1182 (Md. App. 1981)).

151. 14 HOWELL ST. TR. 1312 (1660).

servant, John Perry. Taken into custody and repeatedly interrogated by a justice of the peace, Perry initially denied any wrongdoing. As the interrogations continued, however, Perry eventually changed his story and claimed that he, his mother, and his brother had robbed and murdered Harrison and that they had dumped the body in a swamp. Even though searchers failed to find Harrison's body in the swamp and even though Perry's mother and brother vigorously denied Perry's story, Perry, his mother, and his brother were convicted and executed entirely on the strength of Perry's confession. Some years after the unfortunate Perrys had been executed, Harrison returned home to Gloucestershire. In a letter to a local knight, Harrison explained that he had been kidnapped, shipped to Turkey, and sold into slavery, and that he had eventually escaped and returned to England.¹⁵²

While *Perry's Case* provided the impetus for a corroboration rule,¹⁵³ English courts were reluctant to adopt the rule and never quite absorbed it into the common law.¹⁵⁴ One court even described it as a mere "rule of judicial practice," apparently unworthy of a place in the law of

152. David A. Moran, *In Defense of the Corpus Delicti Rule*, 64 OHIO ST. L.J. 817, 828 (2003) (citing 14 HOWELL ST. TR. at 1312-22 (1660)).

153. See, e.g., *id.* at 828-29; Ayling, *supra* note 44, at 1126; J. Terry Schwartz, *California's Corpus Delicti Rule: The Case for Review and Clarification*, 20 UCLA L. REV. 1055, 1060-61 (1973); Rollin M. Perkins, *The Corpus Delicti of Murder*, 48 VA. L. REV. 173, 174-75 (1962). This understanding is not universal, however. In his 1678 treatise, *Pleas of the Crown*, Matthew Hale declared, "I would never convict any person of murder or manslaughter, unless the fact were proven to be done, or at least the body found dead." 2 MATTHEW HALE, PLEAS OF THE CROWN 290 (1678). Thus, Hale is also cited as a source of the corpus delicti rule. See, e.g., 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 n.70 (1993). Hale's formulation is dissimilar from the corpus delicti rule, however. Whereas the corpus delicti rule requires independent proof of the "body of the crime," Hale asks only for "the body." Furthermore, whereas the corpus delicti rule applies only in the context of confession evidence, neither of the cases on which Hale relied involved a confession.

In other words, Hale did not actually propose the *corpus delicti* rule, and the *corpus delicti* rule would not have affected the cases he mentioned. What Hale did propose was a rule requiring the prosecution to produce the victim's body in a homicide case, a requirement that the common law has never accepted.

Moran, *supra* note 152, at 828 (citing Perkins, *supra*, at 182-83). Curiously, Hale did not discuss *Perry's Case*, which preceded his treatise by several years.

154. See *Opper v. United States*, 348 U.S. 84, 89 (1954) (noting that the English courts were "hesitant" to incorporate the rule fully into the common law).

evidence.¹⁵⁵ The English corroboration rule applies today only in homicide cases and is not universally followed.¹⁵⁶

Notwithstanding its irresolute beginnings, the corroboration doctrine emerged quickly in American jurisdictions. The first court to recognize the rule appears to have been the North Carolina Supreme Court, which described it in 1797 in *State v. Long*:¹⁵⁷ “Where A. makes a confession, and relates circumstances which are proven to have actually existed as related in the confession, that may be evidence sufficient for a jury to proceed upon to convict the prisoner; but a naked confession, unattended with circumstances, is not sufficient.”¹⁵⁸ The short per curiam opinion cited no authority, but relied on the observation that “[a] confession, from the very nature of the thing, is a very doubtful species of evidence, and [is] to be received with great caution.”¹⁵⁹ *State v. Long* was a relatively obscure case—the defendant had been accused of horse-stealing¹⁶⁰—but it was not long before a much more sensational case shed light upon the need for a corroboration rule.¹⁶¹ One commentator called it an “American version of *Perry’s Case*.”¹⁶²

In 1819, brothers Jesse and Stephen Boorn were arrested for the murder of their brother-in-law, Russel Colvin, who had disappeared from his Manchester, Vermont home seven years earlier.¹⁶³ After his brother implicated him, and after he had been threatened with a death sentence if he did not come clean, Stephen eventually confessed.¹⁶⁴ Both brothers were tried, convicted, and sentenced to hang.¹⁶⁵

Stephen’s attorney quickly placed a notice in a New York newspaper, seeking information about the long lost Russel Colvin.¹⁶⁶ As luck would have it, he got a response from a man in New York who

155. *Queen v. Unkles*, 8 Ir. R.-C.L. 50 (1873) (cited in Note, *Proof of the Corpus Delicti Aliunde the Defendant’s Confession*, 103 U. PA. L. REV. 638, 639 (1955)).

156. See JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2070, at 510 (James H. Chadbourn ed., 1978); *Oppen*, 348 U.S. at 89; Ayling, *supra* note 44, at 1126; Moran, *supra* note 152, at 831.

157. 2 N.C. (1 Hayw.) 455 (1797) (per curiam).

158. *Id.*

159. *Id.* at 456.

160. *Id.* at 455.

161. Moran, *supra* note 152, at 829 (citing *The Trial of Stephen and Jesse Boorn*, 6 AM. ST. TR. 73, 73-75 (1819)); see also ROB WARDEN, WILKIE COLLINS’S THE DEAD ALIVE: THE NOVEL, THE CASE, AND WRONGFUL CONVICTION (2005).

162. Moran, *supra* note 152, at 829.

163. *Id.* (citing *Boorn*, 6 AM. ST. TRIALS at 73-75).

164. *Id.* at 829-30.

165. *Id.* at 830. The Vermont Legislature commuted Jesse’s sentence to life in prison. *Id.*

166. *Id.*

claimed to have met a gentleman fitting Colvin's description.¹⁶⁷ When the likeness of Russel Colvin was found—allegedly deranged and insisting that he was somebody else—he was brought to Vermont where he was immediately recognized.¹⁶⁸ Stephen Boorn came within days of his scheduled execution before the Vermont Supreme Court reluctantly granted a new trial.¹⁶⁹ The prosecution decided not to pursue the case, and the Boorn brothers were vindicated.¹⁷⁰

This infamous case garnered widespread attention, including that of Professor Simon Greenleaf. In his influential evidence treatise, Greenleaf relied on the Boorn case to support an emerging doctrine: "In the United States, the prisoner's confession, when the corpus delicti is not otherwise proved, has been held insufficient for his conviction . . ."¹⁷¹ Wigmore concluded that in all likelihood this statement led to the widespread adoption of the corpus delicti rule in American jurisdictions throughout the nineteenth century.¹⁷²

Unlike their English counterparts, American courts applied the rule to almost all crimes,¹⁷³ requiring the prosecution to prove two things before admitting a confession to a jury. First, it must show that a death, injury, or loss had occurred. Second, it must demonstrate that a criminal agency was responsible.¹⁷⁴ The corpus delicti rule has maintained a central place in American evidence law.¹⁷⁵ In 1984, Massachusetts became the fiftieth state to adopt the rule.¹⁷⁶

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* n.92.

171. SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 214, at 297-98 & n.1 (10th ed. 1860).

172. Moran, *supra* note 152, at 831 (citing WIGMORE, *supra* note 86, § 2071, at 511 for the proposition that the common law adoption of the rule was "chiefly moved, in all probability, by Professor Greenleaf's suggestion").

173. Mullen, *supra* note 153, at 386.

174. WIGMORE, *supra* note 86, § 2072, at 524. Wigmore points out that the third element encompassed within the corpus delicti of a crime, proof of the defendant's involvement, was never required by the courts. *Id.* at 524-26.

175. The rule has, however, been subject to much criticism that it is logically unsound. For example, Judge Learned Hand expressed this view in 1918:

That the rule has in fact any substantial necessity in justice, we are much disposed to doubt . . . [b]ut we should not feel at liberty to disregard a principle so commonly accepted, merely because it seems to us that such evils as it corrects could be much more flexibly treated by the judge at trial

Daeche v. United States, 250 F. 566, 571 (2d. Cir. 1918).

176. Commonwealth v. Forde, 466 N.E.2d 510 (Mass. 1984). The Massachusetts court stated,

By then, however, several jurisdictions had begun a trend abandoning the orthodox corpus delicti rule for a new form of corroboration by verifying the confession itself, rather than the crime. A minority of courts have modified the orthodox version of the corpus delicti rule. This approach, termed an “extension” of the orthodox version, requires that “the corroboration must consist of *substantial* evidence, independent of the accused’s confession, which tends to establish *each and every element* of the crime.”¹⁷⁷ Neither the orthodox version nor the extension of the corpus delicti rule has been followed religiously. As the North Carolina Supreme Court stated in *North Carolina v. Parker*, there has been significant disagreement as to how much independent evidence of the crime is required: “Jurisdictions differ as to the quantum of independent evidence touching upon the *corpus delicti* and corroborative of the accused’s extrajudicial statements which is necessary to sustain a conviction.”¹⁷⁸

2. *Weaknesses of the Corpus Delicti Rule*

In many cases, the orthodox corpus delicti rule provides too much assistance to the prosecution in proving the elements of a crime. To establish guilt in a criminal case, “the prosecution must show that (a) the injury or harm constituting the crime occurred; (b) this injury or harm was caused by someone’s criminal activity; and (c) the defendant was the perpetrator of the crime.”¹⁷⁹ The corpus delicti is generally understood to comprise only the first two elements—that a harm or injury occurred by criminal act. The rule does not require corroboration that the defendant was the perpetrator of the act, nor does it demand support of any other element of the crime.¹⁸⁰ For example, once the prosecution has established that a person died and the death resulted from a criminal act, the prosecution may use a defendant’s confession to prove the

The defendant urges that we overrule our decisions that a conviction can be based solely on evidence of an extrajudicial confession by the accused In support of his argument the defendant asserts that the rule in all of the forty-nine other States is that an uncorroborated confession is insufficient to prove guilt. . . . We note that, despite the impressive numbers, the majority rule has been criticized, and diluted, and the advantages of our flexible rule have been acknowledged. . . . Nonetheless, the majority rule has much to commend it, in that it precludes the possibility of conviction of crime based solely on statements made by a person suffering a mental or emotional disturbance or some other aberration. We therefore agree with the defendant, and we hereby adopt the corroboration rule.

Id. at 513 (citations omitted).

177. *State v. Parker*, 337 S.E.2d 487, 492 (N.C. 1985) (emphasis added).

178. *Id.* at 491 n.20 (citations omitted).

179. *Id.* at 492.

180. *See State v. Mauchley*, 67 P.3d 477, 482 (Utah 2003).

defendant's guilt and other elements of the crime, such as intent or malice.¹⁸¹ Given the relative ease of establishing the corpus delicti in a criminal case and the weight jurors attribute to confession evidence, even if factually unsupported, jurisdictions that adopt the orthodox version of the corpus delicti rule may make it easier for the prosecution to convict both the guilty and the innocent.

In 1954, the Supreme Court criticized the corpus delicti rule for "serv[ing] an extremely limited function."¹⁸² The rule's original purpose was to protect individuals who falsely confessed to a crime that was never committed. Such false confessions are rare. The far more frequent occurrence involves a person falsely confessing to a crime that did occur, but in which the individual played no part, or at least played a very different role. Unfortunately, the rule seems unconcerned with these possible turns of events; "there seems to be little distinction between convicting a person for a crime that was never committed and convicting a person for a crime that was committed by someone else."¹⁸³ In short, "the rule does nothing to ensure that a particular defendant was the perpetrator of the crime."¹⁸⁴

The corpus delicti rule is most problematic because it concentrates on whether a crime occurred rather than whether a confession is true or false. The rule views the trustworthiness of a confession as subordinate to and inherent in proof of a crime. Indeed, the critical misplaced assumption built into the corpus delicti rule is this: "The belief seems to be that if the State can introduce independent evidence supporting the occurrence of the charged crime, a confession about the crime must be reliable."¹⁸⁵ This is an illogical leap that has been disproved by countless instances of false confessions to very real crimes. To put it more softly, if a rule concerns itself with proof of the crime rather than the trustworthiness of the confession, it will fail to ferret out false confessions.

In certain cases, the corpus delicti rule will bar the admission of reliable confessions, a result that has caused some prosecutors to call for its abolition.¹⁸⁶ Because the rule mandates that prosecutors prove that the harm or injury was the result of a criminal act, it is often difficult for prosecutors to satisfy this requirement when the crime lacks a tangible injury or when the injury is difficult to prove (for example, child

181. *Id.*

182. *Smith v. United States*, 348 U.S. 147, 153 (1954).

183. *Mauchley*, 67 P.3d at 483 (citing *State v. Parker*, 337 S.E.2d 487, 494 (N.C. 1985)).

184. *Id.* at 484.

185. *Id.* (citing Ayling, *supra* note 44, at 1128).

186. B. Don Taylor III, *Evidence Beyond Confession: Abolish Arizona's Corpus Delicti Rule*, ARIZ. ATT'Y, May 2005, at 22.

molestation or child death by smothering).¹⁸⁷ In addition, as the definitions of crimes have grown increasingly more complicated and precise, “defining the *corpus delicti*, or in other words, defining what the State must show to establish the charged crime was committed before a confession may be admitted has become more difficult and it has made the rule even more unworkable.”¹⁸⁸ Apart from flaws that are inherent in the definition and operation of the rule, the rule does not add to procedural and constitutional safeguards considered necessary to prevent coerced confessions.¹⁸⁹

2. THE TRUSTWORTHINESS STANDARD

Several state courts and the federal district courts have chosen to adopt a different rule of corroboration, most often termed the “trustworthiness standard.” This new rule of corroboration was announced by the Supreme Court in 1954 in two cases issued on the same day, *Opper v. United States*¹⁹⁰ and *Smith v. United States*.¹⁹¹ The federal courts have adopted the trustworthiness standard almost unanimously,¹⁹² as have many state courts.¹⁹³

In marked contrast to the corpus delicti rule, the trustworthiness standard requires corroboration of the confession itself rather than corroboration that a crime was committed. Under the new corroboration rule, “there is no necessity that the proof independent of the defendant’s confession touch the corpus delicti at all. . . . Proof of any corroborating circumstances is adequate which goes to fortify the truth of the confession or tends to prove facts embraced in the confession.”¹⁹⁴

187. See *Mauchley*, 67 P.3d at 484.

188. *Id.* at 486 (citations omitted).

189. See, e.g., *Brown v. Mississippi*, 297 U.S. 278, 286-87 (1936); *Spano v. New York*, 360 U.S. 315, 322-23 (1959); *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960); *Miranda v. Arizona*, 384 U.S. 436, 445, 447 (1966).

190. 348 U.S. 84 (1954).

191. 348 U.S. 147 (1954).

192. See, e.g., *United States v. Johnson*, 589 F.2d 716, 718 (D.C. Cir. 1978); *United States v. Singleterry*, 29 F.3d 733, 737 (1st Cir. 1994); *United States v. Corona-Garcia*, 210 F.3d 973, 979 (9th Cir. 2000); *United States v. Abigando*, 439 F.2d 827, 833 (5th Cir. 1971).

193. Several state courts have also embraced the new standard: “[T]he corroboration rule focusing on the sufficiency of the independent evidence tending to demonstrate the trustworthiness of the defendant’s confession has found favor with a number of state courts.” *State v. Parker*, 337 S.E.2d 487, 495 (N.C. 1985) (citing *State v. Kalani*, 649 P.2d 1188, 1195 (Haw. Ct. App. 1982); *People v. Brechon*, 390 N.E.2d 626, 629 (Ill. App. Ct. 1979); *State v. George*, 257 A.2d 19, 21 (N.H. 1969)).

194. *Parker*, 337 S.E.2d 487, 491 (alteration omitted) (quoting *Opper*, 348 U.S. at 92).

Under the trustworthiness standard, before the state may introduce a confession, it “must introduce substantial independent evidence which would tend to establish the trustworthiness of the [confession].”¹⁹⁵ In effect, the trial court judge acts as a gatekeeper and must determine, as a matter of law, that a confession is trustworthy before it can be admitted. In making the trustworthiness determination, the trial court judge is to consider “the totality of the circumstances.”¹⁹⁶ Only after a confession is deemed trustworthy by a preponderance of the evidence may it be admitted into evidence.¹⁹⁷ The Utah Supreme Court described this gatekeeping function as similar to a determination about the voluntariness of a confession.¹⁹⁸

Determinations of trustworthiness hinge on whether there is independent evidence that a crime has occurred. When there is no such evidence, a court may rely on “other evidence typically used to bolster the credibility of an out-of-court statement” to establish the trustworthiness of a confession.¹⁹⁹ Factors used to substantiate the credibility and reliability of an out-of-court statement in other circumstances include: “evidence as to the spontaneity of the statement; the absence of deception, trick, threats, or promises to obtain the statement; the defendant’s positive physical and mental condition, including age, education, and experience; and the presence of an attorney when the statement is given.”²⁰⁰ When no substantial independent evidence exists, the court may also look to the overall facts and circumstances to determine whether the confession is consistent.²⁰¹ On the other hand, when there is substantial independent evidence of a crime, a confession may be deemed trustworthy if it “demonstrates the individual has specific knowledge about the crime.”²⁰² Three factors that tend to demonstrate personal knowledge are:

- (1) providing information that “leads to the discovery of evidence unknown to the police,”
- (2) providing information about “highly unusual elements of the crime that have not been made public,” and
- (3) providing “an accurate description of the mundane details of the crime scene which are not easily guessed and have not been reported publicly,” because

195. *Mauchley*, 67 P.3d at 488 (citing *Opper*, 348 U.S. at 93).

196. *Id.* at 490.

197. *Id.*

198. *Id.* at 490 n.6.

199. *United States v. Singleterry*, 29 F.3d 733, 737 n.3 (1st Cir. 1994).

200. *Mauchley*, 67 P.3d at 488 (citations omitted).

201. *Id.*

202. *Id.* (citing *Leo & Ofshe*, *supra* note 38, at 438).

“mundane details [are] less likely to be the result of suggestion by the police.”²⁰³

In this way, the judge is said to measure the “degree of fit” between the confession and the facts of a crime when assessing trustworthiness.²⁰⁴

Perhaps the most promising and obvious aspect of the trustworthiness standard in preventing use of false confessions is its focus on the reliability of the confession itself rather than on evidence that a crime has been committed, as is the case under the corpus delicti rule. By allowing the trial court judge to act as a gatekeeper in admitting a confession, the trustworthiness standard can prevent false or unreliable confessions from being admitted into evidence.²⁰⁵

Some courts have called the trustworthiness standard confusing and have blamed the Supreme Court for creating “something of a hybrid rule having elements both of admissibility and sufficiency.”²⁰⁶ There is truth to this description; the trustworthiness standard controls the *admission* of confession evidence by examining the *sufficiency* of independent evidence corroborating the confession. Yet the dual aspects of the standard are unlikely to be problematic. Rather, the biggest dangers in the application of the trustworthiness standard lie in trial court judges’ potential to be cavalier about what constitutes sufficient independent corroborative evidence (by rubber stamping the prosecution’s motions) or in failing to act as a gatekeeper at all.

3. CORROBORATION RULES ARE NOT SUFFICIENT TO EXPOSE UNRELIABLE CONFESSIONS: THE CENTRAL PARK JOGGER CASE

To assess the reliability of confessions, courts must analyze the confessions themselves and assess the extent to which they are corroborated. In the Central Park Jogger case, however, such an analysis of the confessions would still have failed to expose the unreliability of the defendants’ confessions. New York’s corroboration rule provides that “[a] person may not be convicted of any offense solely upon

203. *Id.* (citing Leo & Ofshe, *supra* note 38, at 438-40).

204. *Id.*

205. A determination that a confession is trustworthy does not “preclude[] the jury from independently assessing the weight it wishes to attribute to the [confession].” *Mauchley*, 67 P.3d at 490 (citing *United States v. Dickerson*, 163 F.3d 639, 643 (D.C. Cir. 1999)). Even after a confession is admitted, the jury’s role is left intact—it may decide what weight to give to a confession and whether it considers a confession trustworthy. Similarly, even after a judge deems a confession trustworthy, the other rules of evidence still apply. For example, a judge may decide that under Federal Rule of Evidence 403, a trustworthy confession may nevertheless be more prejudicial than probative, denying its admittance on that ground. See *Singleton*, 29 F.3d at 738-39.

206. *Dickerson*, 163 F.3d at 642.

evidence of a confession or admission made by him without additional proof that the offense charged has been committed.”²⁰⁷ In practice, very little proof is needed. New York courts have held that the state need not produce additional proof connecting the defendant with the crime.²⁰⁸ All that is needed is “the production of some proof, of whatever weight, that a crime was committed by someone.”²⁰⁹ In the Central Park Jogger case, the discovery of the victim’s body and the condition of her body would have been enough corroboration to admit the boys’ confessions at trial.

The Central Park Jogger defendants likely would not have fared better if New York had been a jurisdiction that analyzed confession evidence under the trustworthiness standard. The trustworthiness doctrine should provide greater protection than the voluntariness test or the corpus delicti rule because it directs judges to evaluate the reliability of confession evidence before admitting it into evidence. However, this rule fails to weed out false confessions for other reasons. Because police are prone to suggest and incorporate corroborating evidence into a suspect’s confession, whether inadvertently or intentionally, many false confessions masquerade as true confessions. Without an electronic recording of the entire interrogation process, courts are left to decide a swearing contest between a suspect and police officer about who provided the details of the crime that only the true perpetrator could have known. Overwhelmingly, courts side with the police and admit confessions.²¹⁰ Moreover, the quantum of proof of corroboration required in most jurisdictions adhering to the trustworthiness doctrine is very low, allowing many unreliable confessions to go to a jury.²¹¹ Even where DNA evidence undermines the truth of a suspect’s confession, judges tend to admit such confessions into evidence.²¹²

207. N.Y. CODE CRIM. PROC. § 60.50 (McKinney 2004).

208. *People v. Murray*, 353 N.E.2d 605, 609 (N.Y. 1976).

209. *People v. Daniels*, 339 N.E.2d 139, 141 (N.Y. 1975).

210. Steven A. Drizin & Marissa J. Reich, *Heeding the Lessons of History: The Need for Mandatory Recording of Police Interrogations to Accurately Assess the Reliability and Voluntariness of Confessions*, 52 *DRAKE L. REV.* 619, 638 (2004).

211. See Ayling, *supra* note 44.

212. The case of the Norfolk Four dramatically illustrates this reluctance. Four Navy seamen, Danial Williams, Joseph Dick, Derek Tice, and Eric Wilson, were convicted for participating in the murder and rape of Michelle Moore Bosko in 1997 in Norfolk, Virginia. See *Norfolk Four: A Miscarriage of Justice*, http://www.norfolkfour.com/index.php?norfolk/case_history/ (follow “Executive Summary” hyperlink) (last visited Feb. 19, 2006). The men were convicted based on the confessions that police obtained from them during lengthy and coercive interrogations. *Id.* No physical or forensic evidence linked them to the crime. *Id.* Told by their lawyers that they would likely get the death penalty if they took their cases to trial, two of the men, Williams and Dick, pled guilty to participating in Bosko’s rape and murder. *Id.* The other two men, Wilson and Tice, recanted their confessions and took their chances at trial. *Id.* After Williams and Dick pled guilty, and before Wilson and Tice went to trial, another man, Omar Ballard, was linked to the murder and rape through DNA testing of

III. FALSE CONFESSIONS AND EMPIRICAL SOCIAL SCIENCE

A. *Pre-Ayling Empirical Social Science Research
and False Confessions*

A student comment published in this very law review exposed the failings of the corroboration rules more than twenty years ago. In 1984, Corey J. Ayling wrote *Corroborating Confessions: An Empirical Analysis of Legal Safeguards Against False Confessions*.²¹³ Ayling's article was prophetic in many ways. It was written before the seminal works of leading American false confession experts like Saul Kassin, Richard Leo, and Richard Ofshe were published. It was also written before DNA evidence revealed that false confessions were a leading cause of wrongful convictions.²¹⁴

Ayling recognized that common law corroboration rules failed to prevent wrongful convictions based on false confessions for a variety of reasons. His article not only pointed out the failings of the corroboration rules, but also offered constructive suggestions for how to strengthen the rules to screen out false confessions more effectively. For our purposes, his most important contributions were twofold. First, he realized that the corpus delicti rule would never serve its intended purpose unless judges took seriously their roles as gatekeepers of reliable evidence. Ayling wrote,

If unjust convictions are to be avoided, if the police are to be motivated to search for independent evidence, and if the defendant is to be protected against the tendency of the jury to view confessions uncritically, then the judge must make her own independent determination that the confession is sufficiently corroborated to be reliable.²¹⁵

Second, Ayling noted that judges could never accurately assess the trustworthiness of confessions unless they were presented with a

semen found inside the victim and on cigarette butts at the crime scene. *Id.* He also confessed in great detail to killing Bosko by himself. *Id.* After Ballard surfaced, Williams moved to withdraw his guilty plea. *Id.* The trial court denied Williams's motion. *Id.* The trial court also allowed the confessions of Tice and Wilson to go to the jury. *Id.* Both were ultimately convicted, Tice of murder (twice) and Wilson of rape. *Id.*

213. Ayling, *supra* note 44.

214. BARRY SCHECK, PETER NEUFELD & JIM DWYER, *ACTUAL INNOCENCE* 92 (2000).

215. Ayling, *supra* note 44, at 1153.

complete recording of the entire interrogation process leading up to and resulting in the confession.²¹⁶

Ayling's analysis of false confessions in 1984 was prescient, wide-ranging, insightful, and ahead of its time. He diagnosed what he called "the problem of physically uncoerced false confessions,"²¹⁷ attempted to explain their multiple and contributing causes,²¹⁸ and argued that they occur "with sufficient regularity to justify prophylactic measures."²¹⁹ Because of the inherently coercive nature of interrogation and the malleability of the human mind, Ayling believed that "confession evidence should be considered presumptively unreliable."²²⁰ He recognized, however, that the law did not take seriously enough the phenomenon of false confessions because of the public misperception or "common sense view that physically uncoerced false confessions are made by freaks and occur freakishly."²²¹ Ayling persuasively argued against this view by marshalling evidence from the extant social science literature on cognitive psychology, social psychology, and sociology to demonstrate the risk that American police interrogation produced false confessions.²²² Although he acknowledged that the incidence of false confessions was unknown, he argued that they occurred frequently enough to warrant legal safeguards.²²³

Although Ayling's empirical synthesis of the risk of false confessions may have been remarkable for its time, it was limited. For example, he never identified or analyzed a single case of false confession,²²⁴ and his literature review and analysis primarily drew from the study of Chinese and Korean prisoner of war interrogations in the 1950s,²²⁵ rather than civilian or contemporary police interrogations. Ayling's synthesis thus provided no direct analysis of American police interrogation methods or the process through which they sometimes produced false and unreliable confessions. These omissions are glaring,

216. *Id.* at 1191.

217. *Id.* at 1155.

218. *Id.* at 1157-70.

219. *Id.* at 1155.

220. *Id.* at 1173.

221. *Id.* at 1155.

222. *Id.* at 1155-79.

223. *Id.* at 1156 ("The social science literature indicates that physically uncoerced false confessions are not idiosyncratic.").

224. Curiously, not even the well-known and widely reported 1973 false confession case of Connecticut teenager Peter Reilly was mentioned. *See* JOAN BARTHEL, A DEATH IN CAANAN (1976); DONALD S. CONNERY, GUILTY UNTIL PROVEN INNOCENT (1977).

225. *See* ROBERT JAY LIFTON, THOUGHT REFORM AND THE PSYCHOLOGY OF TOTALISM (1961).

but not surprising, considering the state of the empirical social science literature in 1984.

B. Post-Ayling Empirical Social Science Research and False Confessions

One year after Ayling's article, social psychology professors Saul Kassin and Lawrence Wrightsman published a seminal book chapter that reconceptualized the study of police interrogation and false confession.²²⁶ Drawing on case studies and social psychological theories of attitude change, Kassin and Wrightsman suggested three distinct types of false confession: voluntary,²²⁷ coerced-compliant,²²⁸ and coerced-internalized²²⁹ (also referred to as coerced-persuaded).²³⁰ Although this typology has been modified and extended by others, it has provided an important conceptual framework for studying the antecedents, causes, and consequences of false confession.²³¹ Kassin and Wrightsman's work also ushered in the modern social scientific study of police interrogation and false confession, setting much of the research agenda in this area and inspiring others to pursue it.²³²

In the last two decades, social scientists and legal scholars have published hundreds of empirical studies on police interrogations, false confessions, and related issues.²³³ Since Ayling's 1984 article, these studies have extensively documented the existence of false confessions,²³⁴ offered an empirically informed psychological analysis of interrogation

226. Saul M. Kassin & Lawrence S. Wrightsman, *Confession Evidence*, in *THE PSYCHOLOGY OF CONFESSION EVIDENCE & TRIAL PROCEDURE* 67 (1985).

227. Kassin and Wrightsman defined voluntary false confessions as occurring "in the absence of elicitation." *Id.* at 76.

228. They defined coerced-compliant false confessions as occurring when "the suspect publicly professes guilt in response to extreme methods of interrogation, despite knowing privately that he or she is truly innocent." *Id.* at 77.

229. They defined a coerced-internalized false confession as one in which the suspect "actually comes to believe that he or she committed the offense." *Id.* at 78.

230. 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).

231. Ofshe & Leo, *supra* note 230; GISLI H. GUDJONSSON, *THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS* (2003).

232. G. Daniel Lassiter & Jennifer J. Ratcliff, *Exposing Coercive Influences in the Criminal Justice System: An Agenda for Legal Psychology in the Twenty-First Century*, in *INTERROGATIONS, CONFESSIONS AND ENTRAPMENT* 1, 1-8 (G. Daniel Lassiter ed., 2004).

233. Kassin & Gudjonsson, *supra* note 41, at 61-67.

234. Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 *STAN. L. REV.* 21, 56-64 (1987); Leo & Ofshe, *supra* note 38; Drizin & Leo, *supra* note 2.

techniques and the influence process that leads to confessions,²³⁵ suggested an empirical analysis of the causes and risk factors for false confessions,²³⁶ analyzed the impact of confession evidence and its consequences in the criminal justice system,²³⁷ and provided an analysis of the indicia of false and unreliable confessions.²³⁸

Social scientists, legal scholars, and independent writers have documented numerous false confessions to serious crimes through individual²³⁹ and aggregated case studies.²⁴⁰ Although we still do not know (and probably will never know) the incidence of false confessions, five studies alone have documented almost 300 cases of interrogation-induced false confession since the late 1980s. Bedau and Radelet's 1987 study revealed that forty-nine of the 350 capital miscarriages of justice they studied in capital and potentially capital cases between 1900 and 1985 were caused by false confessions.²⁴¹ In 1998, Leo and Ofshe identified and analyzed sixty cases of police-induced false confession in the post-*Miranda* era (after 1966).²⁴² In 2000, Scheck, Neufeld, and Dwyer reported the first sixty-two wrongful conviction cases in the

235. Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. L. REV. 979, 985-97 (1997); Deborah Davis & William O'Donohue, *The Road to Perdition: Extreme Influence Tactics in the Interrogation Room*, in HANDBOOK OF FORENSIC PSYCHOLOGY: RESOURCE FOR MENTAL HEALTH AND LEGAL PROFESSIONALS 897 (William T. O'Donohue & Eric Levensky eds., 2004); GUDJONSSON, *supra* note 231.

236. Ofshe & Leo, *supra* note 235, at 1001-113; Kassin & Gudjonsson, *supra* note 41, at 48-56.

237. Kassin & Neumann, *supra* note 40, at 481-83; Kassin & Sukel, *supra* note 40, at 42-44; Leo & Ofshe, *supra* note 38, at 472-91; Drizin & Leo, *supra* note 2, at 959-63.

238. Ofshe & Leo, *supra* note 235, at 997-1000; Leo & Ofshe, *supra* note 38, at 438-44.

239. SELWYN RAAB, JUSTICE IN THE BACK ROOM (1967); CONNERY, *supra* note 224, at 53-79; TERRY GANEY, ST. JOSEPH'S CHILDREN: A TRUE STORY OF TERROR AND JUSTICE 31-44 (1989); PAUL MONES, STALKING JUSTICE 174-75 (1995); ROGER PARLOFF, TRIPLE JEOPARDY 19-31 (1996); KEVIN DAVIS, THE WRONG MAN: A TRUE STORY (1996); JIM FISHER, FALL GUYS: FALSE CONFESSIONS AND THE POLITICS OF MURDER 153-55 (1996); JOHN TAYLOR, THE COUNT AND THE CONFESSION: A TRUE MYSTERY (2002); MARA LEVERITT, DEVIL'S KNOT: THE TRUE STORY OF THE WEST MEMPHIS THREE 75-91 (2002); MARGARET EDDS, AN EXPENDABLE MAN: THE NEAR EXECUTION OF EARL WASHINGTON, JR. 35-44 (2003); Bedau & Radelet, *supra* note 234; SCHECK, NEUFELD & DWYER, *supra* note 214; Leo & Ofshe, *supra* note 38; Richard A. Leo & Richard J. Ofshe, *The Truth About False Confessions and Advocacy Scholarship*, 37 Crim. L. Bull. 293, 330-70 (2001); Rob Warden, *The Role of False Confessions in Illinois Wrongful Murder Convictions Since 1970*, <http://www.law.northwestern.edu/depts/clinic/wrongful/FalseConfessions2.htm> (last visited Mar. 28, 2006); Drizin & Leo, *supra* note 2.

240. Bedau & Radelet, *supra* note 234; Leo & Ofshe, *supra* note 38; Drizin & Leo, *supra* note 2.

241. Bedau & Radelet, *supra* note 234, at 57.

242. Leo & Ofshe, *supra* note 38; Leo & Ofshe, *supra* note 239, at 298-302.

United States established through DNA exoneration and beginning in 1989.²⁴³ By March 2005, the number of DNA exonerations had grown to 174.²⁴⁴ Twenty-two percent (40/174) of these wrongful convictions were caused by, or related to, false confessions.²⁴⁵ In 2003, Warden studied the role of false confession in miscarriages of justice in Illinois homicide prosecutions since 1970 and found that approximately 60 percent (25/42) of those wrongfully convicted had falsely confessed.²⁴⁶ Most recently, in 2004, Drizin and Leo collected and analyzed a cohort of 125 false confession cases in the post-*Miranda* era and found that 81 percent of those wrongfully convicted had falsely confessed.²⁴⁷ Unlike when Ayling was writing in 1984, there is now no question that false confessions occur with sufficient regularity to warrant the imposition of legal safeguards such as electronic recording requirements and meaningful corroboration rules in order to minimize the wrongful conviction of the innocent.

In the two decades since Ayling's article, social scientists have also empirically analyzed interrogation techniques and the influence process that moves a suspect from denial to confession.²⁴⁸ This has become possible largely due to the increased use of recording in custodial interrogations, allowing social scientists and legal scholars direct access to the interrogation process.²⁴⁹ Psychological research has shown that interrogation is a sequenced, multistep influence process through which detectives seek to persuade a suspect that he or she is indisputably caught, and that the most viable way to mitigate punishment or to escape the situation is to agree with the interrogator's proposed scenario and confess.²⁵⁰ Interrogators try to break down a suspect's anticipated resistance by: repeatedly accusing the suspect of committing the crime and lying about it; cutting off and interrupting denials; attacking alibis or assertions of innocence as illogical, implausible, or untrue; insisting that no one will believe the suspect's protestations of innocence; and, most importantly, accumulating real or fabricated evidence said to prove the suspect's guilt incontrovertibly.²⁵¹ These "negative incentives"²⁵² are

243. SCHECK, NEUFELD, & DWYER, *supra* note 214, at 246.

244. Innocence Project, <http://www.innocenceproject.org> (last visited Mar. 28, 2006).

245. *Id.*

246. Warden, *supra* note 239.

247. Drizin & Leo, *supra* note 2.

248. Leo, *Inside*, *supra* note 120; Ofshe & Leo, *supra* note 235; GUDJONSSON, *supra* note 231, at 115-57.

249. Ofshe & Leo, *supra* note 235, at 981-82.

250. Leo, *Inside*, *supra* note 120, at 278-79; Ofshe & Leo, *supra* note 230, at 197-207; Davis & O'Donohue, *supra* note 235.

251. Leo, *Inside*, *supra* note 120; Ofshe & Leo, *supra* note 235, at 1003-50; Davis & O'Donohue, *supra* note 235.

intended to convince the suspect that it is futile to deny the crime and that he or she will be successfully prosecuted and convicted if such denials continue. In addition to these techniques, detectives also use “positive incentives”²⁵³ or inducements²⁵⁴ to motivate the suspect to believe that it is in his or her self-interest to comply with the interrogator’s demand to confess. These inducements range from intangible suggestions that the suspect will feel better if he or she confesses, to the implication that the interrogator or system will favor or help a suspect who confesses, to various forms of promises and threats.²⁵⁵

Empirical research has also considerably advanced our understanding of the psychological causes of, and risk factors for, police-induced false confessions.²⁵⁶ The primary cause of false confession is the interrogator’s use of psychologically coercive²⁵⁷ interrogation techniques such as implicit or explicit promises of leniency in exchange for confession and threats of differential punishment in the absence of confession.²⁵⁸ Other coercive techniques include lengthy or incommunicado interrogation; depriving essential necessities such as food, sleep, water, or access to bathroom facilities; refusing to honor a suspect’s request to terminate interrogation; and inducing extreme exhaustion and fatigue. Some researchers have argued that additional situational risk factors that may cause innocent people to confess falsely include physical custody and isolation, confrontation, and minimization techniques.²⁵⁹

Even though psychological coercion is the primary cause of police-induced false confessions, individuals differ in their ability to withstand interrogative pressure, and thus in their susceptibility to confess falsely. Individuals who are highly suggestible²⁶⁰ or highly compliant²⁶¹—all

252. Leo, *Inside*, *supra* note 120, at 279.

253. *Id.*

254. Ofshe & Leo, *supra* note 235, at 990.

255. *Id.* at 1051-1106.

256. *Id.*; Davis & O’Donohue, *supra* note 235; Kassin & Gudjonsson, *supra* note 41, at 53-56.

257. By psychological coercion, we mean either one of two things: (1) police use of interrogation techniques that are regarded as inherently coercive in psychology and law; or (2) police use of interrogation techniques that, cumulatively, cause a suspect to perceive no choice but to comply with the interrogators’ demands. Usually, these amount to the same thing. The vast majority of documented false confessions in the post-*Miranda* era either have been directly caused by or have involved promises or threats. See Drizin & Leo, *supra* note 2, at 918.

258. *Id.*

259. Kassin & Gudjonsson, *supra* note 41, at 53-55.

260. Suggestibility refers to the tendency to accept and repeat back information that is suggested by another. Individuals who are highly suggestible tend also to have poor memories, high levels of anxiety, low self-esteem or assertiveness—personality factors that also make them more vulnerable to the pressures of interrogation and thus

other things being equal—are more likely to confess in response to police interrogation pressure.²⁶² Mentally handicapped or cognitively impaired individuals, children, juveniles, and the mentally ill are also unusually vulnerable to police interrogation pressure and are more likely to confess falsely as a result.²⁶³

The mentally handicapped are more likely to confess falsely than people of normal or above average intelligence for a variety of related reasons: subnormal intellectual functioning (low intelligence, short attention span, poor memory, or poor conceptual or communication skills); limited social intelligence and understanding; lack of self-confidence; generally poor problem-solving abilities; a tendency to mask or disguise their cognitive deficits; the tendency to look to others (particularly authority figures) for appropriate behavior cues; and a generally lower ability to withstand the same level of pressure, distress, and anxiety as other individuals.²⁶⁴ Because children and juveniles possess many of these same traits, they are also more predisposed to submissive behavior when questioned by police.²⁶⁵ People with mental

likely to falsely confess. Kassir & Gudjonsson, *supra* note 41, at 51-52. While it is a personality trait, interrogative suggestibility tends to be heightened by sleep deprivation, fatigue, and drug or alcohol withdrawal. *Id.* at 52.

261. Compliance refers to the tendency to go along with the statements, requests, or instructions of another. GUDJONSSON, *supra* note 231, at 370. Individuals who are highly compliant tend to be conflict avoidant, acquiescent, and eager to please, especially with authority figures. *Id.*

262. Kassir & Gudjonsson, *supra* note 41, at 51-52.

263. *Id.* at 52-53.

264. James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 445-46 (1985); Morgan Cloud et al., *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495, 511-14 (2002); GUDJONSSON, *supra* note 231, at 324-26.

265. Many of the developmental traits that characterize the mentally handicapped also characterize young children and adolescents. Like the mentally handicapped, juveniles are highly compliant. Drizin & Leo, *supra* note 2, at 944, 1005. They tend to be immature, naïvely trusting of authority, acquiescent, and eager to please adult figures; these traits predispose them to be submissive when questioned by police. *Id.* Juveniles also tend to be highly suggestible. *Id.* Like the mentally handicapped, juveniles are easily pressured, manipulated, and persuaded into agreeing with or making false statements, including incriminating ones. *Id.* Like the mentally handicapped, juveniles (especially young children) lack the cognitive capacity and judgmental maturity to fully understand or appreciate either the nature or gravity of an interrogation or the long-term consequences of their responses to police questions. *See id.* Juveniles—again like the mentally handicapped—have limited language skills, memory, attention span, and information-processing abilities compared to normal adults. *See id.* And like the mentally handicapped, they are less capable of withstanding interpersonal stress, and are thus more likely to perceive aversive interrogation as intolerable and, in response, to tell an interrogator what he wants to hear, regardless of truth, merely to escape the situation. *See generally* Kenneth J. King, *Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children from Unknowing, Unintelligent, and Involuntary Waivers of Miranda Rights*, 2006 WIS. L. REV. All of these traits explain why juveniles are more vulnerable

illness (for example, psychosis) are also disproportionately more likely to falsely confess, especially in response to police pressure, because they possess any number of psychiatric symptoms that make them more likely to agree with, spontaneously suggest, or confabulate false and misleading information to detectives during police interrogations.²⁶⁶

Social scientists and legal scholars have also empirically studied the impact of confession evidence on triers of fact and the consequences of false confessions for the American criminal justice system.²⁶⁷ A suspect's confession sets in motion a seemingly irrefutable presumption of guilt among justice officials, the media, the public, and lay jurors.²⁶⁸ The system is stacked against the individual who confesses, treating that suspect more harshly at every stage of the investigative and trial process.²⁶⁹ A suspect who confesses is significantly more likely to be incarcerated prior to trial, charged, pressured to plead guilty, and convicted. Moreover, a confession creates its own set of confirmatory and cross-contaminating biases,²⁷⁰ leading both officials and jurors to interpret all other case information in the worst possible light for the defendant. As the case against an innocent false confessor moves from one stage to the next in the criminal justice system, it gathers more collective force and the error becomes increasingly difficult to reverse.

If introduced against a defendant at trial, a false confession is highly likely to lead to a wrongful conviction. As mentioned earlier, in their study of sixty false confessions, Leo and Ofshe found that 73 percent of all false confessors whose cases went to trial were erroneously convicted,²⁷¹ this number went up to 81 percent in Drizin and Leo's study of 125 false confessions.²⁷² Taken together, these studies converge on the same conclusion: as the U.S. Supreme Court stated in *Arizona v. Fulminante*, "a confession is like no other evidence."²⁷³ It is "uniquely

to coercive interrogation and more susceptible to, and thus at risk for, making a false confession. Drizin & Leo, *supra* note 2, at 944, 1005.

266. Allison D. Redlich, *Mental Illness, Police Interrogations, and the Potential for False Confession*, 55 *PSYCHIATRIC SERVICES* 19, 20 (2004).

267. Kassin & Sukel, *supra* note 40; Kassin & Neumann, *supra* note 40; Leo & Ofshe, *supra* note 239, at 298-302; Drizin & Leo, *supra* note 2, at 960-63.

268. Kassin & Sukel, *supra* note 40; Kassin & Neumann, *supra* note 40; Leo & Ofshe, *supra* note 239; Drizin & Leo, *supra* note 2, at 951-52, 921-23.

269. Leo, *Inside*, *supra* note 120, at 298-99.

270. George Castelle & Elizabeth Loftus, *Misinformation and Wrongful Convictions*, in *WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE* 17-35 (Saundra O. Westervelt & John Humphrey eds., 2001).

271. Leo & Ofshe, *supra* note 38, at 481-82.

272. Drizin & Leo, *supra* note 2, at 960.

273. *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991). Researchers have demonstrated that mock jurors find confession evidence more incriminating than any other type of evidence. See Kassin & Neumann, *supra* note 40.

potent²⁷⁴ and “profoundly prejudicial”²⁷⁵ in its ability to bias the trier of fact in favor of the prosecution, overwrite contradictory or exculpatory case evidence, and lead to the wrongful conviction of the innocent.²⁷⁶ As Welsh White has noted, “the system does not have safeguards that will prevent the jury from giving disproportionate weight to such confessions.”²⁷⁷

Finally, social scientists have analyzed more closely the indicia of true and false confessions and have articulated standards for evaluating the likely reliability of statements, admissions, and confessions.²⁷⁸ Drawing on generally accepted principles in the social sciences,²⁷⁹ Ofshe and Leo have proposed a standard for assessing the likely reliability of interrogation-induced statements.²⁸⁰ In the next Part, we summarize this proposed standard, expand upon it, and refine it.

IV. REINVIGORATING RELIABILITY

A. *The Ofshe-Leo Test*

Ofshe and Leo have argued that the reliability of a suspect’s confession can be evaluated by analyzing the fit (or lack thereof) between the descriptions in his postadmission narrative²⁸¹ 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.²⁸² A suspect who committed the crime will possess personal (that is, nonpublic) knowledge about both dramatic and mundane crime facts that are known only by the perpetrator, the police, or the victim (for example, the location of the weapon, items taken during the crime, and specific aspects of the crime scene such as the color of paint on the wall or the pattern in the carpet). A suspect who did not commit the crime will not possess personal knowledge of the crime details unless the suspect has preexisting

274. See Kassin & Neumann, *supra* note 40, at 469.

275. Davis & O’Donahue, *supra* note 235, at 967.

276. Leo & Ofshe, *supra* note 38, at 448.

277. WHITE, *supra* note 101, at 155.

278. GUDJONSSON, *supra* note 231, at 115-242; Ofshe & Leo, *supra* note 235, at 1118-20; Leo & Ofshe, *supra* note 38, at 438-40.

279. Richard A. Leo, *False Confessions: Causes, Consequences, Solutions*, in *WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE* 36, 36-54 (Saundra O. Westervelt & John Humphrey eds., 2001).

280. Ofshe & Leo, *supra* note 235, at 990-92, 1118-20; Leo & Ofshe, *supra* note 38, at 495-96.

281. This refers to the account the suspect gives after saying the words “I did it.”

282. Ofshe & Leo, *supra* note 235, at 990-97.

knowledge,²⁸³ or the police have “contaminated” the suspect through education about the crime scene facts during the interrogation process. Assuming that the suspect does not possess preexisting knowledge and has not been contaminated by police suggestion, the probative value of crime facts and details accurately provided in the suspect’s postadmission narrative is directly proportionate to the likelihood that such details could have been guessed by chance.²⁸⁴

Absent preexisting knowledge or contamination, the postadmission narratives of the guilty true confessor and innocent false confessor will therefore look different.²⁸⁵ The guilty confessor’s postadmission narrative will likely demonstrate personal knowledge of crime facts; will be able to lead police to new, missing, or derivative crime scene evidence; will be able to provide them with missing information; will be able to explain seemingly anomalous or otherwise inexplicable crime facts; and will likely be corroborated by existing objective evidence.²⁸⁶ By contrast, the innocent confessor will not be able to supply accurate crime details in a postadmission narrative unless the confessor guesses them by chance; will not be able to lead police to new, missing, or derivative evidence; will not be able to explain crime scene anomalies or other unique or unlikely aspects of the crime; and the postadmission narrative will not be corroborated by existing objective evidence.²⁸⁷ Instead, the innocent false confessor’s postadmission narrative will likely be replete with guesses and errors, and will be either inconsistent with or contradicted by the objective case evidence.²⁸⁸ In short, the postadmission narrative of a suspect who is confessing truthfully will tend to fit with the crime facts and objective physical evidence, whereas the postadmission narrative of an innocent suspect who is confessing falsely will not.

283. For example, the suspect could have learned about the crime from media coverage, overheard conversations, community gossip, or as an innocent bystander during the commission of the crime.

284. As Ofshe and Leo have noted:

Assuming that neither the investigator nor the media have contaminated the suspect by transferring information about the crime facts, or that the extent of contamination is known, the likelihood that his answers will be correct should be no better than chance. The only time an innocent person will contribute correct information is when he makes an unlucky guess. The likelihood of an unlucky guess diminishes as the number of possible answers to an investigator’s questions grows large.

Ofshe & Leo, *supra* note 235, at 993.

285. *Id.* at 991-97.

286. *Id.*

287. *Id.* at 993-97.

288. *Id.*

In many cases, analyzing the fit between a suspect's postadmission narrative and the crime facts and existing objective case evidence provides a standard against which to evaluate the statement's likely reliability. As Leo and Ofshe have specifically pointed out:

There are at least three indicia of reliability that can be evaluated to reach a conclusion about the trustworthiness of a confession. Does the statement (1) lead to the discovery of evidence unknown to the police? (e.g., location of a missing weapon that can be proven to have been used in the crime, location of missing loot that can be proven to have been taken from the crime scene, etc.); (2) include identification of highly unusual elements of the crime that have not been made public? (e.g., an unlikely method of killing, mutilation of a certain type, use of a particular device to silence the victim, etc.); or (3) include an accurate description of the mundane details of the crime which are not easily guessed and have not been reported publicly? (e.g., how the victim was clothed, disarray of certain furniture pieces, presence or absence of particular objects at the crime scene, etc.).²⁸⁹

Ofshe and Leo have argued that courts should insist on a minimum standard of reliability, and thus independent corroboration, before admitting a confession into evidence. Otherwise, its prejudicial impact will outweigh its probative value.²⁹⁰ Ofshe and Leo have further argued that the fit analysis necessary to determine a confession's likely reliability can only be properly conducted if police have electronically recorded the interrogation in its entirety. Without this, there is no way to objectively resolve the so-called "swearing contest" between police and the suspect regarding who said what during the interrogation.

B. Responses to Criticism

Welsh White has suggested that the Ofshe-Leo proposal is not an administratively feasible means of evaluating a confession's reliability for the purpose of admissibility.²⁹¹ White's critique of the Ofshe-Leo proposal focused on five separate points: 1) the false confessor will sometimes get unique crime facts right because he has incorporated police suggestions into his confession,²⁹² learned key details from outside

289. Leo & Ofshe, *supra* note 38, at 438-39.

290. Ofshe & Leo, *supra* note 230, at 239.

291. White, *supra* note 43, at 2024-28.

292. *Id.* at 2024-25.

sources such as the media,²⁹³ or simply made a reasonable guess,²⁹⁴ 2) it is not clear how strong a showing the government must make under the fit standard for a confession to be admissible;²⁹⁵ 3) a taping requirement is not a sufficient predicate for a fit analysis, but instead every communication between the police and the suspect must be recorded and available for judicial scrutiny;²⁹⁶ 4) the fit standard would require a substantial expenditure of judicial resources;²⁹⁷ and 5) the fit standard is unfair to law enforcement “because, in some cases, an otherwise trustworthy confession would be excluded simply because the suspect—for whatever reason—refused to provide a sufficiently detailed explanation of the crime.”²⁹⁸

We believe these criticisms are easily rebutted. First, Ofshe and Leo have repeatedly pointed out that false confessors will sometimes supply crime facts that are not likely guessed by chance if they possess preexisting knowledge from the media or if the police have contaminated their knowledge of the crime by feeding them crime details and asking leading questions, particularly in the postadmission portion of the interrogation.²⁹⁹ The clear solution to this problem is: (1) for the police to record the entire interrogation so that the trial judge can determine whether police contamination has occurred; and (2) and for the judge to analyze whether the suspect could have gained knowledge of key details from facts released to the public by the media.³⁰⁰ Second, it would not be necessary to record all police communications prior to the interrogation for the police to adequately undertake the fit analysis Ofshe and Leo proposed. Third, the fit analysis would not require a substantial expenditure of judicial resources because pretrial assessments of the reliability of confession evidence need not lead to lengthy contested hearings. In most cases, witnesses would not need to be called because the defense could submit its reasons for why the confession is not reliable in its pleadings; the state could reply by proffer or affidavit; and the judge could view the recorded confession, analyze it, and rule on the

293. *Id.* at 2025.

294. *Id.*

295. *Id.*

296. *Id.* at 2026.

297. *Id.* at 2027 (“In order to make the determination, the judge would have to scrutinize the entire interrogation, a process that would sometimes take several hours.”).

298. *Id.* at 2027-28.

299. Ofshe & Leo, *supra* note 235, at 993-97.

300. With electronic databases such as LexisNexis and Westlaw available in courtrooms throughout the country, it is relatively easy for trial courts to determine whether a case has been in the newspapers and to see what facts have been revealed by the media. If a suspect claims preexisting knowledge because of community gossip or overheard conversations, it is of course up to his or her counsel to argue this point with supporting evidence before a judge.

pleadings after argument. Moreover, the savings in court time and resources when unreliable confessions are screened out by the fit analysis more than outweighs the minimal expenditure in judicial resources for trial courts to conduct the analysis and prevent false confession cases from going to trial.³⁰¹

As White pointed out, Ofshe and Leo did not specify in their 1997 proposal precisely how strong a showing the government must make under the fit standard for disputed confessions to be admissible. Ofshe and Leo focused instead on general psychological and legal principles, arguing that courts need to understand and apply the logic of a postadmission fit analysis in their evaluations of disputed confession evidence so that all confessions entered into evidence meet a minimum reliability threshold.³⁰² They argued that this is the only way to guarantee under Federal Rule of Evidence 403 (and its state analogues) that the probative value of confession evidence exceeds its unfair prejudicial effect. By definition, an unreliable confession can have little probative value. Given juror overreliance on confession evidence, unreliable confessions will be unfairly prejudicial once entered into evidence against the accused.³⁰³ As a result, White's criticism of the Ofshe-Leo proposal misses the mark because Rule 403 (and its state analogues) is a fundamental rule of evidence that does not require the proponent of a particular piece of evidence to specify the precise bar that must be set for its admissibility. Rather, it directs trial judges to conduct a general balancing test to ensure that weakly probative or highly prejudicial evidence is not introduced at trial if the potential harm from doing so exceeds the potential benefit. Based on empirical studies of the consequences of false confession evidence,³⁰⁴ the Ofshe-Leo proposal sought to provide general guidance to trial judges who must conduct the Rule 403 balancing analysis when one party attempts to enter a disputed confession into evidence.

301. Videotaping would save substantial court time and expense because electronically recorded confessions would induce guilty pleas from individuals who would otherwise take their case to trial. Videotaping would also cut down on the time spent testifying by police and defendants at pretrial hearings (such as voluntariness hearings) about what occurred during the interrogation because the electronic recording objectively resolves that issue.

302. Leo & Ofshe, *supra* note 239, at 302 ("Due to the substantial prejudicial effect of admitting into evidence a false confession, some minimum standard of reliability should be required before a judge deems it to have probative value that exceeds its prejudicial effect.").

303. Leo & Ofshe, *supra* note 38, at 429, 438-40; Drizin & Leo, *supra* note 2, at 1003.

304. See, e.g., Michael Napier & Susan H. Adams, *Criminal Confessions: Overcoming the Challenges*, 72 FBI L. ENFORCEMENT BULL. 9 (2002); see also Vincent A. Sandoval, *Strategies to Avoid Interview Contamination*, 73 FBI L. ENFORCEMENT BULL. 1 (2003).

Finally, we do not believe that the Ofshe-Leo fit standard is unfair to law enforcement or would result in the arbitrary exclusion of trustworthy confessions. Rather, properly trained law enforcement already use the fit standard to evaluate whether confessions are objectively verifiable and, therefore, likely to be reliable. For example, it is a common principle of police work not to reveal “holdback evidence” (that is, unique crime facts or details not publicly known or easily guessed by chance) so that the confessor can provide the information to corroborate the confession’s reliability.³⁰⁵ More generally, White’s criticism misconceives the nature of the interests at stake when a reliable confession is excluded from evidence. As a society, we are willing to accept the occasional exclusion of a true confession in order to guard against false confessions because of the “fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.”³⁰⁶ By imploring judges to require minimum indicia of reliability before entering disputed confessions into evidence, the fit standard is intended to prevent the wrongful conviction of the innocent based on false and unreliable confession evidence.

*C. Developing a New Reliability Test Based
on the Ofshe-Leo Fit Standard*

In 1998, when Welsh White criticized the Ofshe-Leo recommendations, empirical social science research into the problem of false confessions was not nearly as developed as it is today, almost a full decade later. Since 1998, there has been a wealth of new social science research into this phenomenon.³⁰⁷ The power of DNA evidence to exonerate the wrongfully convicted or wrongfully arrested and charged was just beginning to be felt. Since 1998, the number of proven false confessions which have been documented has more than tripled. The innocence revolution has rocked the entire criminal justice system, causing the system to question the reliability of some of the sacred cows of proof, including not only confession evidence, but also eyewitness evidence, accomplice testimony, and forensic evidence like blood, hair, and fingerprint analysis.³⁰⁸ And it has caused many systems to adopt reforms, including the mandatory electronic recording of police interrogations, which seemed impossible before the exonerations.

305. Napier & Adams, *supra* note 304, at 9, 14.

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

307. See Kassin & Gudjonsson, *supra* note 41.

308. SCHECK, NEUFELD & DWYER, *supra* note 214; see also Innocence Project, <http://www.innocenceproject.org> (last visited Mar. 28, 2006).

1. INCORPORATING THE OFSHE-LEO FACTORS

There is little dispute that the Ofshe-Leo factors should contribute to an assessment of confession evidence reliability. They are routinely relied upon by all parties in the criminal justice system to assess reliability. For example, defense attorneys,³⁰⁹ prosecutors,³¹⁰ and police officers³¹¹ all agree that a suspect who knows “non-public information that only the true perpetrator would have known which can be independently verified” is probably telling the truth. For this very reason, police officers are trained to hold back information from the press and from suspects during questioning.³¹² When police officers announce an arrest, and prosecutors file charges or argue to juries that a confession is reliable, the fact that suspects were able to recount such nonpublic details is always trumpeted as evidence that the right man is in custody.

Law enforcement officers also agree that a confession is reliable if it leads them to information that they did not already know. Investigators are trained that a confession is only as good as the evidence corroborating it; nothing corroborates a confession better than a suspect who leads the police to a murder weapon, bloody clothes, proceeds of a robbery, or other such evidence.³¹³ The absence of such corroboration,

309. Seeking to overturn the conviction of their client, Timothy Brown, for the murder of police officer Patrick Behan, on the basis of new evidence—a surreptitiously taped confession by another man—Miami public defenders argued that the “mark of a true confession is one in which a suspect reveals facts that only the true killer would know.” Wanda DeMarzo, *Lawyers: Real Killer of Officer Unmasked*, MIAMI HERALD, Aug. 22, 2002, at 8B.

310. In objecting to a defense attorney’s request for DNA testing of the victim’s clothing and the alleged murder weapon, Prosecutor Michael Green argued that the testing would amount to “a wild goose chase” because the defendant, Frank Sterling, confessed to details that only the real killer would have known. Ben Dobbin, *Prosecutors Agree to Test Hair Found in 1988 Murder Victim’s Hand*, ASSOCIATED PRESS, Nov. 15, 2004; see also Gary Craig, *The Confession*, ROCHESTER DEMOCRAT & CHRON. (Rochester, N.Y.), Oct. 17, 2004, at 8A.

311. Jeremy Kohler, *Teen Is Accused of Killing Former Pro Soccer Player*, ST. LOUIS POST-DISPATCH, July 10, 2004, at 8 (stating that the suspect was charged, even though he denied killing the victim, because he knew details only the killer would know).

312. FRED E. INBAU, JOHN E. REID, JOSEPH P. BUCKLEY & BRIAN C. JAYNE, CRIMINAL INTERROGATIONS AND CONFESSIONS 432-33 (4th ed. 2004). Inbau et al. refer to this information that was purposely withheld from the press or the public as *dependent* corroboration. See, e.g., Pablo Lopez, *Victim of Slaying in Fresno Identified*, FRESNO BEE, Nov. 10, 2004, at B4 (stating that the homicide sergeant refused to release details of the slaying, saying that only the killer would know them); see also Kelley Scott, *Evidence Revealed in Former Rice Mayor’s Slaying*, ST. CLOUD TIMES, Aug. 4, 2004 at 1A (acknowledging that authorities typically hold back information “to preserve and protect some things that only the killer would know”).

313. INBAU ET AL., *supra* note 312, at 432-34. Inbau et al. refer to this as *independent* corroboration.

however, does not necessarily mean that a confession is unreliable. Such evidence may not exist in every case—bloody clothes may be burned, weapons may be disposed of, and money can be spent.³¹⁴

The third Ofshe-Leo factor relating to the reliability of a confession is the extent to which the suspect's account of the crime fits with the objectively knowable facts of the crime.³¹⁵ Are there errors in the fit? If so, do these errors concern matters the suspect is not likely to lie about (for example, mundane as opposed to dramatic crime scene details)? Similarly, if the suspect gets some general facts correct, but misses on many specifics, are the matters that suspect gets right not likely to be guessed by chance? Absent police contamination or preexisting knowledge, an innocent suspect should only get an objectively demonstrable crime scene fact correct when making a lucky guess, and the likelihood of making lucky guesses decreases with the number of possible answers to the question.³¹⁶

In many of the false confession cases we have studied, there were significant errors in the fit that should have pointed the police officers to the probability that the suspect was guessing and was not involved in the crime.³¹⁷ Innocent false confessors are often ignorant of many of the crime scene details, making their postadmission narratives replete with errors. These errors may be highly significant because they cast doubt on the likely reliability of the suspect's admission and suggest that it, and the suspect's postadmission narrative, "are of little or no value as evidence of guilt."³¹⁸

314. *Id.* at 433-34.

315. As Leo and Ofshe have pointed out:

[O]nly statements that can be objectively evaluated have any value. A suspect's contribution of a story with a lot of details about what he and the murder victim talked about in private before she was killed has no value since it can never be verified. An accurate description of a number of related, or even one highly improbable, established fact(s) is necessary.

Leo & Ofshe, *supra* note 239, at 312 n.78.

316. *Id.*

317. See, e.g., Leo & Ofshe, *supra* note 38, at 435-38; Ofshe & Leo, *supra* note 235, at 1086-88.

318. Ofshe & Leo, *supra* note 235, at 997. Some errors or omissions of key facts do not always mean that a confession is unreliable. Suspects may forget some details over time or may withhold them for a variety of reasons, including, but not limited to, a desire to minimize their role in the crime or to protect accomplices. For example, Richard Allen Davis admitted to kidnapping a child but was not willing to admit that he also raped her. As Leo and Ofshe have pointed out, however:

[I]f a defendant has been properly and thoroughly debriefed, his personal knowledge of the crime should allow him to supply sufficiently detailed information to prove a confession's reliability by demonstrating his specific knowledge of what happened (e.g., the circumstances of the kidnapping, the child's clothing, the location of the killing ground, the description of the

2. *The Importance of Electronic Recording*

A fourth factor relating to reliability is whether the confession and the interrogation preceding the confession were electronically recorded. As of 1998, when White criticized the Ofshe-Leo test, only two states, Alaska³¹⁹ and Minnesota,³²⁰ required law enforcement to electronically record custodial interrogations. Both were the result of state supreme court decisions. Since 1998, the number of states has grown to seven.³²¹ In 2003, in response to a flurry of false confessions in murder cases, Illinois became the first state to enact a law requiring recording of all custodial interrogations in homicide cases.³²² Maine,³²³ the District of Columbia,³²⁴ and New Mexico³²⁵ quickly followed Illinois's lead.

In addition to this legislative activity, several state courts have also issued decisions that spurred law enforcement officers to start recording. In 2003, the New Jersey Supreme Court, proclaiming that the "proverbial 'time has arrived' for this Court to evaluate fully the protections that electronic recordation affords to both the State and to criminal defendants," established a study committee to make recommendations regarding the electronic recording of custodial interrogations.³²⁶ In 2005, that committee recommended that New Jersey begin recording custodial interrogations in homicide cases as of January 2006 and in other serious

killing scene, etc.) even if he resists confessing to certain particularly heinous acts.

Leo & Ofshe, *supra* note 38, at 440.

319. Stephan v. State, 711 P.2d 1156, 1162 (Alaska 1985).

320. State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994).

321. See Thomas P. Sullivan, *Electronic Recording of Interrogations: Everybody Wins*, 95 J. Crim. L. & Criminology 1127, 1128 (2005) [hereinafter, Sullivan, *Electronic*]. In addition to these seven states, many cities and counties have chosen to record interrogations. *Id.*; see also THOMAS P. SULLIVAN, POLICE EXPERIENCES WITH RECORDING CUSTODIAL INTERROGATION 2, 20, 27-28 (2004), <http://www.law.northwestern.edu/depts/clinic/wrongful/documents/SullivanReport.pdf> [hereinafter SULLIVAN, POLICE].

322. 725 ILL. COMP. STAT. ANN. 5/103-2.1 (West 2005). Because the statute was instigated by a recommendation of the Illinois Governor's Commission on Capital Punishment, it is limited to homicide investigations. See 705 ILL. COMP. STAT. ANN. 405/5-401.5 (West 2005) (requiring recording of juvenile homicide interrogations).

323. ME. REV. STAT. ANN. tit. 25 § 2803-B(1)(K) (West 2005).

324. D.C. CODE ANN. §§ 5-116.01, 5-116.03 (LexisNexis 2005).

325. The New Mexico statute, which took effect on January 1, 2006, provides that state and local law enforcement officers conducting custodial interviews of persons suspected of having committed a felony must electronically record the interview in its entirety when they are reasonably able to do so. The statutory command applies both inside and outside police facilities. 2005 New Mexico Laws 2408-10.

326. State v. Cook, 847 A.2d 530, 546-47 (N.J. 2004).

felonies as of January 2007.³²⁷ The court adopted these recommendations in October 2005.³²⁸

In 2004, the Massachusetts Supreme Court issued a decision that has led to widespread recording of interrogations.³²⁹ Although the court did not require recording, it did hold that the inexcusable failure to record an interrogation would entitle the defendant to receive a favorable jury instruction.³³⁰ Most recently, in July 2005, the Wisconsin Supreme Court required electronic recording of all custodial interrogations of juvenile suspects.³³¹ The Wisconsin legislature promptly enacted legislation codifying the mandatory recording requirement for juvenile interrogations and extended the rule to adults in all felony cases.³³² In December 2005, Governor Jim Doyle signed the new electronic recording bill into law.³³³

In light of these developments, we struggled with whether electronically recording interrogations and confessions as a prerequisite for admitting confession evidence should be part of our reliability test. There is much to commend such a rule. Electronically recording interrogations is a reform being utilized by hundreds of police agencies around the country.³³⁴ Surveys suggest that most agencies overwhelmingly support it, rebutting the many myths about the prohibitive costs of recording, both in terms of finances and the loss of confession evidence.³³⁵

327. SUPREME COURT OF N.J., REPORT OF THE SUPREME COURT SPECIAL COMMITTEE ON RECORDATION OF CUSTODIAL INTERROGATIONS 39-41 (2005), *available at* <http://www.judiciary.state.nj.us/notices/reports/cookreport.pdf>.

328. SUPREME COURT OF N.J., ADMINISTRATIVE DETERMINATION RE: REPORT OF THE SPECIAL COMMITTEE ON RECORDATION OF CUSTODIAL INTERROGATIONS 1-3 (2005), *available at* <http://www.judiciary.state.nj.us/notices/reports/recordation.pdf>.

329. Commonwealth v. DiGiambattista, 813 N.E.2d 516 (Mass. 2004).

330. *Id.* at 533-34.

331. *In re Jerrell C.J.*, 2005 WI 105, ¶¶ 57-58, 283 Wis. 2d 145, ¶¶ 57-58, 699 N.W.2d 110, ¶¶ 57-58 (2005).

332. Assemb. B. 648, 2005-2006 Reg. Sess. (Wis. 2005), *available at* <http://www.legis.state.wi.us/2005/data/AB-648.pdf>. In the case of juveniles, the failure to record the interrogation results in the exclusion of the juvenile's statements at trial. *Id.* In the case of adults, however, the failure to record an interrogation of an adult suspect in felony cases entitles the defendant to a jury instruction "that it is the policy of the state [of Wisconsin] to record custodial interrogations related to felonies and that the jury may consider the absence of a recording in weighing the evidence." *Id.*

333. Steven Walters, Doyle Signs Reforms Suggested by Avery Panel, MILWAUKEE J. SENTINEL, Dec. 17, 2005, *available at* <http://www.jsonline.com/story/index.aspx?id=378495>.

334. Sullivan, *Electronic*, *supra* note 321, at 1128; *see also* SULLIVAN, POLICE, *supra* note 321, at 10, 23-24 (discussing the nominal cost of videotaping and its great savings, particularly in contesting interrogation procedures).

335. SULLIVAN, POLICE, *supra* note 321, at 27.

Recording creates an objective, comprehensive, and reviewable record of the interrogation process and relieves judges from having to rely on subjective credibility judgments to resolve a “swearing contest” between a suspect and a law enforcement officer over what transpired during the interrogation. Without a recording, it is difficult—sometimes impossible—for judges accurately to assess the reliability of confession evidence. Judges can determine whether the critical details of the crime contained in the confession originated in the mind of the suspect or were suggested to the suspect by the interrogators, either inadvertently or intentionally, only by seeing or hearing what happened during the interrogation.

Although we support mandatory electronic recording of interrogations and exclusionary rules for failing to record, at this time we do not think that the failure to record an interrogation should be an absolute bar to the admission of a confession on reliability grounds.³³⁶ Most states requiring or encouraging recording do not automatically exclude unrecorded confessions and interrogations.³³⁷ There may be some circumstances, like equipment failure, spontaneous confessions, and the refusal of the suspect to speak to police if recorded, that are not the fault of the police. The mere fact that a confession is unrecorded also does not necessarily mean that it is unreliable; it simply means that judges and juries may have a more difficult time determining whether the confession is reliable.

To encourage recording interrogations, we believe that law enforcement officers should have a higher burden when seeking to admit unrecorded statements. Although the same factors for evaluating the reliability of confession evidence exist whether the confession is recorded or unrecorded, these factors should be given different weight in the case of unrecorded confessions. Therefore, we suggest different tests of reliability depending upon whether the interrogation process was recorded.

336. The case for barring confessions that are the product of unrecorded interrogations in the voluntariness context is arguably stronger. In this context, the burden is on the State to prove that under the “totality of the circumstances,” a confession is voluntary. Because the method for preserving confession evidence is within the control of the State and its agents, the State’s inexcusable failure to record should be a strong, if not dispositive, factor in assessing whether the State has met its burden.

337. Sullivan, *Electronic*, *supra* note 321, at 1131-35.

E. A New Reliability Test

1. RELIABILITY TEST FOR RECORDED INTERROGATIONS AND CONFESSIONS

Judges evaluating the reliability of confessions that are the product of a recorded interrogation should weigh three factors: 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 the crime facts and existing objective evidence.

As in the case of voluntariness hearings, challenges to the reliability of confession evidence should commence upon filing a motion to exclude by the defense. The motion can be styled as a motion in limine under local rules of evidence that track Federal Rule of Evidence 403.³³⁸ Although confession evidence failing to meet one or more of the factors in our test is clearly relevant under the Federal Rules of Evidence, it may not be particularly probative of a suspect's guilt. Because juries often see confession evidence as dispositive of guilt, even when it is false, its prejudicial effect can be devastating to an innocent defendant.³³⁹ This is the reason Rule 403 allows judges to exclude unreliable evidence on the ground that its probative value is outweighed by its prejudicial effect.³⁴⁰

Defendants will bear the burden of production on the issue of reliability, and need only marshal some evidence that the confession is unreliable based upon the tripartite "totality of the circumstances" test outlined above. The ultimate burden of persuasion, however, falls on the prosecution. Because the jury is the ultimate fact finder with respect to the truth or falsity of a confession, the standard for admissibility should be less than "beyond a reasonable doubt." We propose a "preponderance of the evidence standard."

A hearing on the issue of confession reliability should proceed only after any attempt to exclude a confession on involuntariness grounds. The reason for this is simple: the truth or falsity of the confession is not relevant to a determination of the voluntariness of the confession. If

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

339. Leo & Ofshe, *supra* note 38, at 484-85; Drizin & Leo, *supra* note 2, at 995-96.

340. Leo & Ofshe, *supra* note 38; Drizin & Leo, *supra* note 2, at 950.

judges were to conduct reliability assessments first, their comparison of the contents of the confession with the corroborating evidence could color their assessment of voluntariness.³⁴¹

Pretrial assessments of the reliability of confession evidence need not lead to the kind of lengthy contested hearings often seen in voluntariness hearings. In most cases, witnesses would not need to be called; 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 confession and rule on the pleadings after argument. To the extent that prosecutors must demonstrate the evidence of a fit, the nonpublic facts known by the defendant and the evidence recovered as a result of the defendant's statements would allow them to do so in most cases by proffer or affidavit.

More generally, the kind of evidentiary evaluation we propose is one that trial courts do all the time to prevent unreliable or nonprobative evidence from biasing, confusing, or misleading juries. Judges are routinely called upon to decide whether to admit reliable evidence. The requirement in a criminal case that the evidence presented to the jury have sufficient indicia of reliability as a threshold to admissibility is neither new nor novel. For example, the rules of evidence prohibiting the admissibility of hearsay evidence are rooted in concerns about the unreliability of such evidence. Similarly, the numerous exceptions to the hearsay rule are grounded in the idea that some forms of hearsay are so trustworthy as to be admissible whether or not the declarant is available.³⁴² Judges may also admit hearsay statements not specifically covered by a hearsay exception if the statement has "equivalent circumstantial guarantees of trustworthiness."³⁴³

341. Ayling, *supra* note 44.

342. FED. R. EVID. 803, 804.

343. FED. R. EVID. 807. We can think of several additional examples:

1) The danger of an irreparable misidentification provoked the Supreme Court to establish as the central question at an admissibility hearing whether, under the totality of the circumstances, the identification was reliable. *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972). As the Court stated five years later:

There are, of course, several interests to be considered and taken into account. The driving force behind *United States v. Wade*, and *Stovall*, . . . was the Court's concern with the problems of eyewitness identification. Usually the witness must testify about an encounter with a total stranger under circumstances of emergency or emotional stress. The witness's recollection of the stranger can be distorted easily by the circumstances or by later actions of the police. Thus, *Wade* and its companion cases reflect the concern that the jury not hear eyewitness testimony unless that evidence has aspects of reliability.

Manson v. Brathwaite, 432 U.S. 98, 111-12 (1977).

2) Criminal trial courts routinely screen anonymous tips before admitting evidence gathered from police stops, arrests, and searches. An anonymous tip lacking indicia of

2. STRICTER RELIABILITY TEST FOR UNRECORDED INTERROGATIONS AND CONFESSIONS

If the state seeks to admit a confession that is not the product of a recorded interrogation, it must first meet a threshold test. If prosecutors can demonstrate by clear and convincing evidence that it was infeasible for reasons that were not the fault of law enforcement, an unrecorded confession can be admitted into evidence against a defendant if the confession strongly links the suspect to the crime by leading law enforcement to evidence that was previously unknown to them. If the prosecutor can meet this burden, the judge must still balance the remaining reliability factors outlined in the Ofshe-Leo proposal before admitting the confession.

Because the absence of a recording often makes it impossible for both judge and jury to determine whether the details of the confession came from the suspect or were suggested by the police, the failure to record should carry some penalty. We propose that prosecutors must demonstrate by clear and convincing evidence that recording was infeasible for reasons that were not the fault of law enforcement. In practice, there will only be a few reasons why the failure to record will be justified, including an equipment malfunction, a spontaneous confession by a defendant who was in custody but outside of the interrogation room, and situations where a suspect refused to speak to the police if recorded.

Even in these situations, law enforcement officers should make every reasonable attempt to record either the interrogation process or the suspect's refusal. For example, if there is a breakdown in video equipment, law enforcement officers should attempt to capture the process on audiotape. Officers should also seek to get suspects to repeat spontaneous confessions at the stationhouse on recording equipment. If the suspect refuses to be recorded, the refusal should be recorded or otherwise documented. In allowing these limited exceptions, we

reliability "does not justify a stop and frisk whenever and however it alleges the illegal possession of a firearm." *Florida v. J.L.*, 529 U.S. 266, 274 (2000).

3) Even procedural due process case law expects that in certain circumstances (depending upon the interests at stake for the individual and the State) the government is permitted to deprive individuals of liberty or property, without prior notice and opportunity to be heard, so long as a postdeprivation remedy is available and the procedures used in the deprivation were reliable. *Matthews v. Eldridge*, 424 U.S. 319, 334-35 (1976); *see also Richardson v. Perales*, 402 U.S. 389, 404-05, 407 (1971).

4) In Illinois, judges presiding over capital cases must conduct pretrial hearings to determine if the testimony of an informant is reliable. The burden is on the prosecution to show by a preponderance of the evidence that the informant's testimony is reliable before it may be admitted against a defendant in a death penalty case. 725 Ill. Comp. Stat. 5/116-2 (2003).

recognize that feasibility has nothing to do with reliability. These exceptions are a concession to the fact that recording may not always be possible and that law enforcement officers should not lose potentially reliable confessions through no fault of their own.

Assuming that law enforcement officers pass the “infeasibility test,” they must also produce evidence previously unknown to them tying the suspect to the crime, knowledge of which arose from the suspect’s unrecorded interrogation. In many cases, this may not be possible, either because such evidence never existed or because the evidence was destroyed. Nevertheless, if the suspect’s confession does not lead law enforcement officers to such evidence, then the suspect’s confession should not be admitted. Placing a premium on finding new evidence as a result of the unrecorded confession is justified because it is the only one of the three reliability factors that does not depend on a swearing contest between the officers and the suspect regarding the interrogation. Although it is possible that police officers could lie about when they recovered corroborative evidence or when they learned about such evidence, such lies are unlikely given the progression of police investigations and the number of officers from different units who are required to document and date the events of the investigation.

If prosecutors meet both prongs of the threshold test for unrecorded confessions—infeasibility and leading law enforcement to new evidence—courts must still assess the remaining two factors of the test: whether a confession contains nonpublic information known only by the true perpetrator, and whether the details of the confession fit the crime. Innocent suspects may know some details that fit some of the crime scene evidence or facts that only the true perpetrator should know. For example, suspects who discovered the victim’s body, who were shown photographs of the crime scene, or who have visited the crime scene may be privy to information that might make a confession appear credible. Similarly, suspects who have spoken with the victim’s family members, listened to neighborhood gossip, or read or viewed press accounts of the crime may possess such information. Requiring a judge to inquire into the source of a suspect’s knowledge and analyze these factors closely offers added protection against the possibility of a wrongful conviction.

V. CONCLUSION: THE CENTRAL PARK JOGGER CASE REVISITED

Prosecutors in the Central Park Jogger case would not have been able to admit the confessions of the five defendants at their trial under our test for reliability. Had our test been in place at the time, many of the concerns with the reliability of the defendants’ confessions, which only surfaced after Reyes’s DNA dispositively linked him to the crime in 2002, would have been apparent to prosecutors, defense attorneys, and

the court in 1989. In other words, if our test had been in place in 1989, it would have prevented all five false confessions from being entered into evidence against the five defendants, and thus would have prevented all five wrongful convictions.

Our test first asks whether it was feasible for the police to record the interrogation in its entirety. If so, then law enforcement must record the interrogation or else the unrecorded confession will be excluded. There is only one exception to this requirement: if prosecutors can demonstrate by clear and convincing evidence that it was infeasible to record the confession for reasons that were not the fault of law enforcement, the confession will still be admitted if it strongly links the suspect to the crime by leading law enforcement to evidence that was previously unknown to them. In the Central Park Jogger case, the *interrogations* were not recorded; rather, four of the five *confessions* were partially recorded.³⁴⁴ Under our test, the confessions likely would have been excluded.³⁴⁵ Even if the prosecution could have shown that recording was infeasible through no fault of law enforcement, none of the five confessions led police officers to any evidence they did not already know about. This is contrary to what one would have expected in a crime with so many alleged perpetrators and with so much physical evidence left at the crime scene.

Perhaps the more interesting question is whether any of the five confessions would have been admitted into evidence under our test if the interrogations had been recorded in their entirety. We believe the answer is “no” because the confessions would have failed all three prongs. First, none of the confessions contained any nonpublic information known only to perpetrators or accomplices. Nor, as we have seen, did any of the five confessions lead the police to evidence about the crime that they did not already know, as required by the second prong of our test. Rather, police officers took several of the defendants to the crime scene or showed them photographs of the crime scene and the victim’s body.³⁴⁶ By exposing the boys to this information, police contaminated the inquiry into the source of the suspects’ knowledge, thereby rendering it largely impossible to confirm the reliability of any of the five confessions.

The third prong of our tripartite test for recorded confessions may have been the most problematic when evaluating the reliability of the

344. The prosecutors recorded confessions from Wise, McCray, Santana, and Richardson. Salaam’s confession was not recorded.

345. It was feasible for Manhattan homicide detectives to record the interrogations in their entirety because they had a policy of recording confessions at the time.

346. Saul Kassin, *False Confessions and Jogger Case*, N.Y. TIMES, Nov. 1, 2002, at A31.

Central Park Jogger defendants' confessions. This is because none of the defendants' postadmission narratives fit well with the crime facts, objectively verifiable evidence, or even with each other. The five confessions differed from one another:

on the specific details of virtually every major aspect of the crime—who initiated the attack, who knocked the victim down, who undressed her, who struck her, who held her, who raped her, what weapons were used in the course of the assault, and when in the sequence of events the attack took place.³⁴⁷

Moreover, the five defendants' confessions were not consistent with the objectively verifiable evidence³⁴⁸ and much of what they said was demonstrably false.³⁴⁹ For example, Wise erroneously confessed that the jogger's clothes had been cut off and that her leg had been cut with a knife;³⁵⁰ Richardson erroneously confessed that the jogger's bra had been ripped off;³⁵¹ and Santana erroneously confessed the jogger had been naked during the attack.³⁵²

The defendants' confessions also failed to reveal knowledge that they should have known if they had committed the crime. For example, none of the five confessions mentioned the jogger's walkman, keys, or a search for money that was suggested by the fact that the insole had been pulled out of her shoe.³⁵³ Nor were any of the defendants able to give specific information about the direction the jogger was coming from or running to, where she was attacked, or how they happened to notice her.³⁵⁴ And, of course, none of the five confessions were corroborated by DNA evidence.

In short, even with this contamination, the boys got more details wrong than they got right, and the details they got wrong were about key facts that the true perpetrators would not have missed, such as the location of the attack and the victim's body. Most of the facts that they got right, including the fact that the jogger was beaten and sexually assaulted, they not only learned from their interrogators, but also had a high chance of guessing correctly. Although DNA evidence proved the confessions false in 2002, the evidence of their falsity was in plain view in 1989, if only the kind of reliability analysis described in this Article

347. Manhattan DA's Report, *supra* note 20, ¶ 86.

348. *Id.* ¶¶ 91-93.

349. *Id.* ¶ 93.

350. *Id.*

351. *Id.*

352. *Id.*

353. *Id.* ¶ 92.

354. *Id.* ¶¶ 91-93.

had been systematically undertaken by police, prosecutors, the trial court, or the two juries that convicted all five boys.

The DNA identification of Reyes that prompted the reinvestigation of the Central Park Jogger case was the first meaningful reliability assessment of the confession evidence undertaken by prosecutors. It came thirteen years too late. After all, the DNA results excluding the five confessing defendants as the source of the semen found in the Jogger's vagina and on the sock had been known in 1989,³⁵⁵ as had the numerous inconsistencies, discrepancies, and contradictions in the all five confessions.³⁵⁶ Police and prosecutors should have studied these errors more closely at the time, especially after the DNA tests came back and excluded all five boys. Although there were serious problems with all five statements from the moment they were elicited, the system failed to weed them out despite the early warning signs. Instead, police, prosecutors, and the trial courts placed blind faith in facially damning confessions that turned out to be entirely false.

To be sure, the phenomenon of police-induced false confession was not as widely known or studied in 1989 as it is today. Nevertheless, there can be no excuses in the twenty-first century for similar failures of judgment in light of our greater knowledge about the problem of false confessions and the multiple pathways to wrongful conviction. DNA must not be the trigger for police and prosecutors to analyze the reliability of confession evidence closely and carefully. Contrary to what occurred in the Central Park Jogger case, only a minority of false confessions are discovered as a result of DNA evidence.³⁵⁷ Most are not.

The Central Park Jogger case stands as a testament to the remarkable and tragic fallibility of the American criminal justice system, which exists to a degree that was almost unthinkable in the pre-DNA era. The legacy of the Central Park Jogger case is not merely that police and prosecutors extracted five demonstrably false confessions from five innocent teenage boys that led to five wrongful convictions in one of the most highly publicized, closely scrutinized, and emotionally charged cases of the twentieth century. Sadly, this was only one of the tragic consequences of police and prosecutorial error in this case. Following his vicious attack and rape of the Central Park Jogger, Reyes went on to commit additional violent crimes against five more women: on June 11, 1989, Reyes raped, robbed, stabbed, and beat a twenty-four-year-old woman;³⁵⁸ three days later on June 14, 1989, Reyes raped, robbed, and

355. SULLIVAN, *supra* note 2, at 89-90, 103, 145-47.

356. *Id.*

357. Drizin & Leo, *supra* note 2, at 955-56.

358. Manhattan DA's Report, *supra* note 20, ¶ 55(1).

He used a knife he got from the victim's kitchen. . . . The victim suffered a fractured nose, two black eyes, and multiple areas of bruising, some of them

stabbed to death another twenty-four-year-old woman,³⁵⁹ on July 19, 1989, Reyes raped, robbed, and cut a twenty-year-old woman;³⁶⁰ on July 27, 1989, Reyes robbed and punched a twenty-eight-year-old woman whom he had intended to rape before neighbors interrupted the crime;³⁶¹ and, on August 5, 1989, Reyes raped and robbed a twenty-four-year-old woman.³⁶²

The legacy of the Central Park jogger case is that by extracting five demonstrably false confessions from five innocent young boys, police and prosecutors allowed a violent serial predator to continue robbing, raping, stabbing and, in one case, killing other women before he was finally apprehended and brought to justice. The pretrial reliability test that we propose in this Article will prevent judges from admitting false confessions into evidence, thus preventing juries from wrongfully convicting the innocent. In so doing, it will also force police to focus on gathering reliable evidence so that true perpetrators, such as Matias Reyes, are no longer free to continue inflicting their violent crimes on innocent victims.³⁶³

large, on her knees, her legs, her neck, and her flank. In addition, the victim had two superficial stab wounds on her thigh, one in her side, one on a finger, one near her left eyebrow, and one under each eye.

Id.

359. *Id.* ¶ 55(2).

360. *Id.* ¶ 55(3).

361. *Id.* ¶ 55(4).

362. *Id.* ¶ 55(5).

363. In Drizin and Leo's recent study of 125 proven false confessions, 81 percent (101) were confessions to murder. See Drizin & Leo, *supra* note 2, at 947. In a recent study of 340 exonerations from 1989-2003, 96 percent involved murder and rape cases. Samuel Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 523-24 (2005).