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The Future of Confession Law: Toward Rules for the Voluntariness Test

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THE FUTURE OF CONFESSION LAW: TOWARD RULES FOR THE VOLUNTARINESS TEST

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Confession law is in a state of collapse. Fifty years ago, three different doctrines imposed constitutional limits on the admissibility of confessions in criminal cases: Miranda *doctrine under the Fifth Amendment,* Massiah *doctrine under the Sixth Amendment, and voluntariness doctrine under the Due Process Clauses of the Fifth and Fourteenth Amendments. But in recent years, the Supreme Court has gutted* Miranda *and* Massiah*, effectively leaving suspects with only voluntariness doctrine to protect them during police interrogations. The voluntariness test is a notoriously vague case-by-case standard. In this Article, I argue that if voluntariness is going to be the framework for confession law going forward, courts will need to disentangle the complex of values that is discussed under that heading and then use their clarified understanding as the basis for a judicially administrable rubric for regulating interrogation practices.*

As a matter of history and current practice, I argue that there are two different strands within voluntariness doctrine—one deontological strand that focuses on the offensiveness of the police methods used and one consequentialist strand that is concerned with the problem of false confessions. Courts could profit from disentangling those strands and creating different tests for each. Once the two strands are separated, voluntariness doctrine can move toward rules that are tailored to the distinctive values animating each strand. Toward that end, I propose different tests for determining the voluntariness of confessions going forward depending on which of the two strands is implicated in a given case.

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Introduction

Constitutional regulation of police interrogation is in a state of collapse. Half a century ago, three different doctrines imposed limits on the admissibility of confessions in criminal cases: *Miranda* doctrine under the Fifth Amendment,[1] *Massiah* doctrine under the Sixth Amendment,[2] and voluntariness doctrine under the Due Process Clauses of the Fifth and Fourteenth Amendments. Of the three, voluntariness was always the most amorphous. Justices and commentators alike described the voluntariness test as a "forgiving and vague,"[3] case-by-case standard with no definite shape[4] that, in practice, almost always resulted in the admission of suspects' confessions.[5] In

1. Miranda v. Arizona, 384 U.S. 436 (1966).

2. Massiah v. United States, 377 U.S. 201 (1964).

3. Brandon L. Garrett, *The Substance of False Confessions*, 62 Stan. L. Rev. 1051, 1094 (2010); *see also* Richard A. Leo, Police Interrogation and American Justice 277 (2008) ("The voluntariness test . . . invites inconsistent application."); Welsh S. White, *Miranda*'s Waning Protections 39 (2001) (describing the voluntariness test as "constantly shifting and evolving"); Yale Kamisar, *On the Fortieth Anniversary of the* Miranda *Case: Why We Needed It, How We Got It—And What Happened to It*, 5 Ohio St. J. Crim. L. 163, 168 (2007) (describing the test as "too amorphous, too perplexing, too subjective and too time-consuming to administer effectively").

4. *See, e.g.*, Culombe v. Connecticut, 367 U.S. 568, 605 (1961) (plurality opinion) (describing voluntariness as "an amphibian"); Blackburn v. Alabama, 361 U.S. 199, 207 (1960) (noting that voluntariness is animated by a "complex of values").

5. *See, e.g.*, Mark A. Godsey, *Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination*, 93 Calif. L. Rev. 465, 470 (2005) ("[A] finding that a confession was made involuntarily [is] very rare in practice."); Yale Kamisar, *A Dissent from the* Miranda *Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 Mich. L. Rev. 59, 62 (1966) ("A victim of objectionable interrogation practices could only satisfy [the voluntariness test] . . . in a utopian judicial world.").

contrast, *Miranda* and *Massiah* supplied more definite rules, and courts relied on them to do the heavy lifting in regulating police interrogation practices.

In the last decade, however, the Roberts Court has gutted criminal suspects' *Miranda* and *Massiah* protections.[6] As a result, where there used to be three different constitutional doctrines to protect suspects during a police interrogation, there is now effectively one: voluntariness. And the voluntariness doctrine remains as hazy and unfocused as ever, bouncing among various concerns about confessions and almost always arriving at the conclusion that what the police did was, all things considered, acceptable. If voluntariness is going to be the framework for confession law, courts will need to disentangle the complex of values that is discussed under that heading and then use their clarified understanding as the basis of a judicially administrable rubric for regulating interrogation practices. In this Article, I begin that process and offer suggestions for ways to put rule-like contours on the morass that is voluntariness doctrine.

Some may quarrel with the premise of this Article, arguing that courts have no incentive to clarify and hone voluntariness doctrine.[7] After all, courts have gutted *Miranda* and *Massiah* to ease restrictions on police interrogation practices. Judges know that the police need confessions to obtain criminal convictions,[8] and they don't want to appear soft on crime by freeing confessed criminals.[9] The amorphous nature of the current voluntariness standard permits the admission of most confessions while still being flexible enough to allow courts to step in when particularly egregious problems arise. In short, if judges don't think voluntariness doctrine is broken, why would they fix it?

There is something to that argument. But it ignores a different set of judicial incentives, one that becomes more urgent as courts find themselves constantly adjudicating voluntariness claims in a world without rules to guide them. Those circumstances create a felt need for more predictable and uniform principles. As is well known, regulators perennially struggle with

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6. *See, e.g.*, Charles D. Weisselberg, *Mourning* Miranda, 96 Calif. L. Rev. 1519 (2008); Jonathan Witmer-Rich, *Interrogation and the Roberts Court*, 63 Fla. L. Rev. 1189 (2011); *see also infra* Section I.C.

7. *Cf.* Yale Kamisar, *The Rise, Decline, and Fall (?) of* Miranda, 87 Wash. L. Rev. 965, 1026–27 (2012) (expressing doubt that the Supreme Court would want to reshape the voluntariness test if *Miranda* were overruled).

8. *See* Maryland v. Shatzer, 559 U.S. 98, 108 (2010) (describing confessions as an "unmitigated good" and as "essential to society's compelling interest in finding, convicting, and punishing those who violate the law" (quoting McNeil v. Wisconsin, 501 U.S. 171, 181 (1991))).

9. Many judges are elected and thus subject to political pressure to appear tough on crime. *See* American Bar Ass'n, Fact Sheet on Judicial Selection Methods in the States 1, http://www.abanet.org/leadership/fact_sheet.pdf (noting that judges in thirty-nine states are elected); *see also* Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. Chi. L. Rev. 689, 727 (1995).

the relative benefits of rules and standards as means for governing behavior.[10] Rules have the benefit of clarity. They allow people to more easily predict whether their conduct will be deemed unlawful, and they provide for more consistent application of legal norms. But rules are also bound to be under- and overinclusive with respect to the norms they seek to advance, and they may not provide the flexibility necessary to implement those norms in varying circumstances. Standards provide that flexibility. They allow decisionmakers to consider the specific circumstances of a case and, one hopes, to reach just outcomes on the facts before them. But they provide less clarity, less consistency, and less guidance than rules.[11]

A similar pattern would emerge across many areas of law if one charted courts' use of rules and standards. Courts charged with applying specific rules encounter outlier cases in which the applicable rule directs a certain result, but equity and justice seem to direct another. Courts then create exceptions for those situations, thus blurring the clarity of the rule and making it more standard-like. If the exceptions become too pervasive and too textured, courts revert back to more rules to rein in the doctrine.[12]

Similarly, when faced with the need to interpret overly open-ended standards, courts infuse those standards with rule-like elements—especially when courts find themselves applying the standards to frequently recurring situations in which the law ought to provide clear guidance. If the rule-like contours get too specific and start to be too over- or underinclusive, courts shift back to a more standard-like inquiry.[13]

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10. For seminal contributions to the rules/standards debate, see Frederick Schauer, Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life 17–31 (1991); Ronald M. Dworkin, *The Model of Rules*, 35 U. Chi. L. Rev. 14, 22–29 (1967); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 Duke L.J. 557, 571–86 (1992); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685 (1976); Pierre Schlag, *Rules and Standards*, 33 UCLA L. Rev. 379 (1985).

11. *See, e.g.*, Schlag, *supra* note 10, at 384–89.

12. *See, e.g.*, Adam I. Muchmore, *Jurisdictional Standards (and Rules)*, 46 Vand. J. Transnat'l L. 171, 183–87 (2013) (describing this trend in choice of law); Carol M. Rose, *Crystals and Mud in Property Law*, 40 Stan. L. Rev. 577, 577–90 (1988) (describing this trend in property law). For a particularly good description of this trend, see Neumeier v. Kuehner, 286 N.E.2d 454, 457–58 (N.Y. 1972), describing the evolution of choice of law in personal injury cases and explaining how courts moved from a mechanical place of injury rule to an open-ended standard that considered which jurisdiction had the greatest concern with or interest in the litigation, and then moved back to a multipronged rule.

13. *See* Daniel A. Crane, *Rules Versus Standards in Antitrust Adjudication*, 64 Wash. & Lee L. Rev. 49, 49–71 (2007) (describing this trend in antitrust law); Matthew G. Doré, *Statutes of Limitation and Corporate Fiduciary Claims: A Search for Middle Ground on the Rules/Standards Continuum*, 63 Brook. L. Rev. 695, 720–32 (1997) (explaining this trend in corporate law); David A. Weisbach, *Formalism in the Tax Law*, 66 U. Chi. L. Rev. 860, 860–63 (1999) (explaining how lawmakers are shifting the tax system away from rules toward standards). The famous fight between Justice Holmes and Justice Cardozo about the meaning of reasonableness in tort law nicely illustrates this trend. *Compare* Balt. & Ohio R.R. v. Goodman, 275 U.S. 66, 70 (1927) (Holmes, J.) (developing a rule that a car driver negligently crosses railroad tracks unless he stops and gets out of his car to look for a train before crossing), *with* Pokora v. Wabash Ry., 292 U.S. 98 (1934) (Cardozo, J.) (limiting *Goodman* and reverting back to a reasonableness standard).

This dance between rules and standards operates like a pendulum, swinging to one side and then the other until a satisfactory equilibrium has been reached. The degree of each swing depends in part on the composition of the Supreme Court and the political climate at the time. And the equilibrium is, of course, transient. The Court can reach equilibrium for a period, and then the world changes and the dance begins again and continues until the Court achieves a new equilibrium.[14]

Criminal procedure routinely exemplifies the tension between rules and standards, particularly when courts are tasked with regulating police conduct. Police regularly put their lives in danger and must make split-second decisions involving widely varying factual scenarios.[15] For these reasons, courts are often inclined to use standards that give police the flexibility they need to protect themselves, and the public, in difficult and time-pressured situations.[16] At the same time, the Supreme Court has recognized that police are "engaged in the often competitive enterprise of ferreting out crime,"[17] which drives them, often in good faith, to overvalue solving crimes and securing convictions and to undervalue competing social interests in things like privacy and avoiding false convictions. As a result, the Bill of Rights must limit police behavior and provide clear guidance about those limits. And although police do face varied situations, they also encounter standard ones: an officer will see many cases that are in relevant respects much like cases she has seen before. When situations recur frequently, the need for clear rules to guide police action and inform later judicial analysis of that action is at its zenith. For these reasons, courts often want to establish rules to guide police behavior in run-of-the-mill cases.[18]

The courts' experience regulating confessions both demonstrates the dance between rules and standards and explains why courts will need to create some rule-like contours for the voluntariness doctrine going forward.

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14. *See infra* Part I; *see also* Crane, *supra* note 13, at 51–52; Rose, *supra* note 12, at 590–97.

15. *See* Terry v. Ohio, 392 U.S. 1, 10 (1968) ("[I]n dealing with the rapidly unfolding and often dangerous situations on city streets the police are in need of an escalating set of flexible responses . . . .").

16. *See, e.g.*, *id.* (allowing police to stop and frisk a suspect based on reasonable suspicion that the suspect is armed and dangerous).

17. Johnson v. United States, 333 U.S. 10, 14 (1948).

18. *See, e.g.*, Maryland v. Shatzer, 559 U.S. 98, 110 (2010) (establishing a rule that once a suspect invokes her *Miranda* right to counsel, the police may reapproach her after a two-week break in custody, and noting that "law enforcement officers need to know, with certainty and beforehand, when renewed interrogation is lawful"); Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 55–58 (1991) (specifying forty-eight hours as the time within which police must present a person arrested without a warrant to a magistrate to establish probable cause for continued detention); *see also* Kaplow, *supra* note 10, at 577 (recognizing that rules often dominate when a law must be applied frequently because the costs of a one-time promulgation of the rule are less than the costs of repeatedly enforcing a standard); Wayne R. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith"*, 43 U. PITT. L. REV. 307 (1982) (discussing the Supreme Court's tendency to want to draw bright line rules).

When the Supreme Court began to regulate confessions in the 1930s, it adopted a generalized due process standard under which only confessions that were given "voluntarily" would be admissible.[19] That open-ended standard gave courts flexibility to develop the law slowly rather than starting with a rule that might prove unworkable in practice. And even if the Court had been inclined to adopt a rule, it is unclear that any rule could have adequately served the "complex of values" that animated voluntariness doctrine.[20] As the Court noted, voluntariness incorporated concepts of fairness,[21] concerns about ensuring that the system remained adversarial rather than inquisitorial,[22] notions of individual autonomy and free will,[23] and concerns about the reliability of confessions.[24] It is hard to imagine a rule that would vindicate all of those interests at once.

Not surprisingly, however, the first thirty years of the Court's experiment with regulating confession law demonstrated the unworkability of a completely open-ended standard. The lower courts were all over the map in their descriptions of what made a confession involuntary[25] and were consistent only in their pervasive tendency to uphold whatever the police might do in a given case.[26] It was well understood that police were beating suspects—particularly African American men in the South—and using extreme psychological and physical pressure to get suspects to confess.[27] But the voluntariness test was too vague to force police to stop these abusive interrogation methods. Potentially innocent people were being convicted[28] and the Supreme Court's docket was not large enough to take every case that involved offensive police interrogation practices.[29] There was, as a result, immense

19. *See* Brown v. Mississippi, 297 U.S. 278 (1936); *see also infra* Section I.A.

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

21. *See, e.g.*, Lisenba v. California, 314 U.S. 219, 236 (1941) ("The aim of the requirement of due process is . . . to prevent fundamental unfairness in the use of evidence . . . .").

22. *See, e.g.*, Ashcraft v. Tennessee, 322 U.S. 143, 152–54 (1944).

23. *See, e.g.*, Culombe v. Connecticut, 367 U.S. 568, 602 (1961) (plurality opinion) (noting that voluntariness considers whether "the confession [is] the product of an essentially free and unconstrained choice by its maker").

24. *See, e.g.*, *Blackburn*, 361 U.S. at 207.

25. *See, e.g.*, H. Frank Way, Jr., *The Supreme Court and State Coerced Confessions*, 12 J. Pub. L. 53, 65 (1963) (surveying lower court cases and noting that courts would "pick and choose the precedents" to reach whatever results they wanted).

26. *See* Geoffrey R. Stone, *The* Miranda *Doctrine in the Burger Court*, 1977 Sup. Ct. Rev. 99, 102 (1977) (describing the "persistence of state courts in utilizing the ambiguity of [voluntariness] to validate confessions of doubtful constitutionality").

27. *See, e.g.*, Beecher v. Alabama, 389 U.S. 35 (1967); Brown v. Mississippi, 297 U.S. 278 (1936); *see also* Leo, *supra* note 3, at 51, 69 (describing the use of the "third degree" during this time).

28. *See, e.g.*, *Brown*, 297 U.S. at 279 (noting that, aside from the confessions, there was not sufficient evidence of the defendants' guilt).

29. *See* Dickerson v. United States, 530 U.S. 428, 434 (2000) ("[The Supreme Court] applied the due process voluntariness test in 'some 30 different cases decided during the era that intervened between *Brown* and *Escobedo* . . . .'" (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 223 (1973))); *see also* Transcript of Oral Argument, Vignera v. New York, 384 US.

pressure to put some rule-like contours on the open-ended voluntariness standard.[30]

For a time, it appeared that the Court might address these problems by putting some rule-like contours on voluntariness doctrine.[31] And the Court did eventually impose rules to regulate police interrogation, albeit through *Miranda* and *Massiah* rather than within voluntariness doctrine itself.[32] The Rehnquist and Roberts Courts, however, have gutted the *Miranda* and *Massiah* protections by diluting their triggering requirements, relaxing the standards for waiver and invocation, and reducing the scope of their exclusionary rule protection. As a result, the regulation of confession law has collapsed back into a focus on voluntariness.[33] With the amorphous voluntariness test back at the forefront, courts will have to pick up where they left off in the 1960s.[34]

Parallel pressures to those that led to the creation of *Miranda* and *Massiah* will cause litigants to push the courts, once again, for more rule-like contours on the voluntariness standard. With more and more police departments videotaping interrogations, courts now see stark and unavoidable examples of police overreaching.[35] As police misconduct becomes more visible, there is more public outcry and more pressure to use the law to prevent recurring misconduct.[36] The war on terror and the public debate about the

436 (1966) (No. 760) ("[I]f you're going to determine [the admissibility of the confession] each time on the circumstances . . . [if] this Court would take them up one by one . . . . [it is] more than we are capable of doing." (Black, J.)).

30. *See* Walter V. Schaefer, The Suspect and Society: Criminal Procedure and Converging Constitutional Doctrines 9–10 (1967) ("Pressing upon [the Supreme Court] are hundreds of cases every year in which, in one form or another, the claim is advanced that the constitutional rights of a convicted man were violated through the use at his trial of a confession . . . . It seems inevitable that the Supreme Court will be searching for some automatic device by which the potential evils of incommunicado interrogation can be controlled.").

31. *See, e.g.*, Crooker v. California, 357 U.S. 433 (1958) (considering and rejecting a rule that would deem continued questioning of a suspect after he requested counsel a violation of due process); Cicenia v. Lagay, 357 U.S. 504 (1958) (considering and rejecting a rule that would deem it a violation of due process if police continued to question a suspect outside the presence of his lawyer when the suspect had asked to see his lawyer and his lawyer was present at the station and requesting to speak with the client).

32. *See infra* Section I.B.

33. *See infra* Section I.C.

34. *See* Weisselberg, *supra* note 6, at 1595 (describing *Miranda* as "an obstacle to the more important assessment of voluntariness").

35. *See, e.g.*, People v. Medina, 25 P.3d 1216, 1225–26 (Colo. 2001) (en banc); Commonwealth v. Nga Truong, No. CV20090385, 28 Mass. L. Rptr. 223, at *3 (Super. Ct. Feb. 25, 2011).

36. *Chicago Inquiry: Police Tortured Black Suspects*, NBCNEWS.com (July 19, 2006, 5:51 PM), http://www.nbcnews.com/id/13936994/ns/us_news-life/t/chicago-inquiry-police-tortured-black-suspects/#.VIsXPjHF_To; *cf.* Dana Liebelson, *This Legislation Could Stop the Next Eric Garner Tragedy in New York*, Huffington Post (Dec. 3, 2014, 7:05 PM), http://www.huffingtonpost.com/2014/12/03/this-legislation-could-st_n_6264938.html. A great deal of attention is now focused on police use of force and the distrust between police departments and communities of color in this country in the wake of the deaths of Michael Brown and Eric

use of torture during high-profile interrogations has also brought questions about whether any police interrogation tactics are per se prohibited to the forefront.[37] And as we continue to discover more wrongful convictions based on false confessions and the attendant social science literature penetrates the legal culture,[38] courts will feel even more pressure to act to protect the innocent.[39]

For all of these reasons, courts are being pushed to address what is constitutionally permissible or impermissible in an interrogation room, and many scholars have recognized the need for more clarity in the legal rules governing interrogation practices.[40] That said, many scholars are advocating for change through state statutes, rules of evidence, or revised police regulations.[41] Although I support many of these suggested reforms, there is still a place and a need for regulating confessions through state and federal constitutional provisions.[42]

Courts have often used constitutional provisions to protect against police overreaching in the interrogation room.[43] Advocates for a requirement that police videotape interrogations have waged their battles on constitutional grounds (as well as statutory and regulatory grounds).[44] As a result,

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Garner. *See, e.g.*, Steve Holland & Julia Edwards, *Obama Vows to Address "Simmering Distrust" Between Police, Minorities*, Reuters (Dec. 1, 2014, 6:36 PM), http://www.reuters.com/article/2014/12/01/us-usa-missouri-shooting-obama-idUSKCN0JF2ZH20141201. It is too soon to know whether the move for reform of police procedures will include a discussion of police-citizen interactions after the initial arrest stage when suspects are interrogated.

37. *See, e.g.*, Sophia Pearson et al., *Torture-Linked CIA Officials Face Future Stuck in U.S.*, Bloomberg (Dec. 10, 2014, 8:06 PM), http://www.bloomberg.com/news/2014-12-11/torture-linked-cia-officials-face-future-stuck-on-u-s-.html.

38. *See infra* Section III.B.

39. *See* Daniel S. Medwed, *Innocentrism*, 2008 U. Ill. L. Rev. 1549, 1549 (noting that criminal procedure is "undergoing a transformation due to the increasing centrality of issues related to actual innocence in courtrooms, classrooms, and newsrooms").

40. See, for example, sources cited *supra* notes 3–7.

41. *See, e.g.*, Garrett, *supra* note 3, at 1115–16 (arguing for better police regulations); Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 Law & Hum. Behav. 3, 30–31 (2010) (arguing for better police training); Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 Wis. L. Rev. 479, 531–35 (arguing for pretrial reliability assessments under federal and state evidentiary rules and statutes).

42. I include state constitutional interpretation in my analysis, because many states have incorporated the Supreme Court's voluntariness doctrine into their state constitutional analyses. *See, e.g.*, State v. James, 678 A.2d 1338, 1350 (Conn. 1996) (noting that the voluntariness standards are the same under the state and federal constitutions).

43. *See infra* Parts I & II.

44. *E.g.*, Christopher Slobogin, *Toward Taping*, 1 Ohio St. J. Crim. L. 309, 317–21 (2003).

one of the first states to recognize the need for videotaping did so through an interpretation of its state constitution.[45]

History tells us that constitutional analysis will be a part of the dialogue about regulating interrogation practices going forward. If that is true, then the collapse of confession law back into voluntariness is significant. With voluntariness back at the forefront, courts will need to think about how to give content to the doctrine. To do that, courts will need to disentangle the different strands of voluntariness doctrine. No rule or set of rules can vindicate the interest in voluntariness if "voluntariness" is an undifferentiated umbrella term for many different concepts. But if courts can disaggregate the interests that huddle under that umbrella, they can begin to formulate appropriate rules.

In Part I of this Article, I explain how the confession law pendulum has swung from an open-ended voluntariness standard to the rules of *Miranda* and *Massiah* and then back to the voluntariness standard, thus necessitating some rules for voluntariness doctrine. In Part II, I explain that historically and as a matter of current practice there are two strands of voluntariness analysis—one deontological and one consequentialist. The deontological branch is concerned with action that is bad in and of itself regardless of its effect on the suspect (offensive-police-methods involuntariness). The consequentialist branch concerns police action that is bad *because* of its tendency to produce unreliable confessions (effect-on-the-suspect involuntariness).

Although others have recognized these two aspects of voluntariness to varying degrees and in different forms,[46] many scholars have argued that more recent Supreme Court decisions, culminating in *Colorado v. Connelly*,[47] removed any concern about reliability from the voluntariness analysis.[48] In Part II, I explain why that view is misguided, both as a reading of the precedent and as a description of current practice. I explain how *Connelly* rejected a strand of voluntariness that focused on the suspect's rational decisionmaking and ability to exercise free will independent of any police action. Instead,

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45. Stephan v. State, 711 P.2d 1156, 1159 (Alaska 1985). States have similarly interpreted their state constitutions to place limits on police procedures when eliciting eyewitness identifications. *E.g.*, State v. Hunt, 69 P.3d 571, 576 (Kan. 2003); State v. Henderson, 27 A.3d 872, 919–20 & n.10 (N.J. 2011); State v. Ramirez, 817 P.2d 774, 780–81 (Utah 1991).

46. *See, e.g.*, Charles T. McCormick, Handbook of the Law of Evidence 157 (1954) ("Can we not best understand the entire course of decisions in this field . . . as an application to confessions both of a privilege against evidence illegally obtained . . . and of an overlapping rule of incompetency which excludes the confessions when untrustworthy?"); Joseph D. Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 Va. L. Rev. 859, 909–24 (1979) (describing "[t]he [f]airness or [u]ndue [i]nfluence" and "trustworthiness" concerns that animate voluntariness); Monrad G. Paulsen, *The Fourteenth Amendment and the Third Degree*, 6 Stan. L. Rev. 411, 429 (1954) (noting that there was a "police methods" focus and a "trustworthiness" focus in the Court's voluntariness doctrine).

47. 479 U.S. 157 (1986).

48. *See, e.g.*, Brandon L. Garrett, Convicting the Innocent: Where Criminal Prosecutions Go Wrong 37 (2011); George E. Dix, *Federal Constitutional Confession Law: The 1986 and 1987 Supreme Court Terms*, 67 Tex. L. Rev. 231, 272–76 (1988); Leo et al., *supra* note 41, at 498–99.

the Court imposed a threshold police misconduct requirement on the voluntariness doctrine and, in so doing, folded concerns about mentally disabled suspects who cannot exercise free choice into the offensive-police-methods and effect-on-the-suspect variants of voluntariness. Thus, I argue in Part II that, contrary to the view of many scholars, modern confession law properly understood is still concerned with both the offensive-police-methods *and* the effect-on-the-suspect forms of voluntariness.

Finally, in Part III, I explain that an important problem with the current voluntariness doctrine is its failure to distinguish between these two strands. By disentangling the strands, I offer a basis for moving beyond the present totality-of-the-circumstances approach.[49] Once the two strands are separated, voluntariness doctrine can move toward rules that are tailored to the distinctive values animating each strand. In Part III, I propose different tests for determining the voluntariness of confessions depending on which strand is implicated in a given case.

I. The Collapse of Confession Law into Voluntariness

The Bill of Rights, as interpreted by the Warren Court, provides three different and overlapping layers of constitutional protection to criminal suspects interrogated by the police. The Fifth Amendment privilege against self-incrimination[50] applies to any suspect who is in custody and requires the police to read the famous *Miranda* warnings to the suspect and then obtain a knowing, intelligent, and voluntary waiver of those *Miranda* rights before asking incriminating questions.[51] The Sixth Amendment right to counsel[52] prohibits the police from questioning anyone charged with a crime without a lawyer present unless the right to the assistance of counsel is knowingly, intelligently, and voluntarily waived.[53] And finally, the Due Process Clauses of the Fifth and Fourteenth Amendments[54] require that confessions be *voluntary*: that is, they prohibit the police from overbearing the will of suspects in order to get them to confess, regardless of whether they are in custody or have been charged.[55]

In the beginning, the Supreme Court relied solely on the voluntariness test to determine the admissibility of confessions, but as the Court began to incorporate more specific rights against the states, it gravitated away from the open-ended voluntariness standard and toward more specific rules. For the past fifty years, the Court has relied primarily on rules derived from the

49. *See also* Paulsen, *supra* note 46, at 429–35 (arguing that voluntariness doctrine should be disentangled).

50. U.S. Const. amend. V.

51. Miranda v. Arizona, 384 U.S. 436, 467–71, 475 (1966).

52. U.S. Const. amend. VI.

53. Massiah v. United States, 377 U.S. 201, 205–06 (1964).

54. U.S. Const. amend. V; *id.* amend. XIV, § 1.

55. Spano v. New York, 360 U.S. 315, 321–24 (1959).

Fifth Amendment privilege against self-incrimination and the Sixth Amendment right to counsel to regulate police interrogation practices. As many have lamented, the Supreme Court has practically eliminated criminal suspects' Fifth and Sixth Amendment rights in recent years, effectively collapsing the regulation of confession law back into the open-ended voluntariness standard.[56] In this Part, I trace the accordion-like evolution of the Court's confession law jurisprudence from an open-ended standard to a series of rules and back to a standard again.

A. *The Beginning: A Voluntariness Standard*

The Supreme Court first began using the Constitution to regulate police interrogation in the 1930s.[57] At that time—before *Miranda* and *Massiah*—the Court treated its scrutiny of confessions solely as a due process matter under the Fifth and Fourteenth Amendments. To be consistent with due process, a confession to the police had to be voluntary.[58] But the concept of voluntariness was far from clear. Rather than articulating clear criteria for determining whether a confession was voluntary, the Court used a totality-of-the-circumstances test within which any of several different questions might be relevant, including whether the suspect's will was overborne,[59] whether the confession was obtained in a fundamentally unfair way,[60] whether it was likely false and unreliable,[61] and whether the suspect's decision to confess was the product of a rational intellect and a free will.[62]

Several of these questions are themselves question-begging—what does it mean, for example, for a suspect's will to be overborne—and in any event there was no clear sense of how the different concerns overlapped or were related to one another. In short, voluntariness analysis seemed like a hazy composite influenced by multiple animating concerns. And not surprisingly, there was wide divergence among courts regarding what would render a confession involuntary.[63] Litigants advocated for rule-like contours on the

56. *See* sources cited *supra* note 6; *see also* Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to* Miranda v. Arizona*)*, 99 Geo. L.J. 1, 24 (2010) ("*Miranda* has effectively been overruled.").

57. Although the Supreme Court discussed the voluntariness of confessions before the 1930s, *see, e.g.*, Hopt v. Utah, 110 U.S. 574, 584–85 (1884), it was not until *Brown v. Mississippi*, 297 U.S. 278 (1936), that it started using due process to regulate police interrogation in the states.

58. *See Brown*, 297 U.S. 278.

59. *See, e.g.*, *Spano*, 360 U.S. at 323.

60. *See, e.g.*, Lisenba v. California, 314 U.S. 219, 236–37 (1941).

61. *See, e.g.*, Blackburn v. Alabama, 361 U.S. 199, 207 (1960).

62. *See, e.g.*, Culombe v. Connecticut, 367 U.S. 568, 602 (1961) (plurality opinion).

63. *See* Way, *supra* note 25, at 65.

voluntariness test to provide some clarity.[64] But rather than fixing the voluntariness test, the Warren Court created new doctrines to displace it.[65]

B. *The Fifth and Sixth Amendment Rules*

In 1964, the Supreme Court decided *Massiah v. United States*[66] and held that, once the government formally charges a suspect with a crime, the Sixth Amendment guarantees the suspect a right to have counsel present at all critical pretrial stages of the prosecution, which includes any police interrogations, unless the suspect waives the right.[67] Grounded in principles of fairness and equity, the Court reasoned that the right to counsel at trial would have little meaning if the government could establish its entire case with pretrial confessions and identifications obtained without counsel present.[68]

Massiah's bright-line requirement of counsel post-indictment[69] meant that voluntariness doctrine would serve as the primary means of regulating police behavior only in those cases in which charges had not been filed. Once an actual prosecution began, the Sixth Amendment right to counsel kicked in and displaced voluntariness as the primary means of regulating police interrogations.

Two years later, the Supreme Court addressed pre-indictment interrogations when it brought the Fifth Amendment privilege against self-incrimination into police stations. In *Miranda v. Arizona*,[70] the Court held that before the police could ask for potentially incriminating information from a suspect in custody, they must read the famous warnings and then obtain a knowing, intelligent, and voluntary waiver of the suspect's *Miranda* rights.[71]

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64. *See* sources cited *supra* note 31.

65. *See* Stone, *supra* note 26, at 102–03 ("Given the Court's inability to articulate a clear and predictable definition of 'voluntariness,' the apparent persistence of state courts in utilizing the ambiguity of the concept to validate confessions of doubtful constitutionality, and the resultant burden on its own workload, it seemed inevitable that the Court would seek 'some automatic device by which the potential evils of incommunicado interrogation [could] be controlled.'" (alteration in original) (footnote omitted) (quoting SCHAEFER, *supra* note 30, at 10)).

66. 377 U.S. 201 (1964).

67. *Massiah*, 377 U.S. at 206–07.

68. *Id.* at 204–05; *see also* United States v. Wade, 388 U.S. 218, 235–36 (1967) ("The trial which might determine the accused's fate may well not be that in the courtroom but that at the pretrial confrontation, with the State aligned against the accused . . . [who is] unprotected against [police] overreaching . . . .").

69. The Supreme Court later clarified that the right to counsel is triggered by "the initiation of adversary judicial criminal proceedings," whether by means of a formal charge, a preliminary hearing, an indictment, an information, an arraignment, or a first formal hearing. Rothgery v. Gillespie Cnty., 554 U.S. 191, 198 (2008). I refer to this point as "post-indictment," but I mean to include all of these triggering events.

70. 384 U.S. 436 (1966).

71. *Miranda*, 384 U.S. at 467–73. *Miranda* was the Court's second attempt to provide more specific regulations for pre-indictment interrogation practices. *See* Escobedo v. Illinois,

The *Miranda* Court reasoned that custodial interrogation created an inherently compulsive environment.[72] To honor the suspect's Fifth Amendment privilege against compelled self-incrimination, the police would have to do something—for instance, read the *Miranda* warnings—to dispel that inherent compulsion.

Many hailed *Miranda* and *Massiah* as providing clear, bright-line rules to displace the confusion that voluntariness doctrine had sown.[73] To be sure, *Miranda* and *Massiah* did not obviate the requirement that a confession be voluntary. But, when the police read a suspect his rights and obtained a valid waiver of those rights, the courts almost always found the resulting confession voluntary.[74] And a rule directing lower courts to determine whether the police had read the *Miranda* warnings and whether the suspect had waived his rights was much more susceptible to uniform and predictable administration than the totality-of-the-circumstances voluntariness analysis.

In the years since *Miranda* and *Massiah*, the Supreme Court has written dozens of decisions to clarify the scope of their protections. At first, the Court made sure to keep the doctrines distinct. Whether it was expanding protections or, as was more often the case, contracting them, the Court was clear that *Miranda*, *Massiah*, and the voluntariness test had different content. To be sure, the three analyses overlapped. The Court often drew analogies among the doctrines and used similar principles to define their limits.[75] That said, it was clear that the Fifth Amendment *Miranda* test and the Sixth Amendment right-to-counsel test applied in different factual circumstances. And although the voluntariness test always applied, it was a backup measure that was used primarily to analyze confessions not governed by either *Miranda* or *Massiah*. As a general matter, *Miranda* and *Massiah* supplied the tests governing the admissibility of confessions in criminal courtrooms.[76]

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378 U.S. 478 (1964) (holding that suspects would have a right to counsel during police interrogations pre-indictment in certain circumstances). The scope of *Escobedo* was unclear, and *Miranda* quickly displaced it.

72. *See Miranda*, 384 U.S. at 457–58.

73. *See, e.g.*, Arthur J. Goldberg, *Can We Afford Liberty?*, 117 U. Pa. L. Rev. 665, 674 (1969) (praising the "specificity" of *Miranda* and criticizing the voluntariness doctrine).

74. *See* Missouri v. Seibert, 542 U.S. 600, 608–09 (2004) ("[G]iving the warnings and getting a waiver has generally produced a virtual ticket of admissibility; maintaining that a statement is involuntary even though given after warnings and voluntary waiver of rights requires unusual stamina . . . ."); Berkemer v. McCarty, 468 U.S. 420, 433 n.20 (1984) ("[C]ases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare."); George C. Thomas III & Richard A. Leo, Confessions of Guilt: From Torture to *Miranda* and Beyond 219 ("[C]ourts tend to treat a *Miranda* waiver as a near-conclusive presumption that all subsequent statements are uncoerced.").

75. *See, e.g.*, Michigan v. Jackson, 475 U.S. 625 (1986) (importing a *Miranda* rule into the *Massiah* context but noting the different reasons why the rule should apply), *overruled by* Montejo v. Louisiana, 556 U.S. 778 (2009).

76. *See* Richard A. Leo, *Questioning the Relevance of* Miranda *in the Twenty-First Century*, 99 Mich. L. Rev. 1000, 1021 (2001) (explaining how *Miranda* "displac[ed] the case-by-case voluntariness standard as the primary test of a confession's admissibility").

C. *The Collapse Back into Voluntariness*

The Rehnquist and Roberts Courts have effectively eliminated much of the protection that *Miranda* and *Massiah* gave criminal suspects, and, in so doing, have collapsed confession law back into the voluntariness doctrine. By diluting the triggering requirements of *Miranda* and *Massiah*, relaxing their standards for waiver and invocation, and reducing the scope of their exclusionary rule protection, the Supreme Court has essentially left defendants with only the voluntariness due process test to protect against police overreaching. Although the Court took its first steps toward gutting *Miranda* and *Massiah* in the 1970s, the Roberts Court has spent the past ten years hammering the nails into *Miranda* and *Massiah*'s coffins. As I describe in this Section, the primary means for determining the admissibility of confessions in criminal courts is now once again the voluntariness test.

1. Triggering Requirements

Miranda v. Arizona famously held that a person who is in custody and being interrogated by the police is in an inherently compulsive environment that triggers his Fifth Amendment privilege against compelled self-incrimination.[77] If the police do not take affirmative steps to dispel the inherent compulsion of a custodial environment (like reading the *Miranda* warnings), then the resulting confession violates the suspect's Fifth Amendment privilege and will be suppressed at a later criminal trial.[78] But as protective as this doctrine might be, the analysis only applies to someone who is a suspect in police custody.[79] So a changing definition of what it means to be a suspect in police custody alters the universe of cases in which *Miranda* actually operates.

According to the *Miranda* Court, a person is in custody if he is subjected to "incommunicado interrogation . . . in a police-dominated atmosphere"—like a police station—or if his "freedom of action is curtailed in any significant way."[80] The Court in subsequent cases glossed that definition by saying that a person who voluntarily comes to the station and is told that he is free to go at any point is not in custody.[81] Nor is a person in custody if he is temporarily stopped on the roadside and asked a few questions.[82] But until recently, courts regularly held that people who had been arrested or who were otherwise being held in state facilities (prisons or jails) were in custody when they were detained and questioned by police or correctional officers.[83]

77. 384 U.S. at 457–58.

78. *Miranda*, 384 U.S. at 492–99.

79. *Id.* at 477.

80. *Id.* at 445, 467.

81. California v. Beheler, 463 U.S. 1121, 1123–24 (1983); Oregon v. Mathiason, 429 U.S. 492, 495 (1977).

82. Berkemer v. McCarty, 468 U.S. 420, 439–41 (1984).

83. *See, e.g.*, Mathis v. United States, 391 U.S. 1, 4–5 (1968) (holding that the federal government erred when it failed to Mirandize a suspect being held in state custody on other

In 2012, the Supreme Court held in *Howes v. Fields*[84] that a person who was serving a sentence in a state prison was not in custody when armed deputies took him from his cell at night, brought him to an interrogation room, and questioned him for five to seven hours about another offense while ignoring his repeated requests to stop the questioning.[85] A majority of the justices noted that the deputies had informed Fields that he could go back to his cell if he asked to do so, that he did not ask to leave until the end, that Fields was not physically restrained or threatened during the interrogation, and that the door to the room was sometimes open.[86]

More revealing than the Court's fact-specific holding was its rationale for the decision. The Court emphasized that individuals who are in prison are not as "shock[ed]" by being transported into an interrogation room as those who are taken from home.[87] Restrictions on their freedom are "expected and familiar and thus do not involve the same 'inherently compelling pressures' that are often present when a suspect is yanked from familiar surroundings in the outside world."[88] In the same vein, the Court also noted that prison inmates who are brought in for questioning are not being removed from a "supportive atmosphere," so isolating them is not as coercive as isolating people who are not in prison.[89] The import of the Court's reasoning in *Fields* is counterintuitive: a person already in state custody is *less* likely to be deemed "in custody" for *Miranda* purposes.

After *Fields*, police questioning a prison inmate just need to say the magic words "you are free to go back to your cell if you want to" and the custodial nature of the interaction disappears—as do the inmate's *Miranda* protections. But the typical inmate is unlikely to think that he is free to leave the room. Rather, prison conditions inmates to believe that they must accede to the demands of the prison guards.[90] In America, one out of every

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charges and rejecting the government's argument that he was not in custody); United States v. Cadmus, 614 F. Supp. 367, 370 (S.D.N.Y. 1985) ("*Mathis* makes it clear that an individual imprisoned, irrespective of the reason for his incarceration, is in custody."). Although *Mathis* did not impose a per se rule that custody always exists when someone is in prison, courts often found custody under the totality of the circumstances. *E.g.*, Arthur v. State, 575 So. 2d 1165, 1188 (Ala. Crim. App. 1990). *But see* Illinois v. Perkins, 496 U.S. 292, 296 (1990) (noting that a suspect who is questioned by an undercover officer is not in custody because he is unaware that he is speaking to law enforcement).

84. 132 S. Ct. 1181 (2012).

85. *Fields*, 132 S. Ct. at 1193–94.

86. *Id.* at 1186.

87. *Id.* at 1190.

88. *Id.* at 1191 (quoting Maryland v. Shatzer, 559 U.S. 98, 103 (2010)).

89. *Id.*

90. *Id.* at 1195 (Ginsburg, J., dissenting) ("Fields believed the deputies 'would not have allowed [him] to leave the room.' And with good reason . . . ." (alteration in original) (citation omitted) (quoting Appendix to Petition for Certiorari at 72a, *Howes v. Fields*, 132 S. Ct. 1181 (2012) (No. 10-680))); *see also* Michelle Parilo, Note, *Protecting Prisoners During Custodial Interrogations: The Road Forward After* Howes v. Fields, 33 B.C. J.L. & Soc. Just. 217, 245–46 (2013) ("Upon incarceration, prisoners are forced to abandon their self-reliance and relinquish

hundred American adults is in prison.[91] *Fields* means that an illusory promise can now displace *Miranda*'s protections for all of these individuals.

Without *Miranda* protections, inmates who have been charged with an offense may turn to the Sixth Amendment for protection, only to learn that the Sixth Amendment right to counsel is offense-specific. In *McNeil v. Wisconsin*[92] and *Texas v. Cobb*,[93] the Supreme Court limited the scope of the Sixth Amendment's protection by holding that *Massiah* only applies if the police question a suspect about an offense for which he has been formally charged.[94] As a result, *Massiah* does not provide suspects—whether prison inmates or not—with any Sixth Amendment protection against police questioning about other offenses.

Thus, neither *Miranda* nor *Massiah* protect inmates in most cases. Often, police first learn about an inmate's whereabouts or potential involvement in an unrelated crime after he is already in the prison system.[95] Given high recidivism rates,[96] people tend to cycle in and out of jail with some regularity. After *Fields*, police have every incentive to question current inmates about other potential offenses that they may have committed. Only voluntariness remains to curb abusive police practices.

2. Waiver

Waiver was an early beachhead in the Supreme Court's dismantling of the *Miranda* and *Massiah* protections. When the police want to interrogate someone who is in custody, *Miranda* requires that they first read the warnings and obtain a knowing, intelligent, and voluntary waiver of the suspect's *Miranda* rights to silence and to counsel.[97] The *Miranda* Court emphasized

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their freedom, and this mindset does not simply disappear when prisoners enter the interrogation room.").

91. Carolyn W. Deady, Pell Ctr. for Int'l Relations & Pub. Policy, Incarceration and Recidivism: Lessons from Abroad (2014), http://www.salve.edu/sites/default/files/filesfield/documents/Incarceration_and_Recidivism.pdf.

92. 501 U.S. 171 (1991).

93. 532 U.S. 162 (2001).

94. *Cobb*, 532 U.S. at 164; *McNeil*, 501 U.S. at 176. Or for which he has at least had a first formal hearing. Rothgery v. Gillespie Cnty., 554 U.S. 191, 213 (2008).

95. Sometimes police have been looking for a suspect but only find him once he is picked up on an unrelated charge. Other times, DNA samples that are collected at the time of arrest or conviction provide cold hits to unsolved crimes and trigger police investigation. *See* Maryland v. King, 133 S. Ct. 1958, 1966–68 (2013) (discussing these DNA collection statutes). In still other circumstances, jailhouse informants contact police to tell them about another inmate's potential involvement in criminal activity with the hopes of getting a deal for themselves. *See generally* Alexandra Natapoff, Snitching: Criminal Informants and the Erosion of American Justice (2009).

96. *See* Matthew R. Durose et al., U.S. Dep't of Justice, No. NCJ 244205, Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010 (2014), http://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf (noting that over 76 percent of released prisoners were rearrested within five years).

97. Miranda v. Arizona, 384 U.S. 436, 444 (1966).

that the state would bear the burden of demonstrating a waiver and that it would be "a heavy burden."[98] Moreover, that Court specifically stated that a waiver could not be presumed from silence; rather, the state would have to demonstrate that it was knowingly, intelligently, and voluntarily made.[99]

In *Patterson v. Illinois*,[100] the Court held that a suspect's waiver of *Miranda* rights also serves to waive his *Massiah* rights. After all, the Court reasoned, the *Miranda* warnings advise suspects of their right to counsel. Originally the right to counsel in the *Miranda* warnings was understood as a Fifth Amendment right separate from the Sixth Amendment right to counsel. But on the theory that in substance a waiver of the right to counsel is a waiver of the right to counsel, the Court deemed one waiver sufficient for both.

So when the Court later relaxed its standard for deeming a suspect to have waived his rights, the change affected not just *Miranda* doctrine but *Massiah* doctrine as well. In *Berghuis v. Thompkins*,[101] decided in 2010, the Court held that "an individual who, with a full understanding of his or her rights, acts in a manner inconsistent with their exercise has made a deliberate choice to relinquish the protection those rights afford."[102]

The defendant in *Thompkins* had been arrested on suspicion of homicide. The police read him his *Miranda* rights and, although he acknowledged that he understood them, he refused to sign an advice of rights form. The police proceeded to question him for almost two hours, during which time he refused to answer any questions and effectively remained silent. Two hours into the questioning, a police officer asked the defendant if he was a religious man, and the defendant answered with the single word "Yes." The police then asked the defendant if he had sought forgiveness for shooting the homicide victim, and the defendant again answered "Yes."

The Supreme Court held that those statements constituted a waiver of the defendant's *Miranda* right to silence. In the words of the Court, as long as "a *Miranda* warning was given and [was] understood by the accused, an accused's uncoerced statement establishes an implied waiver."[103]

Had the Court kept the *Miranda* and *Massiah* doctrines distinct, the waiver of *Miranda* rights that *Thompkins* deemed implicit in a suspect's speaking might not also be counted as a waiver of the *Massiah* right to counsel. After all, if the mere act of answering a question is the waiver of something, it is easiest to see it as a waiver of a right to *silence*. But given the prior holding that suspects waive their Sixth Amendment right to counsel by

98. *Id.* at 475.

99. *Id.*

100. 487 U.S. 285 (1988).

101. 560 U.S. 370 (2010).

102. *Thompkins*, 560 U.S. at 385; *see also* Thomas & Leo, *supra* note 74, at 192 ("*Thompkins* is perhaps the most significant *Miranda* case yet decided."); Kamisar, *supra* note 7, at 1019 ("*Thompkins* is a case where the Court fired point-blank at *Miranda*.").

103. *Thompkins*, 560 U.S. at 384.

waiving the *Miranda* rights,[104] it is no surprise that lower courts have interpreted *Thompkins* as extending to the Sixth Amendment context as well.[105]

After *Thompkins*, therefore, any confession that is given after the police read the *Miranda* warnings (or something like them[106]), is admissible, assuming that the suspect has at least a rudimentary ability to comprehend the warnings[107]—and provided that the confession is given voluntarily. Once again, the only remaining check on police authority during the interrogation comes from the voluntariness test.

3. Invocation

Consider next the scenario in which instead of simply remaining silent, a suspect who has been read the warnings affirmatively invokes his *Miranda* rights. In a series of cases beginning with *Edwards v. Arizona*[108] in 1981, the Supreme Court held that once a suspect invokes his *Miranda* right to have counsel present during a police interrogation, the police may not return and try to get him to waive his rights again unless the suspect re-initiates contact with the police by indicating a willingness to discuss the criminal investigation.[109] The *Edwards* prohibition on re-initiation by the police extended to questioning about another offense[110] and even to questioning after the suspect had met with an attorney.[111] Moreover, the Court extended this protection against police re-initiation of questioning to suspects who had invoked their Sixth Amendment right to counsel as well.[112]

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104. *Patterson*, 487 U.S. 285.

105. *See, e.g.*, United States v. Sepulveda-Sandoval, 729 F. Supp. 2d 1078, 1102–03 (D.S.D. 2010); Witmer-Rich, *supra* note 6, at 1233 ("[T]here is every reason to think the Court will apply the *Thompkins* rule equally in the Sixth Amendment context.").

106. The police don't need to recite the *Miranda* warnings verbatim if they say words that are functionally equivalent and basically inform people of their rights. Florida v. Powell, 559 U.S. 50, 60 (2010); Duckworth v. Eagan, 492 U.S. 195, 203 (1989); California v. Prysock, 453 U.S. 355, 361 (1981).

107. This does not require much. *See, e.g.*, United States v. Sanchez-Chaparro, 392 F. App'x 639, 644 (10th Cir. 2010) (holding that a Spanish speaker could understand the warnings even though they were given in English and he appeared to have trouble understanding them at the station); State v. Moses, 702 S.E.2d 395, 401–02 (S.C. Ct. App. 2010) (holding that the lower court did not err in concluding that a seventeen-year-old suspect who was enrolled in special education classes and could read and write at only a third grade level was able to meaningfully understand the *Miranda* warnings); *see also* James J. Tomkovicz, *Standards for Invocation and Waiver of Counsel in Confession Contexts*, 71 Iowa L. Rev. 975, 1049 (1986) ("The policies of the fifth amendment privilege do not demand rationality, intelligence, or knowledge, but only a voluntary choice not to remain silent.").

108. 451 U.S. 477 (1981).

109. *Edwards*, 451 U.S. at 485; *see also* Oregon v. Bradshaw, 462 U.S. 1039, 1044–46 (1983) (plurality opinion) (establishing the standard for re-initiation).

110. Arizona v. Roberson, 486 U.S. 675, 687 (1988).

111. Minnick v. Mississippi, 498 U.S. 146, 155–56 (1990).

112. Michigan v. Jackson, 475 U.S. 625, 625 (1986), *overruled by* Montejo v. Louisiana, 556 U.S. 778 (2009).

Over the past twenty years, however, the Supreme Court has effectively removed these protections by limiting the circumstances under which the *Edwards* line of cases applies. The first major step came in *Davis v. United States*,[113] which held that a suspect does not "invoke" his right to counsel under *Miranda* (and thus does not trigger the *Edwards* protections) unless he clearly and unambiguously asks for a lawyer. If a suspect's request is equivocal, the police have no duty to clarify and may simply proceed with their questions.[114]

Again, lower courts have held that a similar clear-statement-of-invocation rule applies in the Sixth Amendment context,[115] thus effectively conflating the two doctrines by creating a rule under which a suspect has invoked under neither unless he has invoked under both. And of course if the suspect answers any questions, *Thompkins* will direct a finding of implied waiver.[116]

As a practical matter, a rule requiring suspects to use clear and unambiguous language to invoke their rights while in custody will result in relatively few invocations. Social science research establishes that many people, when placed in custodial environments, are intimidated and unlikely to use assertive language.[117] This is particularly true for women and members of certain minority groups, who are more likely to use permissive language.[118] The *Miranda* decision itself recognized the inherently coercive environment created by custodial interrogation.[119]

However, when suspects attempting to invoke their rights use tentative or permissive language, the courts deem them to have spoken equivocally and thus to not have invoked their rights at all.[120] Consider, for example, the following requests for the assistance of counsel, all of which were deemed equivocal and thus insufficient to invoke the speaker's right to counsel: "I'll be honest with you, I'm scared to say anything without talking to a lawyer."[121] "I think I want a lawyer."[122] "Could I call my lawyer?"[123] "I'd rather have my attorney here if you're going to talk stuff like that."[124] "Well I mean,

113. 512 U.S. 452 (1994).

114. *Davis*, 512 U.S. at 461.

115. *See, e.g.*, Marinelli v. Beard, No. 4:CV-07-0173, 2012 WL 5928367, at *49 (M.D. Pa. Nov. 26, 2012); United States v. Bacote, No. 05-234, 2006 WL 1579998, at *8 (D. Minn. June 2, 2006).

116. Berghuis v. Thompkins, 560 U.S. 370, 370–71 (2010).

117. *See generally* Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 259 (1993).

118. *Id.* at 317–20.

119. Miranda v. Arizona, 384 U.S. 436, 457–58 (1966).

120. Marcy Strauss, *Understanding* Davis v. United States, 40 LOY. L.A. L. REV. 1011, 1040–41, 1055 (2007) (examining hundreds of cases and explaining that courts overwhelmingly find invocations ambiguous).

121. Midkiff v. Commonwealth, 462 S.E.2d 112, 114–15 (Va. 1995).

122. Diaz v. Senkowski, 76 F.3d 61, 63–65 (2d Cir. 1996).

123. Dormire v. Wilkinson, 249 F.3d 801, 805 (8th Cir. 2001).

124. State v. Mills, No. CA96-11-098, 1997 Ohio App. LEXIS 5232, at *20 (Ohio Ct. App. Nov. 24, 1997).

I'd still like to have my lawyer here."[125] "[I] want[ ] a lawyer if [my] statements [are] going to be used against [me]."[126]

Moreover, protections have declined even for those who have the resolve to speak clearly and unambiguously. In *Maryland v. Shatzer*,[127] decided in 2010, the Supreme Court held that the *Edwards* protection against police reinitiation only applies for fourteen days after a suspect is released from custody. Fourteen days after a suspect clearly and unequivocally invokes his right to counsel the police may re-approach a suspect and try to elicit an incriminating statement—and they may do so regardless of whether the suspect's request for counsel was honored in the interim.[128] Note too that a person who is serving a prison sentence is released from custody for these purposes when he is returned to the general prison population,[129] just as *Fields* deemed inmates not to be in custody if they are told that they are free to return to their cells.[130]

Thus, after *Shatzer*, a suspect who clearly invokes his rights under *Miranda* is only guaranteed a two-week hiatus before the police may come back. If he invokes again, the police can leave and come back two weeks later. And the "separate" Sixth Amendment right to counsel is unlikely to create any more protection: one year before *Shatzer*, the Court in *Montejo v. Louisiana* eliminated any requirement for the police to suspend interrogation for any determinate length of time when a suspect invokes the Sixth Amendment right to counsel.[131]

Even for suspects who have the wherewithal to invoke their rights explicitly, therefore, the *Miranda* and *Massiah* rights to counsel do not really prevent the police from coercively seeking confessions, so long as police are willing to keep trying. The only hard limit is the voluntariness doctrine: if the police do eventually succeed in getting the suspect to talk without counsel present, the only requirement for the confession to be admissible is that it be voluntarily given.

4. Fruits

In the rare case in which a court finds that the police have violated a suspect's *Miranda* or *Massiah* rights, the next important question is that of

125. State v. Stover, No. 96CA006461, 1997 Ohio App. LEXIS 1493, at *4 (Ohio Ct. App. Apr. 16, 1997).

126. United States v. Hsin-Yung, 97 F. Supp. 2d 24, 32 (D.D.C. 2000).

127. 559 U.S. 98 (2010).

128. *Shatzer*, 559 U.S. at 110.

129. *Id.* at 112–14.

130. Howes v. Fields, 132 S. Ct. 1181, 1194 (2012).

131. 556 U.S. 778, 789 (2009).

remedy. The Court has long held that involuntary statements are inadmissible both in the state's case-in-chief and for impeachment purposes.[132] Moreover, courts generally assume that the fruit-of-the-poisonous-tree doctrine applies to involuntary confessions.[133]

Under this doctrine, derivative statements or physical evidence that the police obtained as a result of an involuntary statement must be suppressed unless the state can establish that (a) it also had actually discovered the evidence independent of the constitutional violation through a legitimate means (independent source doctrine); (b) it had begun a legal investigative process that would have inevitably led it to the contested evidence (inevitable discovery or hypothetical independent source doctrine); or (c) the ultimate discovery of the evidence was so attenuated in time, place, or circumstances from the initial illegality that it should be admissible (attenuation doctrine).[134]

After *Miranda* and *Massiah* were decided, many assumed that this fruit-of-the-poisonous-tree doctrine would determine the admissibility of statements and physical evidence obtained as a result of *Miranda* and *Massiah* violations.[135] But the Court has had a more permissive attitude. First, in cases decided not long after *Miranda*, the Court held that evidence obtained in violation of a suspect's *Miranda* rights is admissible for impeachment purposes, even if it is not admissible in the prosecution's case-in-chief.[136] The Roberts Court recently extended those cases to the *Massiah* context, holding in *Kansas v. Ventris* that evidence obtained in violation of a suspect's Sixth Amendment rights is also admissible for impeachment purposes.[137]

Where the case-in-chief was concerned, for a time the Court did seem to vindicate the assumption that standard fruits doctrine would apply. Thus, in 1984, the Court held in *Nix v. Williams*[138] that physical evidence discovered as the result of a *Massiah* violation could be admitted as part of the prosecution's case-in-chief *if* it would have inevitably been discovered even without the violation.[139]

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132. *See* Mincey v. Arizona, 437 U.S. 385, 398 (1978).

133. *See, e.g.*, People v. Ditson, 369 P.2d 714, 727 (Cal. 1962) (applying fruits doctrine to an involuntary confession); 3 Wayne R. LaFave et al., Criminal Procedure § 9.5(a), at 466–72 (3d ed. 2007).

134. *See* 1 Joshua Dressler & Alan C. Michaels, Understanding Criminal Procedure 374–81 (6th ed. 2013) (describing fruits doctrine and its exceptions).

135. *See* Yale Kamisar, *On the "Fruits" of* Miranda *Violations, Coerced Confessions, and Compelled Testimony*, 93 Mich. L. Rev. 929, 993–1000 (1995) (describing the fruit-of-the-poisonous-tree cases and explaining why many assumed that fruits doctrine applied to confession questions).

136. *See* Oregon v. Hass, 420 U.S. 714, 722–24 (1975); Harris v. New York, 401 U.S. 222, 225–26 (1971).

137. 556 U.S. 586, 593–94 (2009).

138. 467 U.S. 431 (1984).

139. *Nix*, 467 U.S at 446–48. *Nix* built on earlier case law in which the Supreme Court had applied fruits doctrine to pretrial violations of the Sixth Amendment right to counsel in the context of identification procedures. *See* United States v. Wade, 388 U.S. 218 (1967).

But the following year, in a case arising under the *Miranda* framework rather than under *Massiah*, the Court started down a different path. In *Oregon v. Elstad*,[140] the Court held that a properly Mirandized statement obtained an hour after police illegally elicited a one-line admission of guilt without having read the *Miranda* warnings would not be deemed inadmissible as a fruit of the poisonous tree.[141] The facts in *Elstad* were unusual, and for nearly twenty years the Court did not extend its holding in any significant way.

Then, in 2004, the Court in *United States v. Patane*[142] held that as a general matter the physical fruits of a *Miranda* violation (as opposed to testimony obtained as a result of a violation of *Miranda*) will not be excluded from evidence at trial.[143] And even with the Supreme Court's decision in *Nix* still on the books, lower courts have begun to rely on cases like *Elstad* and *Patane* to hold that the fruits doctrine does not apply to *Massiah* violations either.[144]

As of today, testimonial statements obtained in violation of *Miranda* and *Massiah* are still inadmissible as part of the prosecution's case-in-chief.[145] But if the issue is the admissibility of physical evidence discovered as the result of a confession obtained in violation of a defendant's *Miranda* or *Massiah* rights, or the admissibility of any evidence at all obtained in violation of those rights for impeachment purposes, nothing except the voluntariness doctrine stands in the way. Over that broad domain, confessions and the evidence to which they lead are admissible provided only that the confessions are given voluntarily; the rule-like contours of *Miranda* and *Massiah* no longer displace the wide-open standard of voluntariness.

5. A Return to Voluntariness: Summarizing the Collapse

In the last twenty years, the Supreme Court has effectively eliminated most of the protection that *Miranda* and *Massiah* once provided. For individuals who are not in custody—which now includes many prisoners—and who are not being questioned about an offense for which they have been formally charged, voluntariness is the only test that protects them against police overreaching. Even for individuals who are in custody, all the police need to do is read the *Miranda* warnings (or some close variant). If the suspect then speaks at all, waiver is implied if the suspect has any ability to understand English—unless the statement is involuntary. If the suspect affirmatively invokes his or her right to counsel, the police can keep trying

140. 470 U.S. 298 (1985).

141. *Elstad*, 470 U.S. at 318.

142. 542 U.S. 630 (2004).

143. *See* Yale Kamisar, *Postscript: Another Look at* Patane *and* Seibert*, the 2004* Miranda *"Poisoned Fruit" Cases*, 2 Ohio St. J. Crim. L. 97, 98, 114 (2004) (describing *Patane* as "a bullet in the shoulder" of *Miranda*).

144. *See, e.g.*, United States v. Fellers, 397 F.3d 1090, 1095 (8th Cir. 2005) (rejecting fruits doctrine for a *Massiah* violation).

145. *See* Kansas v. Ventris, 556 U.S. 586 (2009); Missouri v. Seibert, 542 U.S. 600 (2004).

every two weeks, whether or not the suspect has actually had the benefit of counsel, and any confession they succeed in obtaining will be admissible—unless it violates the voluntariness doctrine. If the police discover physical evidence as a result of a statement obtained in violation of a suspect's *Miranda* or *Massiah* rights, the evidence will be admissible at trial unless the statement was given involuntarily. And if the suspect intends to testify, a finding of involuntariness is the only thing that will stop the state from using an illegally-obtained statement for impeachment purposes.

In short, not much is left of *Miranda* and *Massiah*. The law regulating confessions has largely swung back to the voluntariness test. And with voluntariness back at the forefront, courts will once again face the problems that plagued voluntariness analysis in the past: as a vague totality-of-the-circumstances standard, voluntariness provides little guidance to police officers and trial judges, as well as little guarantee that like cases will be treated alike. As before, pressure will mount to protect suspects from routinely used, offensive police tactics and to protect the innocent from tactics that might induce false confessions. To address these problems, courts will need to give more definition to the doctrine of voluntariness.

II. Disentangling Voluntariness

It is not easy to articulate a clear conception of voluntariness. The Supreme Court has described a confession as involuntary when it is obtained through tactics that overbear or break the suspect's will,[146] but that formula merely begs the question of what is sufficient to overbear or break a person's will.[147]

As the Court has recognized, the idea of voluntariness is animated by "a complex of values."[148] But the Court has never clearly articulated what those values are. That said, constitutional jurisprudence's concern with voluntariness is not wholly without shape. In particular, the cases and commentary reveal that there are two different strands of voluntariness doctrine, each of which is animated by different values.

The first strand of voluntariness is concerned with police actions that are judged to be inherently bad, regardless of the effects that those actions have on suspects. The second concerns police actions that are bad because they tend to cause suspects to give unreliable confessions. In moral philosophers' terms, the first form is deontological and the second is consequentialist.[149]

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146. Mincey v. Arizona, 437 U.S. 385, 401–02 (1978); Spano v. New York, 360 U.S. 315, 323 (1959).

147. *See* Yale Kamisar, *What Is an "Involuntary" Confession? Some Comments on Inbau and Reid's* Criminal Interrogation and Confessions, 17 Rutgers L. Rev. 728, 746–47 (1963) (discussing the tautological nature of this phrase).

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

149. *See* Michael J. Sandel, Liberalism and the Limits of Justice 3 (2d ed. 1998) (describing deontology as an ethic of categorical duties which stands in contrast to an ethic focusing on practical consequences).

To be sure, these categories are not wholly isolated from each other: our intuitions about what is bad in itself might sometimes be shaped, consciously or unconsciously, by our intuitions about what consequences will flow from certain actions, and vice versa. Nonetheless, it is both possible and helpful to conceive of voluntariness analysis in confession law as having these two different aspects. I will call the first strand "offensive-police-methods" involuntariness, and the second "effect-on-the-suspect" involuntariness.

In different ways and to varying degrees, prior writers have noted that the Court's voluntariness cases sometimes seem to exhibit one of these concerns and sometimes the other.[150] But among those who have made the distinction, many have come to believe that only the offensive-police-methods strand is still a live part of judicial doctrine.[151] As I will show, that view is mistaken. Properly understood, modern confession doctrine still houses both of these concerns. And understanding the contours of each is necessary for understanding what shape confession law should take in the next phase of its development.

In the Sections that follow, I explain the differences between these two strands of voluntariness doctrine and also analyze areas of potential overlap. I also discuss how the Supreme Court once entertained a third variant of voluntariness—one that focused on whether a suspect was exercising her free will in deciding to confess. As I explain below, the Court abandoned this as an independent form of voluntariness in 1986 when it held that, before a court can find a confession involuntary under the Due Process Clause, it must first find that the confession was a result of police action.[152] Having established this threshold, the Court effectively held that a suspect's inability to exercise free will would only be relevant to the constitutional analysis if there were some form of police action that prompted the suspect's confession. The *type* of police action required during this threshold inquiry varies depending on whether the offensive-police-methods or the effect-on-the-suspect form of involuntariness is implicated in a given case. But concern about a suspect's free will absent police action is no longer a part of the Court's voluntariness doctrine. Essentially, the Court has folded this third variant of voluntariness doctrine into the offensive-police-methods and effect-on-the-suspect forms.

150. *See* sources cited *supra* note 46.

151. *See* sources cited *supra* note 48.

152. *See* Colorado v. Connelly, 479 U.S. 157, 164 (1986).

A. *The Offensive-Police-Methods Form of Involuntariness*

Consider first the deontological variant of voluntariness doctrine, here called the "offensive-police-methods" form.[153] Within this framework, courts deem confessions involuntary when the police methods used to obtain them are themselves offensive. The focus in these cases is on the methods that the police use to extract a confession and *not* on the effect of the police tactics on the suspect.

For example, in one of the Court's earliest confession cases, *Brown v. Mississippi*,[154] the police hung one of the defendants from a tree, repeatedly letting him down and hanging him again. When that did not successfully induce a confession, they whipped him until he confessed. The other defendants were stripped, laid over chairs, and whipped until they confessed. The Supreme Court declared the resulting confessions involuntary—not because they were probably unreliable or because Brown and his codefendants were particularly susceptible to interrogation, but because what the police did was "revolting to the sense of justice."[155]

When condemning offensive police methods as part of a voluntariness analysis, the Supreme Court has prohibited tactics that "shock the conscience,"[156] are "offensive to a civilized system,"[157] or, as in *Brown*, are "revolting to the sense of justice."[158] Even when the resulting confession is factually reliable and essential to the prosecution's case, certain tactics are so "tyrannical"[159] in nature and so inconsistent "with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions"[160] that they violate the Due Process Clause.

The offensive-police-methods form of involuntariness has a bit of the "you know it when you see it" quality, but the case law establishes some

153. Others have described this as the "police methods" branch of voluntariness doctrine or the branch predicated on "offensive" police conduct. *See, e.g.*, Albert W. Alschuler, *Constraint and Confession*, 74 Denv. U. L. Rev. 957, 957 (1997) ("offensive governmental conduct"); Kamisar, *supra* note 147, at 754 ("offensive or deliberate and systematic police misconduct"); Paulsen, *supra* note 46, at 431 ("police methods").

154. 297 U.S. 278 (1936).

155. *Brown*, 297 U.S. at 286; *see also* Sheriff v. Bessey, 914 P.2d 618, 622 (Nev. 1996) (noting that police interrogation techniques that "revolt our sense of justice" are involuntary).

156. Chavez v. Martinez, 538 U.S. 760, 774 (2003) (plurality opinion) (quoting Rochin v. California, 342 U.S. 165, 172 (1952)).

157. Miller v. Fenton, 474 U.S. 104, 109 (1985); *see also id.* at 116 (describing some tactics as "[in]compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means").

158. *Brown*, 297 U.S. at 286.

159. Chambers v. Florida, 309 U.S. 227, 236 (1940).

160. *Brown*, 297 U.S. at 286; *see also* Lisenba v. California, 314 U.S. 219, 236 (1941) ("The aim of the requirement of due process is . . . to prevent fundamental unfairness in the use of evidence . . . ."); United States v. Preston, 751 F.3d 1008, 1020 (9th Cir. 2014) (en banc) ("[T]he voluntariness determination 'reflects deep, even if inarticulate, feelings of our society' about the acceptability of the imposition of certain interrogation methods on a particular person." (quoting Haley v. Ohio, 332 U.S. 596, 603 (1948) (Frankfurter, J., concurring))).

clear lines. For example, in *Ashcraft v. Tennessee*,[161] the Supreme Court effectively created an irrebuttable presumption that continuous police questioning for thirty-six hours was per se coercive and would always lead to a finding of involuntariness. The Supreme Court and lower courts have similarly suggested that the use of physical violence or threats of physical violence or both are per se impermissible.[162]

But the offensive-police-methods concern is not triggered only by practices that are so revolting as to be per se prohibited. Some involuntariness findings are predicated on the use of multiple tactics, each of which might not lead to a finding of involuntariness on its own, but their combined use reveals a pattern of police conduct that violates notions of fundamental fairness in an individual case.[163]

Consider, for example, *Culombe v. Connecticut*.[164] In that case, police took the defendant into custody and held him for more than four days, during which time he was intermittently but repeatedly questioned about the offense for short periods of time, not presented to a magistrate promptly as required by Connecticut law, not told of his right to remain silent, and not provided with legal assistance. The police brought his wife and thirteen-year-old daughter to the police station and convinced them to try to persuade him to confess, a tactic which left the defendant sobbing in his cell. Although the Court recognized that prolonged interrogation periods might sometimes be necessary,[165] it ultimately found that the "systematic" nature of this questioning, combined with the other tactics employed, was sufficient to overbear the suspect's will. In short, the totality of the police tactics used was offensive.[166]

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161. 322 U.S. 143 (1944).

162. *See, e.g.*, Beecher v. Alabama, 389 U.S. 35, 38 (1967) (holding that the "inescapable conclusion" is that a confession is involuntary when obtained at gunpoint); Culombe v. Connecticut, 367 U.S. 568, 622 (1961) (plurality opinion) (describing physical brutality and threats of physical brutality as "obvious, crude" devices to break a person's will); *Brown*, 297 U.S. 278; United States v. Jenkins, 938 F.2d 934, 938 (9th Cir. 1991) ("[C]onfessions accompanied by physical violence wrought by the police have been considered *per se* inadmissible."); People v. Zayas, 931 N.Y.S.2d 109, 111 (App. Div. 2011) (same).

163. The distinction between per se offensive tactics and those that are offensive under a totality-of-the-circumstances analysis is similar to Professor White's objective/subjective distinction. *See* White, *supra* note 3, at 45 ("In regulating coercive interrogation practices, the Court adopted both objective and subjective standards. In *Ashcraft*, for example, it established an objective standard, holding that thirty-six hours of virtually continuous interrogation was 'inherently coercive' without regard to the particular suspect's powers of resistance . . . . In other cases, however, the Court employed a subjective standard, considering the suspect's individual characteristics . . . ."). As I discuss *infra* Section III.A, under my typology, only obvious characteristics of a suspect would be relevant under the offensive-police-methods branch of voluntariness.

164. 367 U.S. 568 (1961).

165. *Culombe*, 367 U.S. at 580 (plurality opinion).

166. *See id.* at 625–27, 635.

This totality-of-the-circumstances approach to the offensive-police-methods form of involuntariness is less rule-bound than the per se approach, but the foci of both are the same. The court asks whether a police tactic, standing alone or used in combination with other tactics, is so offensive that it cannot be justified regardless of whether it is likely to prompt false confessions.

B. *The Effect-on-the-Suspect Form of Involuntariness*

The second type of involuntariness analysis is the "effect-on-the-suspect" form. Under this consequentialist approach, courts deem certain police tactics offensive *because* they tend to provoke false confessions. In differentiating this strand of analysis from the offensive-police-methods strand, I do not mean to imply that the tactics giving rise to voluntariness violations under this strand of the doctrine may not also be offensive. But if they are offensive under this strand, it is by virtue of their effects: they tend to cause suspects to confess falsely.

This form of involuntariness analysis is not as prominent in current case law as the offensive-police-methods variant, but it has deep historical roots.[167] Nineteenth-century English courts commonly conceived of confessions as involuntary when the police tactics at issue might have induced untrustworthy confessions.[168] When the U.S. Supreme Court first spoke of involuntary confessions in the late 1800s, it too emphasized that the doctrine was concerned about tactics that led to unreliable statements.[169] By the middle of the twentieth century, the view that voluntariness was animated, at least in part, by concerns about the trustworthiness of confessions was so widely accepted that it was regularly stated by courts, in prominent treatises,

167. *See* Garrett, *supra* note 3, at 1109 ("The concern with the possible unreliability of coerced confessions has ancient roots."); White, *supra* note 3, at 39 (similar); Kamisar, *supra* note 135, at 937 (similar).

168. *See, e.g.*, Scott's Case, (1856) 169 Eng. Rep. 909 (Q.B.) 914; 1 D. & B. 47, 58 ("It is a trite maxim that the confession of a crime, to be admissible against the party confessing, must be voluntary; but this only means that it shall not be induced by improper threats or promises, because, under such circumstances, the party may have been influenced to say what is not true, and the supposed confession cannot be safely acted upon."); *see also* King v. Warickshall, (1783) 168 Eng. Rep. 234 (K.B.) 234–35 ("Confessions are received in evidence, or rejected as inadmissible, under a consideration whether they are or are not intitled 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.").

169. Hopt v. Utah, 110 U.S. 574, 585 (1884) (noting that promises of leniency and threats of violence were problematic because they remove the presumption "that one who is innocent will not imperil his safety or prejudice his interests by an untrue statement"); *see also* Wilson v. United States, 162 U.S. 613, 622 (1896) (same). The lower courts had already recognized that voluntariness was animated by concerns about the reliability of confessions. *See, e.g.*, State v. Bostick, 4 Del. (4 Harr.) 563, 564 (1845) (noting that a confession obtained as a result of promises or threats poses a "great danger . . . that the confession . . . may be untrue" and must be suppressed).

and by respected confession law scholars.[170] In fact, it was so pervasive an idea that the law enforcement community itself accepted it as a core concern of voluntariness doctrine and incorporated it into police training manuals.[171]

In the last sixty years, the Supreme Court has gravitated toward more of a focus on the offensive-police-methods variant of voluntariness analysis.[172] But concerns about reliability have continued to affect and inform lower court decisions.[173] Consider, for example, the common police tactic of promising either to drop the charges or to reduce the severity of the charged offense if the suspect cooperates and admits guilt. One of the primary reasons why courts are concerned about promises of lenient treatment in exchange for confessions is the fear that such promises will cause suspects to confess falsely; a defendant facing the possibility of a heavy sentence if convicted has a powerful incentive to take such a deal and confess, whether he is actually guilty or not.[174]

For the same reason, courts have emphasized that threats to increase the severity of the charges if a person does not confess can render a confession involuntary.[175] In a slightly different vein, prolonged periods of detention for

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170. *See, e.g.*, Stein v. New York, 346 U.S. 156, 196 (1953) (describing the voluntariness doctrine as a constitutional doctrine "for protection of the innocent"); McCormick, *supra* note 46, at 232 ("Procurement of a confession by trick or deception does not vitiate it, unless the deception is calculated to prompt the victim to confess falsely."); 3 John Henry Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law § 822, at 246 (3d ed. 1940) ("The principle upon which a confession is treated as sometimes inadmissible is that *under certain conditions it becomes untrustworthy as testimony*."); Kamisar, *supra* note 147, at 755 (noting that the Supreme Court's cases were concerned with the truth or falsity of the resulting confession).

171. *See, e.g.*, Fred E. Inbau & John E. Reid, Lie Detection and Criminal Interrogation 222 (3d ed. 1953) (noting that "trickery or deception" will not nullify a confession as long as it is not "of such a nature as to be likely to produce an untrue confession").

172. *See* cases cited *infra* notes 214, 217, 219.

173. *See, e.g.*, United States v. Rutledge, 900 F.2d 1127, 1129 (7th Cir. 1990) ("Of course if the confession is *unreliable*, it should go out . . . ."); State v. Kelekolio, 849 P.2d 58, 73 (Haw. 1993) ("[D]eliberate falsehoods . . . which are of a type reasonably likely to procure an untrue statement or to influence an accused to make a confession regardless of guilt, will be regarded as coercive . . . ."); Sheriff v. Bessey, 914 P.2d 618, 622 (Nev. 1996) (holding that police interrogation techniques that "produce inherently unreliable statements" are involuntary); *see also* Garrett, *supra* note 3, at 1100–01 (studying forty false confession cases and emphasizing that the trial judges often discussed reliability when ruling on the voluntariness of the confessions); Welsh S. White, *What Is an Involuntary Confession Now?*, 50 Rutgers L. Rev. 2001, 2007 (1998) ("[T]he voluntariness test was and is designed to exclude confessions resulting from interrogation methods likely to produce untrustworthy statements.").

174. *See, e.g.*, Day v. State, 29 So. 3d 1178, 1181 (Fla. Dist. Ct. App. 2010) ("If the interrogator induces the accused to confess by using language which amounts to a threat or promise of benefit, then the confession may be untrustworthy and should be excluded." (quoting Fillinger v. State, 349 So. 2d 714, 716 (Fla. Dist. Ct. App. 1977)); State v. Zarate, No. 11-0530, 2012 WL 652449, at *6 (Iowa Ct. App. Feb. 29, 2012) ("[T]he question is 'whether the language used amounts to an inducement which is likely to cause the subject to make a false confession.'" (quoting State v. Mullin, 85 N.W.2d 598, 602 (Iowa 1957))).

175. *See, e.g.*, State v. Valero, 285 P.3d 1014, 1020 (Idaho Ct. App. 2012) (describing the detective's representation that the suspect could be charged with a more serious offense if he did not confess as the "most critical[ ]" element of its voluntariness analysis and emphasizing

questioning may provoke false confessions—even if the questioning is not continuous—because suspects will believe that the police will not let them go unless they confess and may, as a result, confess even if they are not guilty.[176] Lower courts continue to emphasize that the likely unreliability of confessions is part of what animates their voluntariness analyses.[177]

As was true with the offensive-police-methods variant of involuntariness, the effect-on-the-suspect variant exists in two forms.[178] The distinction between the two is, roughly, the distinction between the general and the particular. In the first category, there are certain police tactics that significantly increase the likelihood that suspects will confess falsely across the broad universe of criminal cases. Although the science is far from perfect, modern analysis of data from known false-confession cases (generally involving exonerations) has substantially improved the law enforcement community's understanding of the likely effects of different sorts of police tactics. So, albeit within the limits of the available information, it is sensible to speak of tactics that police should know are objectively likely to significantly increase the risk of false confessions.[179]

Then there are tactics that might not be likely to provoke false confessions as a general matter but that the police should know are significantly likely to increase the chance of a false confession in a particular case, given the known characteristics and susceptibilities of the suspect. Consider a case in which the police are questioning a person who is young, impressionable,

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that "[i]t is precisely the type of coercive tactic that could induce an innocent person to confess").

176. *See* Culombe v. Connecticut, 367 U.S. 568, 575 (1961) (plurality opinion) ("[Q]uestioning that is long continued . . . inevitably suggests that the questioner has a right to, and expects, an answer.").

177. *See, e.g.*, Ross v. State, 45 So. 3d 403, 433 (Fla. 2010) ("[T]he danger of police engaging in the type of tactics exhibited in this case is . . . that the confession itself is unreliable."); *see also* State v. Lynch, 686 S.E.2d 244, 248–49 (Ga. 2009) (Nahmias, J., concurring) (considering "the reliability of a confession" as an important part of the voluntariness analysis).

178. Yale Kamisar recognized these two forms more than fifty years ago. *See* Kamisar, *supra* note 147, at 753 ("A good deal turns on whether one means: (A) Is *this particular* defendant's confession 'unreliable' or 'untrustworthy?' or (B) What is the likelihood, objectively considered, that the interrogation methods employed in this case create a substantial risk that a person subjected to them will falsely confess . . . ?").

179. *See, e.g.*, Melissa B. Russano et al., *Investigating True and False Confessions Within a Novel Experimental Paradigm*, 16 PSYCHOL. SCI. 481 (2005) (using an experimental setting to demonstrate that the use of minimization techniques put innocent participants at risk for false confessions); Fadia M. Narchet et al., *Modeling the Influence of Investigator Bias on the Elicitation of True and False Confessions*, 35 LAW & HUM. BEHAV. 452 (2010) (expanding that experimental result to maximization techniques). The advent of DNA analysis and the proliferation of innocence clinics have led to the exoneration of hundreds of prisoners, many of whom were convicted on the basis of false confessions. *See* THOMAS & LEO, *supra* note 74, at 220 ("False confessions are the third leading cause of wrongful convictions."); Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 544–46 (2005) (reporting fifty-one false confession cases). As a result, social scientists have been able to study and identify a number of police interrogation tactics that significantly increase the likelihood of false confessions. Kassin et al., *supra* note 41, at 4, 15–23 (summarizing current research).

and very religious. The repeated assertion that God wants that person to confess might over time cause that particular person to confess falsely, even though it would be unlikely to have a similar effect on either a nonreligious person or a religious adult.

As is true with all such distinctions, the line between these two forms of effect-on-the-suspect involuntariness sometimes calls for judgment in the application, and sometimes the two analyses are better understood as lying along a continuum rather than as the opposing members of a dichotomy. For example, some police tactics significantly increase the likelihood of unreliable statements when used on certain subpopulations: studies have shown that children and individuals with cognitive and intellectual disabilities are particularly likely to confess falsely when presented with fictitious evidence of their guilt.[180] Presenting children or the mentally disabled with false reports that others have identified them as criminals poses an even greater risk of creating a false confession than would the same information when posed to an adult with no mental handicaps.[181]

Thus, it is possible that the use of certain tactics could be offensive but only when used on specific subpopulations. The use of that tactic might not tend to provoke false confessions in general, but the police need no individualized information about a suspect beyond the fact that he is a child or is cognitively disabled to know that the tactic might provoke a false confession in the case at hand.

C. *A Note About Overlap*

Although the foci and the analyses of the offensive-police-methods and effect-on-the-suspect branches of voluntariness doctrine are different, there are obvious areas of overlap. For one, a police interrogation tactic can involve both an offensive police method and one that is significantly likely to lead to a false confession. Consider again the facts of *Brown v. Mississippi*.[182] Hanging someone and whipping him until he confesses are per se offensive police tactics, and courts are right to find such confessions involuntary. But it is also true that a court might have serious reliability concerns about confessions obtained under those circumstances. In *Brown* itself, the Court noted in passing that "[a]side from the confessions, there was no evidence sufficient to warrant the submission of the case to the jury."[183] Threats of

180. Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 919–20, 963–74 (2004); Garrett, *supra* note 3, at 1116; Kassin et al., *supra* note 41, at 20–21. For this reason, police training manuals often counsel against using fictitious evidence when interrogating members of these populations. *See, e.g.*, Fred E. Inbau et al., Criminal Interrogation and Confessions 255 (5th ed. 2013) ("[T]his technique should be avoided when interrogating a youthful suspect with low social maturity or a suspect with diminished mental capacity.").

181. Certain forms of fictitious evidence can also increase the likelihood that an adult suspect with no mental deficiencies will confess falsely. *See infra* Section III.B.1.a.

182. 297 U.S. 278 (1936).

183. *Brown*, 297 U.S. at 279.

violence, extended periods of isolated detention with repeated questioning, and many other police tactics might raise voluntariness concerns along both the offensive-police-methods and effect-on-the-suspect dimensions.

But the fact that both sets of voluntariness concerns might be present within the same facts does not mean that they should be conflated. On the contrary, disentangling them is important. As I explain in Part III, a court's focus and analysis should be different depending on which variant of voluntariness doctrine is at issue. So in a case in which both problems may be present, a court needs to conduct two analyses rather than just one.

D. *The Importance of* Colorado v. Connelly*: Folding Involuntary-in-Fact Doctrine into Offensive-Police-Methods and Effect-on-the-Suspect Voluntariness*

The Supreme Court once entertained a third form of involuntariness—one that in some senses tracks a common-sense understanding of the word "voluntary" better than either of the two extant forms. In its early cases, the Court suggested that any confession that was not the product of the suspect's rational intellect and free will should be suppressed.[184] If a person's mental illness drove him to confess or if he had been given a truth serum, his confession was not the product of his free will and thus would be suppressed because it was "involuntary in fact."[185] What was distinctive about the involuntary-in-fact idea was that it could deem a confession inadmissible even when the police had done nothing other than receive the confession.

In *Colorado v. Connelly*,[186] the Supreme Court rejected the idea of a constitutional violation without police action and held that, in order for a due process voluntariness issue to be presented, there must be police conduct causally related to the resulting confession.[187]

The Supreme Court's decision in *Connelly* is important for three reasons. First, the threshold requirement of police action that induces a confession is important when thinking about how to approach all forms of voluntariness analysis. In the offensive-police-methods form of voluntariness, there will always be police action sufficient to satisfy the *Connelly*

184. *See, e.g.*, Townsend v. Sain, 372 U.S. 293, 307 (1963) (requiring confessions to be "the product of a rational intellect and a free will" (quoting Blackburn v. Alabama, 361 U.S. 199, 208 (1960)); *see also* Culombe v. Connecticut, 367 U.S. 568, 602 (1961) (plurality opinion) (requiring confessions to be "the product of an essentially free and unconstrained choice").

185. *See, e.g.*, *Townsend*, 372 U.S. at 307–08 (holding that a suspect's confession was involuntarily given when the suspect confessed only after being given a drug that had the properties of a truth serum and noting that "[i]t is difficult to imagine a situation in which a confession would be less the product of a free intellect, less voluntary, than when brought about by [such] a drug"); Blackburn v. Alabama, 361 U.S. 199, 210–11 (1960) (holding that the confession of an insane person was involuntary in fact and noting that "the evidence here clearly establishes that the confession most probably was not the product of any meaningful act of volition"); *see also Townsend*, 372 U.S. at 308 ("Any questioning by police officers which *in fact* produces a confession which is not the product of a free intellect renders that confession inadmissible.").

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

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

threshold. If there is no police action, then there will not be "offensive" police action. With respect to the effect-on-the-suspect form of involuntariness, however, the *Connelly* threshold requirement has real teeth. It is not enough if the confession is unreliable. Rather, police action must trigger that unreliable confession for there to be a voluntariness problem under this strand.[188]

Second, *Connelly* is important because it effectively eliminated any independence that the involuntary-in-fact cases had from the other two strands of voluntariness. After *Connelly*, if a suspect volunteers a confession that is not a product of his rational intellect and free will and the police do nothing to provoke the confession, voluntariness doctrine will not exclude the confession regardless of how unreliable it is. The fact that the confession was not the product of the suspect's free and rational will only matters if (1) there was police action that was offensive in and of itself[189] or (2) there was police action that significantly increased the chances of a false confession. Rather than eliminate any concern about involuntary-in-fact confessions, the Supreme Court merely folded this form of involuntariness into the offensive-police-methods and effect-on-the-suspect forms.

The third reason why *Connelly* is important is because of how it has been misread. In the wake of *Connelly*, many scholars have mistakenly lumped together the concept of involuntary-in-fact confessions with the concept of reliability. They argue that *Connelly* sounded the death knell for any variant of voluntariness doctrine predicated on the trustworthiness of the underlying confession.[190] But that is a misreading, one that lets some of *Connelly*'s language eclipse other features also present in the opinion.[191]

To be sure, the Court's opinion in *Connelly* stated that the Due Process Clause does not have the "aim" of excluding false evidence, as opposed to

188. *See infra* Section III.B.1 (discussing the triggering requirement in effect-on-the-suspect cases).

189. *Connelly*'s discussion of *Townsend* demonstrates how some involuntary-in-fact cases will morph into offensive-police-methods cases. In *Townsend*, the Supreme Court held that a suspect's confession was involuntarily given when the suspect confessed only after being given a drug that had the properties of a truth serum. *Townsend*, 372 U.S. at 307–09. The *Connelly* Court did not overrule *Townsend*. It recharacterized the case as one involving offensive police methods. The concern in *Townsend* was not that the resulting confession was unreliable. (The truth serum meant that it was incredibly reliable.) Rather, the *Connelly* Court described *Townsend* as a case involving "police wrongdoing." *Connelly*, 479 U.S. at 165. It was offensive for the police to drug a suspect and then elicit a confession from him in that drug-induced state. According to the *Connelly* Court, the "integral element of police overreaching" was present. *Id.* at 164.

190. *See, e.g.*, GARRETT, *supra* note 48, at 37 ("The U.S. Supreme Court has held that unreliability is irrelevant to the question whether a confession statement is sufficiently voluntary to be admitted at trial."); Dix, *supra* note 48, at 272–73 (similar); Leo et al., *supra* note 41, at 499 (similar).

191. *See* WHITE, *supra* note 3, at 197–98 (suggesting that a "close reading of *Connelly*" reveals that it did not significantly affect the due process analysis and did not intend to preclude courts from considering the trustworthiness of the confession).

the aim of preventing fundamental unfairness.[192] But the Court was careful to emphasize that the mental condition of the defendant "is surely relevant to an individual's susceptibility to police coercion"[193] and is a "significant factor in the 'voluntariness' calculus."[194] Just as the Court was not saying that involuntary-in-fact confessions are never excluded as involuntary, it was also not saying that unreliable confessions are never excluded as involuntary. Rather, the Court was emphasizing that "the crucial element of police overreaching" must always be present in order for a confession to be deemed involuntary.[195]

After *Connelly*, a criminal defendant cannot argue that his due process rights are being violated simply because his unreliable confession is being admitted into evidence against him. But if the police use interrogation tactics that they know or should know are likely to lead to a false confession (whether across cases or in the case at hand), they engage in precisely the type of "police overreaching" that *Connelly* condemns.[196]

Connelly's treatment of *Blackburn v. Alabama*[197] should make the point clear: the confession in *Blackburn* was involuntary partly because the defendant's insanity made his confession involuntary in fact and partly because of concerns about the reliability of the resulting confession.[198] *Connelly* reaffirmed *Blackburn*'s holding, albeit on the understanding that the confession was procured by police overreaching.[199] The fact that *Blackburn* is still good law after *Connelly* indicates that voluntariness doctrine remains concerned with the reliability of confessions. After all, reliability concerns animated the Court's decision in *Blackburn*.[200] The *Connelly* Court simply demanded a threshold showing of police action that leads to the unreliable confession.

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192. *Connelly*, 479 U.S. at 167 ("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 . . . . 'The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false.' " (citation omitted) (quoting Lisenba v. California, 314 U.S. 219, 236 (1941))).

193. *Id.* at 165.

194. *Id.* at 164.

195. *Id.* at 163; *cf.* Perry v. New Hampshire, 132 S. Ct. 716, 730 (2012) (holding that the Due Process Clause is appropriately used to exclude unreliable identifications only after a showing has been made that the suggestive identification process was police orchestrated).

196. *See also* White, *supra* note 3, at 199 (arguing that, even after *Connelly*, "an interrogation method that is substantially likely to induce an untrustworthy statement should still be impermissible under the due process test").

197. 361 U.S. 199 (1960).

198. *See Blackburn*, 361 U.S. at 207 ("[A] most basic sense of justice is affronted by the spectacle of incarcerating a human being upon the basis of a statement he made while insane; and this judgment can without difficulty be articulated in terms of the unreliability of the confession . . . ."); *see also id.* at 200 n.1 (noting that there was scant other evidence to corroborate the confession).

199. According to the *Connelly* Court, the police knew that Blackburn was a mental patient and questioned him, "exploit[ing] this weakness." *Connelly*, 479 U.S. at 164–65.

200. *See supra* note 198.

The question is not reliability simpliciter but rather *whether the police have done something whose effect on the suspect reduces the reliability of the confession obtained*.[201]

III. Going Forward: Toward Rules for Voluntariness

History, law, and current practice reveal two different strands of voluntariness doctrine supported by different rationales. But courts have routinely conflated these two strands, lumping them together into one totality-of-the circumstances analysis. Any effort to refine the definition of voluntariness must distinguish between the two strands and recognize that the test for ascertaining when a confession is involuntary should differ depending on whether one or both strands is implicated in a given case. If the concern is about the reliability of the ultimate confession, the doctrinal analysis should look different than if the concern is with deterring offensive police methods regardless of their effect on a suspect. In this Part, I provide a framework for conducting these different analyses.

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201. In addition to *Connelly*, there are two other cases that scholars cite to argue that reliability is not a valid consideration of voluntariness. Neither precludes courts from relying on an effect-on-the-suspect form of voluntariness. In *Lisenba v. California*, 314 U.S. 219 (1941), the Court stated that "[t]he aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false." 314 U.S. 219, 236 (1941). But that language was dicta, and there was language elsewhere in the opinion that recognized the importance of reliability in voluntariness analyses. *See id.* ("The aim of the rule that a confession is inadmissible unless it was voluntarily made is to exclude false evidence. Tests are invoked to determine whether the inducement to speak was such that there is a fair risk the confession is false.").

In *Rogers v. Richmond*, 365 U.S. 534 (1961), the Court stated that "a legal standard which [takes] into account the circumstance of probable truth or falsity . . . is not a permissible standard under the Due Process Clause of the Fourteenth Amendment." 365 U.S. 534, 543–44 (1961) (footnote omitted). This language, however, needs to be understood in the context of that case. The state court had adopted a myopic definition of voluntariness as requiring suppression *only* if the police tactics were calculated to produce an untrue statement. *See id.* at 541–43. The Supreme Court rejected that definition, noting that offensive police methods could result in a finding of involuntariness even if someone was guilty. *Id.* at 541. The *Rogers* Court was careful to limit the scope of its holding. It cited other Connecticut cases with similar effect-on-the-suspect reasoning and said it was not "meaning to consider the validity of such reasoning, under the Fourteenth Amendment, in any applications, but the one now before us." *Id.* at 544 n.1; *see also* Leo et al., *supra* note 41, at 495 n.99 (noting that the *Rogers* Court "was only referring to the admission of involuntary, yet trustworthy confessions" and arguing that "reliability remained a purpose of the voluntariness rule" after that case). Three years after *Rogers*, the Supreme Court again stated that reliability was one of the animating principles of the voluntariness test. *See* Jackson v. Denno, 378 U.S. 368, 385–86 (1964) (emphasizing that the Fourteenth Amendment forbids the use of involuntary confessions, in part, "because of the probable unreliability of confessions that are obtained in a manner deemed coercive"). Moreover, after *Lisenba*, *Rogers*, and *Connelly*, lower courts have continued to focus on reliability as an important part of the voluntariness analysis. *See supra* notes 173–177 and accompanying text.

A. *A Test for the Offensive-Police-Methods Form of Involuntariness*

The legal system has a powerful interest in deterring police interrogation tactics that are patently offensive to either the general sense of moral decency or the particular conceptions of fairness that underlie the American adversarial system of justice.[202] In this vein, the Supreme Court has recognized the use of physical violence, continuous and uninterrupted questioning of a suspect for an extended period of time, and threats of violence to the suspect as conscience-shocking tactics requiring the suppression of any resulting confessions.[203]

To be sure, there is often disagreement about what tactics must be proscribed in that way.[204] But as a matter of settled law, there is no question about whether the use of certain tactics or combinations of tactics requires suppression. The question is *which* tactics, or combinations of tactics, fall in this category. And if voluntariness doctrine is to assume a more definite shape, more clarity is needed about the answer to that question.

An initial step in that direction, and one whose importance is not widely appreciated, is to recognize that police tactics may be offensive enough to merit suppression either because the police used a particular tactic that is offensive per se or because the police used several tactics that are offensive in combination. Courts should be clear about which practices are offensive per se, even standing alone.[205]

For starters, all courts should clarify that *any* police use of physical violence will result in suppression of a subsequent confession without the need for a totality-of-the-circumstances analysis.[206] Although the Supreme Court has condemned police use of violence, it has always done so in cases involving extreme examples of violent behavior—like the whipping and hanging at

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202. *See* Haley v. Ohio, 332 U.S. 596, 607 (1948) (Frankfurter, J., concurring) (noting that confessions resulting from offensive police practices must be suppressed "[t]o remove the inducement to resort to such methods"); *see also* Kassin et al., *supra* note 41, at 11 (recognizing that *Brown v. Mississippi* and its progeny were designed to "deter unfair and oppressive police practices").

203. *See* Arizona v. Fulminante, 499 U.S. 279, 287 (1991) (threats of physical violence); Ashcraft v. Tennessee, 322 U.S. 143 (1944) (thirty-six hours of continuous questioning); Brown v. Mississippi, 297 U.S. 278 (1936) (physical violence); *see also* Paul Marcus, *It's Not Just About* Miranda*: Determining the Voluntariness of Confessions in Criminal Prosecutions*, 40 VAL. U. L. REV. 601, 607 n.31 (2006) (collecting federal and state cases and noting that "[t]he Supreme Court has never wavered in its view that the use of violence or the threat of physical harm will virtually ensure that any resulting confession will be found to be involuntary").

204. *See generally* Marcus, *supra* note 203 (summarizing lower court rulings on voluntariness).

205. *See* Susan R. Klein, *Identifying and (Re)formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030, 1075 (2001) (suggesting that "the best [the] Court can do" might be "a set of per se prohibitions on certain police practices we find morally offensive").

206. *See, e.g.*, United States v. Jenkins, 938 F.2d 934, 938 (9th Cir. 1991) ("[C]onfessions accompanied by physical violence wrought by the police have been considered *per se* inadmissible.").

issue in *Brown*.[207] Lower courts should extend these holdings and clearly state that any use of physical violence is impermissible and will render a resulting confession involuntary. It is very difficult to administer a doctrine that permits "de minimis" physical violence. A flat prohibition establishes clear guidance for police officers and an enforceable line for courts.[208]

This is not an area in which a realistic understanding of police practices raises any serious concerns about the overinclusiveness of a flat rule or the need for contextual judgment. Police often need to use physical force in order to arrest and detain suspects, as well as to protect themselves and others from harm. But police do not need to lay hands on suspects in custody in order to elicit legitimate confessions from them; police forces have other methods for that purpose.

Then there are tactics which cannot sensibly be completely proscribed but which also should not be permitted without limit, such that appropriate regulation must find a way of saying how much is too much. For example, effective police interrogation often requires that questioning go on for some period of time, but questioning cannot be permitted to continue indefinitely, and certainly not without breaks. *Ashcraft* held that thirty-six hours of continuous relay questioning was over the line, but very few interrogations come near that length.[209] Accordingly, *Ashcraft* as a practical matter provides little guidance, with the result that police and lower courts are largely at sea in trying to think about how long is too long.[210]

To be sure, any clear time limit that a court might impose would embody a contestable judgment, and any rule might in some cases turn out to be over- or underinclusive. Nonetheless, the Supreme Court has been willing to impose clear rules in other criminal procedure contexts where clear guidance is required.[211] And even if the choice of a time limit would be contestable, it need not be completely arbitrary, because it can be based on knowledge about human needs for sleep, food, bathroom breaks, and the like.

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207. *See Brown*, 297 U.S. at 286.

208. Even this prohibition will not answer all questions. Courts will still have to explain what constitutes "physical violence" versus incidental contact. If a police officer puts his hand on a suspect's shoulder or pats him on the back, it might not be "physical violence" under some circumstances.

209. *See* Kassin et al., *supra* note 41, at 16 ("[T]he vast majority of interrogations last approximately from 30 minutes up to 2 hours.").

210. *See* Marcus, *supra* note 203, at 626 (analyzing thousands of voluntariness decisions and noting that "it is striking how little guidance lawyers, judges, and law enforcement officers have in terms of the allowable time for police questioning").

211. *See, e.g.*, Maryland v. Shatzer, 559 U.S. 98, 110–11 (2010) (imposing a fourteen-day prohibition on police questioning after a suspect invokes his *Miranda* rights); Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991) (creating a presumption that presenting a suspect to a magistrate within forty-eight hours of arrest satisfies the prompt presentment requirement).

Most scholars who have looked at this problem have suggested that continuous questioning be limited to between four and six hours.[212] In view of the desirability of drawing a line, it seems reasonable to say that confessions elicited after more than six hours of continuous interrogation should be deemed per se involuntary. Indeed, given the serious kind of abuse that a rule in this area is aimed at preventing, it seems wise not to go all the way to the outer limit: I would probably be inclined to draw the line at five hours rather than six. (And fortunately, for reasons discussed *infra*, drawing the line at five hours should not prevent professional police forces from conducting their investigations successfully.[213]) But whether the line is drawn at six hours or at something less, courts should begin to draw that line.

The issue of threats used to elicit confessions raises a slightly different issue: not just how much is too much, but which threats are serious enough to merit automatic suppression. Threats of physical violence to the suspect or his loved ones should be and have been deemed per se impermissible by a number of courts.[214] (Yes, a per se rule against threats of physical violence creates the need for a jurisprudence defining what constitutes a threat of physical violence. But that inquiry is much more focused than the current totality-of-the-circumstances test.)

Additionally, courts have found that threats of particularly harsh consequences such as charging a person with a more serious crime,[215] throwing him in a dungeon or subjecting him to a greater term of imprisonment,[216]

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212. *Compare* Leo, *supra* note 3, at 311–12 (four hours), *with* White, *supra* note 3, at 204 (six hours), *and* Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 Harv. C.R.-C.L. L. Rev. 105, 145 (1997) (five hours).

213. Valid confessions are almost always elicited within the first four hours of a competent interrogation. *See infra* note 259.

214. *See, e.g.*, Arizona v. Fulminante, 499 U.S. 279, 287–88 (1991) (threat of physical violence); Beecher v. Alabama, 389 U.S. 35, 38 (1967) (holding that the "inescapable conclusion" is that a confession is involuntary when obtained at gunpoint); Culombe v. Connecticut, 367 U.S. 568, 622 (1961) (plurality opinion) (describing threats of physical brutality as "obvious, crude" devices to break a person's will); Griffin v. Strong, 983 F.2d 1540, 1543 (10th Cir. 1993) (threat to place suspect in general population where his guts would be smashed all over the floor). Georgia has a statute that makes a confession involuntary if induced by the "remotest fear of injury." Ga. Code Ann. § 24-8-824 (2013).

215. *See, e.g.*, People v. Beebe, No. C058783, 2009 WL 2427734, at *7 (Cal. Ct. App. Aug. 10, 2009) (threatening to "throw the book at" the suspect and "hammer" him); State v. Valero, 285 P.3d 1014, 1018 (Idaho Ct. App. 2012) (threatening additional crime of lying to the police); Dye v. Commonwealth, 411 S.W.3d 227, 232–33 (Ky. 2013) (threatening a juvenile with the death penalty); People v. Crespo, No. 1812/10, 2010 WL 3808691, at *4–5 (N.Y. Sup. Ct. Sept. 22, 2010) (threatening to increase charges by writing a separate felony count for each bag of drugs recovered); State v. Bordeaux, 701 S.E.2d 272, 279 (N.C. Ct. App. 2010) (threatening a murder prosecution).

216. *See, e.g.*, United States v. Mashburn, 406 F.3d 303, 305 (4th Cir. 2005); State v. Strayhand, 911 P.2d 577, 585 (Ariz. Ct. App. 1995); People v. Diep, No. G039379, 2009 WL 1581500, at *6 (Cal. Ct. App. June 5, 2009); People v. Thomas, 839 P.2d 1174, 1179 (Colo. 1992); State v. Tuttle, 650 N.W.2d 20, 35 (S.D. 2002).

prosecuting or harming his friends or family,[217] administering or withholding medical treatment,[218] taking a person's children away from him,[219] or causing him to lose his job[220] are revolting to our sense of justice and should not be allowed. But the courts have not established any per se rules with respect to these threats; rather, they tend to evaluate the threats in context as part of the totality of the circumstances.[221] Consequently, there is no consensus in the lower courts about when threats to a suspect render a resulting confession involuntary and there is wide divergence in the case law.[222]

Courts should begin to draw lines between threats that should be evaluated in context and threats that are per se so offensive that they are impermissible in any case. Grading "offensiveness" is difficult and perhaps impossible for courts to do in any clear way.[223] But courts can provide guidance to the police by listing those tactics that are clearly on the impermissible side of the line. Police would have much more guidance if the courts said "threats of physical violence or other harsh consequences including charging a person with a more serious crime, subjecting him to a greater punishment, punishing his friends or family, administering or withholding medical treatment, taking his children away, or causing him to lose his livelihood are per se impermissible and will result in a finding of involuntariness."

The list need not be complete. If the police use a tactic that is similar to one of the prohibited tactics listed, the courts could use principles of interpretation to determine whether that tactic is similar enough to be deemed a threat of "other harsh consequences."[224] The courts would have to answer

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217. *See, e.g.*, Harris v. South Carolina, 338 U.S. 68, 69–70 (1949) (plurality opinion); Johnson v. Trigg, 28 F.3d 639, 642 (7th Cir. 1994); United States v. Finch, 998 F.2d 349, 355–56 (6th Cir. 1993); United States v. Andrews, 847 F. Supp. 2d 236, 248–50 (D. Mass. 2012); Brisbon v. United States, 957 A.2d 931, 945 (D.C. 2008); State v. Baker, 521 S.E.2d 24, 26 (Ga. Ct. App. 1999); People v. Thomas, 8 N.E.3d 308, 314–15 (N.Y. 2014); People v. Keene, 539 N.Y.S.2d 214 (App. Div. 1989); State v. Corns, 426 S.E.2d 324, 327 (S.C. Ct. App. 1992); Contreras v. State, 312 S.W.3d 566, 576–77 (Tex. Crim. App. 2010); Black v. State, 820 P.2d 969, 972 (Wyo. 1991).

218. *See, e.g.*, State v. Phelps, 456 N.W.2d 290, 294 (Neb. 1990); State v. Wright, 587 N.E.2d 906, 910 (Ohio Ct. App. 1990).

219. *See, e.g.*, Lynumn v. Illinois, 372 U.S. 528, 534 (1963); United States v. Perez-Guerrero, Nos. 11-40101-01-RDR, 11-40101-02-RDR, 2012 WL 683201, at *12 (D. Kan. Mar. 2, 2012).

220. *See, e.g.*, State v. Thompson, 702 S.E.2d 198, 200–01 (Ga. 2010); State v. Chavarria, 33 P.3d 922, 927–28 (N.M. Ct. App. 2001).

221. Marcus, *supra* note 203, at 619–21 (collecting cases). New York has come close to creating a category of impermissible threats. *See Thomas*, 8 N.E.3d at 314 ("It is established that interrogators may not threaten . . . harm to the interrogee's vital interests."). Of course, there is no clear definition of what constitutes a "vital interest."

222. *See* Marcus, *supra* note 203, at 619–21.

223. *See* Klein, *supra* note 205, at 1074 (describing it as "inherently impossible" to define voluntariness).

224. *Cf.* 2A Norman J. Singer & Shambie Singer, Statutes and Statutory Construction §§ 47.16–.17 (7th ed. 2014) (describing the statutory interpretation principles of *noscitur a sociis* and *ejusdem generis* under which words in a statutory enumeration are defined by reference to their associated words). This strategy of listing cases covering known situations

thorny factual questions about whether a police officer in a given case actually issued a threat, but courts regularly resolve those kinds of factual disputes.

Similarly, courts should consider what other tactics, standing alone, are sufficient to require the conclusion that a confession is involuntary. An analysis of cases involving voluntariness determinations reveals some clear patterns. Courts often find confessions involuntary in cases involving police impersonation of a doctor or some other professional in order to elicit a confession;[225] holding someone for a prolonged period of time without access to family, friends, or counsel;[226] fabrication of false evidence suggesting the suspect's guilt;[227] promises of leniency;[228] and interrogation of juveniles without a supportive adult present.[229] But because courts have addressed these tactics in the course of a more general totality-of-the-circumstances analysis, the cases do not clearly indicate whether any of these tactics is sufficiently offensive to merit per se suppression of a resulting confession.[230] To

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and then using a catch-all category for other cases is a common way regulators attempt to obtain the benefits of rules while limiting the costs. Weisbach, *supra* note 13, at 876 (discussing this strategy in other contexts).

225. *See, e.g.*, Leyra v. Denno, 347 U.S. 556 (1954).

226. *E.g.*, Darwin v. Connecticut, 391 U.S. 346 (1968) (thirty to forty-eight hours); Davis v. North Carolina, 384 U.S. 737 (1966) (sixteen days); Haynes v. Washington, 373 U.S. 503 (1963) (sixteen hours); Ward v. Texas, 316 U.S. 547 (1942) (three days); Chambers v. Florida, 309 U.S. 227 (1940) (five days).

227. *See, e.g.*, State v. Cayward, 552 So. 2d 971 (Fla. Dist. Ct. App. 1989) (laboratory reports); State v. Chirokovskcic, 860 A.2d 986 (N.J. Super. Ct. App. Div. 2004) (laboratory experiments); State v. Patton, 826 A.2d 783 (N.J. Super. Ct. App. Div. 2003) (audio-recorded eyewitness interviews); State v. Farley, 452 S.E.2d 50, 60 n.13 (W. Va. 1994) (polygraph examination results). In fact, one state has enacted a law prohibiting police officers from using fabricated documents to affect the course of their investigations. *See* Tex. Penal Code Ann. § 37.09 (West 2014). Fred Inbau, the author of the leading interrogation manual for police officers, has said that the use of false, incriminating documents is impermissible. Inbau et al., *supra* note 180, at 325 n.2.

228. *See, e.g.*, United States v. Preston, 751 F.3d 1008, 1026–27 (9th Cir. 2014) (en banc); Light v. State, 20 So. 3d 939, 940 (Fla. Dist. Ct. App. 2009); Ramirez v. State, 15 So. 3d 852, 856–57 (Fla. Dist. Ct. App. 2009); Canty v. State, 690 S.E.2d 609, 610 (Ga. 2010); State v. Klepper, 688 S.E.2d 673, 675 (Ga. Ct. App. 2009); Harper v. State, 722 So. 2d 1267, 1273 (Miss. Ct. App. 1998); People v. Thomas, 8 N.E.3d 308, 316 (N.Y. 2014); State v. Bordeaux, 701 S.E.2d 272, 279 (N.C. Ct. App. 2010); *In re* M.E., No. 2010–G–2996, 2011 WL 3558111, at *5 (Ohio Ct. App. Aug. 12, 2011); *see also* Ga. Code Ann. § 24-8-824 (2013) (deeming any confession induced by "the slightest hope of benefit" involuntary); Marcus, *supra* note 203, at 623–24 (summarizing cases).

229. *See, e.g.*, Murray v. Earle, 405 F.3d 278, 288 (5th Cir. 2005); Taylor v. Maddox, 366 F.3d 992, 1015 (9th Cir. 2004); Boyd v. State, 726 S.E.2d 746, 749 (Ga. Ct. App. 2012); *In re* A.S., 999 A.2d 1136, 1145–46 (N.J. 2010); *In re* T.M., No. FJ-21-287-11, 2012 WL 593148, at *5 (N.J. Super. Ct. App. Div. Feb. 24, 2012); State v. Ellvanger, 453 N.W.2d 810, 815 (N.D. 1990).

230. *See* Marcus, *supra* note 203, at 643 ("The reality is that few criteria stand out as especially significant, and even fewer appellate decisions can be viewed as establishing noteworthy precedents.").

be clear, which of these or similar tactics should be per se grounds for suppression is a question that different people might answer differently, and it is not the aim of this Article to provide an authoritative account of all those things that shock our collective conscience. But the courts should engage these questions and make the decisions necessary to provide guidance.[231]

Finally, it is necessary to think about the more complex scenario in which the police have not used a tactic that standing alone is per se offensive enough to merit suppression but may have used a combination of tactics that, taken together, is sufficient to merit suppression. Given the infinite variety of ways in which different police tactics might combine in different cases, it would be impossible to cover all scenarios here with a set of rules. In many cases, courts will have to make judgments that tend more toward a totality-of-the-circumstances analysis. That said, remembering that the concern here is with the offensive-police-practices strand of voluntariness analysis can still guide the inquiry by limiting the circumstances that a court should consider.

The essence of this strand of the analysis is that the validity of a confession depends on the inherent offensiveness (*vel non*) of the police practices used, not the effect that those tactics had on the particular suspect. As a result, a court thinking about whether some combination of police tactics constitutes offensive behavior should not ask whether the confession was reliable. To be clear, this does not mean that facts particular to the given suspect are completely irrelevant to the analysis. Tactics that are offensive when used on a child, for example, might not be offensive when used on an adult.[232] But if the question is about the offensiveness of the police conduct, it must be answered with reference only to those facts about the suspect that the police knew or should have known when they conducted the interrogation.

Hidden characteristics of the suspect that might make him more vulnerable than the general population are not part of the analysis, because the

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231. Scholars have offered various approaches for determining when police methods are offensive. *E.g.*, THOMAS & LEO, *supra* note 74, at 226 (positing a "moral choice theory" under which courts ask "whether [the alternative to talking that the suspect faced] is something that society believes police ought to be able to force on suspects"); Godsey, *supra* note 5, at 515–39 (proposing an "objective penalty" approach under which the court begins with a baseline understanding of what a suspect should expect in an interrogation given reasonable practices and then asks whether police moved the suspect below that baseline). Given that the need for guidance and consistency is driving the courts to further define voluntariness, it seems counterproductive to replace voluntariness with another open-ended standard that requires courts to make case-by-case moral judgments. A list of impermissible tactics would provide more guidance. *See id.* at 518 (recognizing that a "laundry list" approach may be "most consistent with the Framer's original intent"); Paulsen, *supra* note 46, at 437 (advocating for a list).

232. *Cf. Preston*, 751 F.3d at 1010, 1022 (deeming a statement made by an eighteen-year-old with an IQ of sixty-five involuntary in light of suggestive questioning and minimization tactics and noting that it is " 'possible for law enforcement officers to induce an involuntary statement by using techniques [on mentally disabled individuals] that would be acceptable in cases involving mentally typical suspects' " (quoting Morgan Cloud et al., *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495, 509 (2002))).

police should not be held culpable on the basis of facts of which they were reasonably unaware. To be sure, such hidden characteristics of suspects might be relevant under the other strand of voluntariness analysis—that is, the strand that looks at the effect that police tactics have on particular suspects. But the point of keeping the two strands separate is to think clearly about each animating concern of the doctrine, rather than muddling them together.

To summarize: when a criminal defendant raises a voluntariness challenge based on offensive police methods, courts should begin by asking whether any tactic that the police used is per se offensive and therefore merits suppression standing alone. If there is no per se offensive tactic, the court can then engage in a totality-of-the-circumstances analysis that considers whether the sum total of tactics used is offensive, given the known characteristics and vulnerabilities of the suspect. If the defendant's confession is causally linked to the police use of such an offensive tactic or combination of tactics, it should be deemed a suppressible fruit of that tactic.[233] But hidden characteristics of a suspect should not be relevant to this analysis, nor should the reliability of the resulting confession.

B. *A Test for the Effect-on-the-Suspect Form of Involuntariness*

Under the effect-on-the-suspect form of involuntariness, an offensive police tactic is offensive precisely *because* of its tendency to lead to false confessions. There are two distinct parts to the test for determining when a statement is involuntary because of its effect on the suspect: (1) there must be evidence of police "wrongdoing" sufficient to satisfy the *Connelly* threshold, and (2) the resulting confession must be unreliable.

To satisfy the *Connelly* threshold requirement that the police have engaged in "wrongdoing," a defendant challenging a confession under this strand of voluntariness doctrine should be required to produce some evidence that the police knew or reasonably should have known that using the tactic(s) at issue would significantly increase the chance that the suspect would confess falsely. Of course, obvious characteristics of the suspect that the police knew or reasonably should have known about would be relevant to this analysis.

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233. Courts have long required a causal link between offensive police tactics and the resulting confession. *See, e.g.*, Miller v. Fenton, 796 F.2d 598, 612 (3d Cir. 1986). Although I believe that courts often require too close a fit between the offensive practice and the resulting statement, *see* Holland v. McGinnis, 963 F.2d 1044, 1050–51 (7th Cir. 1992) (holding that a second confession given six hours after a man had been beaten by police into giving a first confession was sufficiently attenuated), a full exploration of attenuation and causality is beyond the scope of this Article. However, just as the flagrancy of the police misconduct informs courts' analyses regarding how much attenuation is required to dissipate the taint of illegal conduct in the Fourth Amendment context, *see* Brown v. Illinois, 422 U.S. 590, 603–04 (1975), so too should it inform the analysis here. The prosecution should have to make a more significant showing of attenuation when the police use methods that are per se offensive.

This burden can only be a burden of production: the prosecution always bears the burden of persuasion on the issue of the voluntariness of a confession.[234] And once a defendant has met her burden of production, the prosecution should have two options for persuading the court to regard the confession at issue, and its fruits, as admissible.

First, the prosecution could try to prove that the police did not and should not have known that the tactic(s) at issue would significantly increase the likelihood of a false confession. To make that showing would negate the suggestion of police wrongdoing. It might still be the case that the confession was unreliable. But if so, *Connelly* requires that the defendant look to state or federal evidentiary principles to exclude it: without police wrongdoing, there is no constitutional violation.[235]

Second, even if the court believes that the police did know or should have known that the tactic(s) they used would significantly increase the chance that the suspect would confess falsely, the prosecution can still avoid suppression if it can prove that the resulting confession was in fact reliable by showing, for example, that the police discovered corroborating physical evidence as a result of the confession.[236] After all, the effect-on-the-suspect form of involuntariness analysis provides that certain police tactics are offensive precisely because of the effect that they will have on the suspect—namely, their tendency to produce false confessions. If the state can prove (again, it is the state's burden) that the tactics did not produce that effect, the error is harmless and the confession should not be deemed involuntary.[237]

When conducting this second step in the analysis, the hidden characteristics of the suspect are relevant. Unlike in the offensive-police-methods form of analysis, and unlike at the first stage of effect-on-the-suspect analysis, where what is at issue is the existence of police wrongdoing, the question at this secondary stage is the reliability of the confession that the suspect gave. Assessing that reliability requires attention to the characteristics of the suspect, whether the police were aware of those characteristics or not.

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234. *See* Lego v. Twomey, 404 U.S. 477, 489 (1972).

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

236. When the police use tactics that are offensive under the offensive-police-methods form, it is like structural error that requires automatic suppression, but when they use tactics that are offensive because of their likely effects, it is more like error subject to harmless error analysis. The court should determine if the tactics actually resulted in an unreliable confession.

237. This two-step approach bears some resemblance to the Supreme Court's approach to pretrial identification challenges. The court first asks whether the police orchestrated an identification procedure that was unnecessarily suggestive. *See* Perry v. New Hampshire, 132 S. Ct. 716, 724 (2012). Once that threshold requirement of "bad police conduct" is established, the court considers the reliability of the identification. *See id.* at 724–25. Just as a one-person show up is inherently suggestive, *see* Stovall v. Denno, 388 U.S. 293, 302 (1967), there are certain police interrogation tactics that are inherently likely to lead suspects to confess falsely and should be deemed to satisfy the threshold requirement. Although my proposed two-step approach has structural similarities to the due process pretrial identification analysis, my proposal with respect to the reliability prong has much more bite than its identification counterpart. *See* discussion *infra* Section III.B.2.

To be clear, it would not follow that the police could use tactics that they know are likely to lead to false confessions and still be able to use the confessions they elicit in cases where they get lucky and the confessions are reliable. The effect-on-the-suspect form of involuntariness analysis would not preclude admission of such a confession, because the tactics did not produce the offensive effect. But if police interrogators wantonly deployed tactics they knew would lead to false confessions, courts might deem their conduct patently offensive under the offensive-police-methods strand of involuntariness doctrine, whether as a per se matter or under the totality of the circumstances in an individual case. And nonconstitutional state or federal evidence law could still call for suppression of such confessions. All I mean to say here is that the effect-on-the-suspect form of involuntariness analysis would not lead to suppression in cases in which the resulting confession was deemed reliable.

1. The *Connelly* Requirement of Police Wrongdoing

Unlike with the offensive-police-methods form of voluntariness, the *Connelly* threshold requirement imposes a significant additional burden on the effect-on-the-suspect form of voluntariness. It is not enough that a confession is unreliable. According to *Connelly*, there must be evidence of police "overreaching" to trigger application of the due process clause. There are three ways to demonstrate police wrongdoing sufficient to satisfy the *Connelly* threshold in effect-on-the-suspect voluntariness challenges: (1) direct, subjective evidence that the police used a tactic or series of tactics knowing that it would elicit a false confession; (2) generalized objective evidence suggesting that the tactic(s) at issue are ones that the police should know significantly increase the likelihood of a false confession across cases; or (3) particularized objective evidence suggesting that the tactic(s) at issue would be likely to induce a false confession given the facts in the case at hand.

First, a court could find wrongdoing sufficient to satisfy the *Connelly* requirement if there is direct evidence that the police officer in a particular case either intended to elicit a false confession or actually thought that what he was doing would significantly increase the chance of a false confession. But that scenario is likely to be rare. In most cases, the court will need to determine what the police reasonably should have known, as an objective matter, rather than relying on evidence about the subjective intentions of the interrogating officers.

That objective inquiry should differ depending on whether the claim is that the police used a tactic that is correlated with false confessions across the board (a generalized claim) or that the tactic was likely to provoke a false confession from this particular defendant (a particularized claim).

a. *Generalized Claim*

Sometimes, the police use a tactic that social science research has found to be significantly correlated with false confessions across the broad universe

of criminal interrogations. When the police use such a tactic, it should be considered irrefutable evidence of police wrongdoing that automatically satisfies the *Connelly* requirement. Given the state of modern social science, courts have access to a roster of tactics of this kind. DNA exonerations have provided a wealth of data about the circumstances under which suspects confess falsely. In the last twenty years, empiricists, criminologists, and psychologists have studied cases that we now know relied on false confessions to identify a number of interrogation techniques that are significantly correlated with false confessions.[238] These tactics include lengthy interrogations,[239] contamination of the resulting confession by feeding the suspect key details that only the perpetrator could have known,[240] direct promises of lenient treatment if the suspect confesses,[241] indirect promises of lenient treatment through minimization techniques,[242] threats of harsh consequences if the suspect refuses to confess,[243] false evidence ploys that make it appear that the police can already conclusively establish the suspect's guilt,[244] and leading or suggestive questioning of vulnerable populations (juveniles, mentally disabled people, and the mentally ill).[245]

To be cautious, one should note that the false-confession studies have limits. It is easier to establish a correlation between particular police tactics

238. *See* sources cited *supra* note 179.

239. *See, e.g.*, GARRETT, *supra* note 48, at 21, 38 (noting that the false confessions in his study involved prolonged interrogations lasting many hours or even days with 90 percent of them lasting for more than three hours); Drizin & Leo, *supra* note 180, at 948 ("More than 80% of the false confessors [in our study] were interrogated for more than six hours, and 50% . . . were interrogated for more than twelve hours. . . . [with an] average length of interrogation [of] 16.3 hours . . . .").

240. *See, e.g.*, GARRETT, *supra* note 48, at 19–36 (noting that, in a study of 250 exonerations, 95 percent of the false confession cases involved police contamination); Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 1119 (1997) (discussing police contamination).

241. *See, e.g.*, Drizin & Leo, *supra* note 180, at 918; *see also* LEO, *supra* note 3, at 230 ("The vast majority of documented false confessions in the post-*Miranda* era either have been directly caused by or involved promises or threats.").

242. *See, e.g.*, Kassin et al., *supra* note 41, at 12 ("[M]inimization tactics are designed to provide the suspect with moral justification and face-saving excuses for having committed the crime in question . . . . [T]his tactic communicates by implication that leniency in punishment is forthcoming upon confession."); *id.* at 18 (discussing the psychology that explains how minimization leads to false confessions). For example, if an interrogator in a homicide case suggests that the killing was probably unintentional or done in justifiable self-defense, he is implicitly communicating to the suspect that he will not be punished as severely for admitting to that form of homicide even though he does not make an explicit promise of a lesser offense or punishment.

243. *See, e.g.*, WHITE, *supra* note 3, at 183; Ofshe & Leo, *supra* note 240, at 1072–88.

244. *See, e.g.*, Miriam S. Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 FORDHAM URB. L.J. 791, 827–31 (2006); Kassin et al., *supra* note 41, at 12–17.

245. LEO, *supra* note 3, at 231–34; Saul M. Kassin & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 PSYCHOL. SCI. PUB. INT. 33, 52–53 (2004).

and false confessions than it is to show causation, and studies that approach the question by studying the universe of cases in which suspects confess falsely run the risk of selecting on the dependent variable.[246] (Many false confession cases are also cases in which the police promised leniency if the suspect confessed. But it is hard to draw inferences about the significance of that fact without information about how commonly the police promise leniency in cases in which no false confession follows.)

That said, the conclusion that certain tactics tend to produce false confessions does not rest on statistical correlations alone; suggestions raised in such studies are also supported by experimental and psychological research explaining why such tactics would likely trigger false confessions.[247] And crucially, a finding that the police used one of these tactics would only satisfy the *Connelly* requirement. The prosecution would still have the opportunity to argue that a confession has sufficient indicia of reliability so as to merit admission as evidence.[248]

Just as reasonable jurists may disagree about which police tactics are per se offensive in the offensive-police-methods variant of involuntariness, so too might they disagree about which tactics have been sufficiently shown to increase the likelihood of a false confession in the effect-on-the-suspect variant of involuntariness. That said, there are certain police tactics that everyone agrees are significantly likely to increase the probability of a false confession.

Consider, for example, the common problem of police contaminating an interrogation by telling the suspect details of the crime that only the

246. *See, e.g.*, White, *supra* note 3, at 146–47 (noting the difficulties with establishing causation); Lawrence Rosenthal, *Against Orthodoxy:* Miranda *Is Not Prophylactic and the Constitution Is Not Perfect*, 10 Chap. L. Rev. 579, 617–18 (2007) (arguing that because the police probably use the same interrogation techniques in most interrogations, the fact that these techniques appear in false confession cases "provides no basis to conclude that [they] increase the likelihood that a confession is false"); *see also* Paul G. Cassell, *The Guilty and the "Innocent": An Examination of Alleged Cases of Wrongful Conviction from False Confessions*, 22 Harv. J.L. & Pub. Pol'y 523, 602–03 (1999) (criticizing false confession research).

247. *See* Kassin et al., *supra* note 41 (detailing the psychological and experimental research that supports empirical studies on false confessions).

248. This is where my proposal differs from Professor White's proposal that the use of any police tactic that significantly increases the likelihood of an untrustworthy confession should result in suppression of the confession regardless of the particular confession's trustworthiness. White, *supra* note 3, at 214; White, *supra* note 212, at 139. Although I would welcome a finding that the use of tactics that significantly increase the chances of false confessions is offensive under the offensive-police-methods form of voluntariness, I doubt that courts will go that far. *Cf.* Perry v. New Hampshire, 132 S. Ct. 716, 727 (2012) (expressing concern about opening the floodgates to reliability challenges to pretrial identification procedures if the Court were to permit nonpolice orchestrated procedures to be considered under the Due Process Clause). Given the concerns about inferring causality and the criticisms that scholars have raised about inferring too much from these studies, *see supra* note 246, I worry about courts' willingness to base suppression entirely on the studies. If the point of this variant of voluntariness is to prevent false confessions, then the use of the tactics is problematic only when it has that effect.

perpetrator would know. This phenomenon has been repeatedly documented in videotapes and transcripts of police interrogations involving false confessions, and experts have explained how such contamination is likely to increase the chances of a false confession.[249] Police training manuals recognize the danger of false confessions resulting from contamination and expressly prohibit it,[250] but it still happens with some regularity.[251] When evidence of police contamination of an interrogation is present, the mere existence of it demonstrates that the police have used a tactic that they should know is significantly likely to increase the chance of a false confession.

Consider also the problem of lengthy interrogations. Numerous studies document that false confessions often occur after prolonged periods of questioning that happen over the course of days.[252] The Supreme Court has long recognized that repeated questioning of a suspect over the course of days, even with breaks, "inevitably suggests that the questioner has a right to, and expects, an answer."[253] The police effectively wear the suspect down until he confesses just to make the interrogation stop: as one group of experts put it, "[e]xcessive time in custody may . . . be accompanied by fatigue and feelings of helplessness and despair."[254] In one study of 125 known false confessions, researchers discovered that more than 80 percent came after more than six hours of interrogation and 50 percent came after more than twelve hours.[255] The average length of these interrogations was 16.3 hours,[256] as compared with an average of less than two hours in criminal cases overall.[257]

As discussed earlier, prolonged periods of interrogation might be offensive even without the concern for the reliability of the confessions. But there is an important way in which the two concerns go to different aspects of prolonged interrogation. Where the concern is the sheer inhumanity of an interrogation, it matters a lot whether the interrogation is continuous or whether it includes respites for food, sleep, using the bathroom, and other forms of rest and personal care. A five-hour interrogation conducted in thirty-minute increments with significant breaks in between raises fewer

249. *See* Leo, *supra* note 3, at 234–35; *see also* sources cited *supra* note 240.

250. Joseph P. Buckley, *The Reid Technique of Interviewing and Interrogation*, *in* Investigative Interviewing: Rights, Research and Regulation 190, 204 (Tom Williamson ed., 2006) ("[I]t is imperative that interrogators do not reveal details of the crime so that they can use the disclosure of such information by the suspect as verification of the confession's authenticity.").

251. *See* Brandon L. Garrett, *Contaminated Confessions Revisited*, 101 Va. L. Rev. 395 (2015) (discussing the continuing problem of police contamination).

252. *See* sources cited *supra* note 239.

253. Culombe v. Connecticut, 367 U.S. 568, 575 (1961) (plurality opinion).

254. Kassin et al., *supra* note 41, at 28.

255. Drizin & Leo, *supra* note 180, at 948.

256. *Id.*

257. *See* Kassin et al., *supra* note 41, at 16.

concerns about patently offensive tactics than a continuous five-hour investigation in which the questioning never stops.[258] But where the concern is the reliability of confessions, it turns out that the total length of time from the beginning to the end of the interrogation is important even if the suspect is given time to eat and rest.

The suspect may not feel the same level of physical discomfort and mental stress that attends several hours of uninterrupted interrogation, but the sense that only a confession will end the process may grow over time. Accordingly, a rule limiting the length of interrogations under the effect-on-the-suspect strand of voluntariness analysis should look to the total elapsed time of the interrogation process, not to the length of continuous questioning.

Once again, any rule setting a time constraint is contestable. But again, it need not be completely arbitrary, because the line can be drawn with attention to available knowledge about the interest animating the rule—here, that the police practice not significantly raise the likelihood of false confessions. According to one of the most widely used police manuals in the United States, four hours of professional interrogation is generally sufficient to elicit confessions from guilty suspects—or more precisely, from those guilty suspects from whom confessions can be elicited at all.[259]

Not every guilty suspect confesses after four hours, of course. But if four hours of competent interrogation pass without a confession, the chances of eliciting a valid confession thereafter are vanishingly small. So it seems reasonable for courts to treat confessions that are elicited after more than four hours of interrogation time—with or without breaks—as confessions that the police knew or should have known were procured with a tactic that raises the risk of false confessions.

The gap between this recommended four-hour rule for the effect-on-the-suspect strand of voluntariness analysis and the recommended five-hour rule for the offensive-police-practices strand illustrates both the value of differentiating between the two interests and the way that the two strands might interact in a given case. Suppose the police question a suspect, reach the four-hour mark, and keep going. At that point, they should be deemed to have behaved wrongfully within an effect-on-the-suspect analysis, thus satisfying the *Connelly* requirement of police wrongdoing in a subsequent challenge to the admissibility of a confession. But as always, the state can turn back a challenge under this strand of analysis by showing that the particular confession at issue was in fact reliable.

For the confession to be finally admissible, however, it would also have to satisfy the offensive-police-practices prong. So if the interrogation

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258. *Cf.* Ashcraft v. Tennessee, 322 U.S. 143, 149 (1944) (noting that the prolonged interrogation involved multiple interrogators replacing one another in shifts precisely because even the interrogators could not hold up indefinitely).

259. *See* Fred E. Inbau et al., Criminal Interrogation and Confessions 597 (4th ed. 2001) ("[R]arely will a competent interrogator require more than approximately four hours to obtain a confession from an offender, even in cases of a very serious nature.").

reached the five-hour mark (assuming a continuous interrogation rather than one with breaks), the confession would be deemed involuntary and inadmissible regardless of whether reliability could be shown. And if the confession came somewhere between the four- and five-hour marks, the reviewing court should conduct a totality-of-the-circumstances analysis to determine whether the prolonged questioning, even if not long enough to be per se offensive under the offensive-police-methods strand, might be offensive if considered in combination with other police practices deployed in the case. That totality-of-the-circumstances analysis would not include facts about the reliability of the confession or the effect of the police tactics on the suspect more generally; it would be confined to the question of the offensiveness of the tactics as such.

The contamination of interrogations by introducing facts known to the perpetrator and the prolonged extension of questioning are just two examples of tactics that are significantly correlated with false confessions. There are of course others. Delineating which tactics police should avoid to prevent inducing false confessions will inevitably require courts to engage in some difficult line drawing. Research indicates that direct and indirect threats of serious adverse consequences or promises of significant lenient treatment may substantially increase the chance of a false confession,[260] but courts need to delineate which threats and promises are problematic. There is more than one way to create a taxonomy of threats and promises;[261] courts should begin the process of explaining which threats and promises will trigger reliability scrutiny.[262]

In addition to creating a general taxonomy of what tactics are likely to induce false confessions in the general population, it is also true that courts will need to consider which tactics are likely to induce false confessions only when used on members of vulnerable subpopulations. Several studies document the particular susceptibilities of juveniles, mentally disabled people,

260. *See* sources cited *supra* notes 241–243.

261. *See, e.g.*, WHITE, *supra* note 3, at 206 (arguing that courts should focus on whether "the interrogator should be aware that either the suspect or a reasonable person in the suspect's position would perceive that the interrogator's statements indicated that the suspect would be likely to receive significant leniency if he did confess or significant adverse consequences if he did not"); Kassin et al., *supra* note 41, at 30 (arguing that courts should prohibit interrogation techniques that minimize the legal consequences of confessing but permit those that minimize the moral or psychological consequences of confessing).

262. A similar taxonomy is necessary to delineate which false evidence ploys are problematic. *See* State v. Cayward, 552 So. 2d 971, 974 (Fla. Dist. Ct. App. 1989) (holding that police fabrication of "tangible documentation or physical evidence" should be prohibited because "manufactured documents have the potential of indefinite life and the facial appearance of authenticity"); WHITE, *supra* note 3, at 211–12 (arguing false evidence ploys should be prohibited if they "suggest to the suspect that the evidence against him is so overwhelming that continued resistance is futile"); Gohara, *supra* note 244, at 825–26 (describing false evidence ploys as a kind of "implied threat" and arguing for their prohibition); Kassin et al., *supra* note 41, at 29 (arguing that false evidence ploys should be prohibited "to the extent that the alleged evidence . . . is presented as incontrovertible, sufficient as a basis for prosecution, and impossible to overcome").

and the mentally ill to interrogation practices and describe how certain practices are significantly likely to cause these vulnerable population members to confess falsely even if they would not have similar effects on other people.[263] People with these vulnerabilities are particularly susceptible to suggestive and combative questioning techniques, and they are much more likely to confess falsely when presented with information suggesting their guilt.[264] Thus, there can be generalized, objective evidence that certain tactics are likely to induce false confessions when used on members of specific vulnerable subpopulations.

Police training manuals have long recognized that different protocols should apply to such interrogations, and many states have adopted special procedures to protect members of these subpopulations.[265] Note that the use of one of these tactics would only raise a voluntariness issue if the interrogating officers knew, or should have known, that the suspect had the relevant vulnerability. Under *Connelly*, there is no due process review without bad police conduct, and the culpability of the police must be judged in light of what the police knew or reasonably should have known. But police interrogate people who are clearly vulnerable in these ways often enough to warrant better guidance as to what practices are acceptable. Courts should accordingly articulate which police interrogation tactics will trigger heightened reliability review in situations in which a person's status as a juvenile or as a mentally disabled individual is known or apparent.[266]

b. *Particularized Claim*

The final way in which courts can deem the *Connelly* threshold requirement of police wrongdoing satisfied occurs in cases in which the police use tactics that they should know raise the risk of *a particular suspect* confessing falsely. These are not cases in which the police employ a tactic that is known to significantly increase the likelihood of a false confession across all cases or

263. *See, e.g.*, Morgan Cloud et al., *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495, 511-14 (2002); Drizin & Leo, *supra* note 180, at 944, 1005; Kassin & Gudjonsson, *supra* note 245, at 51–53; Allison D. Redlich, *Mental Illness, Police Interrogations, and the Potential for False Confession*, 55 PSYCHIATRIC SERVS. 19, 20 (2004).

264. *See, e.g.*, LEO, *supra* note 3, at 232–34.

265. *See, e.g.*, INBAU ET AL., *supra* note 180, at 352 (noting that different procedures will apply for vulnerable populations); Drizin & Leo, *supra* note 180, at 1004 (describing the many additional steps one Florida county takes when questioning a mentally disabled suspect); Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. CRIM. L. & CRIMINOLOGY 219, 226–27 (2006) ("About a dozen states require the presence of a parent or other 'interested adult' when police interrogate juveniles . . . .").

266. *See, e.g.*, LEO, *supra* note 3, at 312–13 (arguing that police should "make a reasonable effort to afford an appropriate adult the opportunity to be present during all questioning"); Kassin et al., *supra* note 41, at 29 (arguing that police should never be permitted to lie about inculpatory evidence that they have when questioning members of vulnerable subpopulations); White, *supra* note 212, at 143 (arguing that police should not be permitted to use leading questions).

even across a known subset of all cases. Rather, these cases involve circumstances in which the police should be aware of vulnerabilities that a particular suspect has in an individual case.

The defendant's production burden here is slightly more onerous, because the defendant cannot merely point to the use of a tactic on the court's menu of disfavored police methods. Instead, the defendant must explain why the police behavior was likely to raise the risk of a false confession under the particular circumstances of the case.

That said, the burden of persuasion that the confession was voluntarily obtained always remains with the prosecution.[267] In a case in which the defendant alleges that the police used tactics that risked a false confession in the particular circumstances, the state can rebut a finding of bad police conduct by either proving that the tactics used were not likely to risk a false confession in the particular case or showing that, even if they were, the police had no reason to know that their tactics were risky—that is, they had no reason to know the particular facts about the individual defendant that differentiated the case before them from the ordinary run of cases. Failing that, the state would have to show that the confession was in fact reliable.

2. Reliability

Once the *Connelly* requirement has been satisfied and the court is convinced that the police knew or should have known that their tactics would significantly increase the likelihood of a false confession, the court should proceed to consider whether the resulting confession was in fact reliable.[268] As is always true in voluntariness determinations, the state has the burden of persuasion,[269] so here the state must prove that the resulting confession was reliable. How onerous that burden is should vary depending on the type of tactic used. Typically, the state must demonstrate the voluntariness of a confession by a preponderance of the evidence.[270] When the police use tactics that raise the risk of false confessions, the state's burden should be higher. The state should have to demonstrate reliability by clear and convincing evidence for the confession to be admissible.[271]

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267. *See* Lego v. Twomey, 404 U.S. 477, 484–87 (1972).

268. *See* Grano, *supra* note 46, at 921 (arguing for a reliability assessment). *But see* White, *supra* note 173, at 2022 (arguing that the Court should focus on the methods used rather than the ultimate reliability of the confession).

269. *See Lego*, 404 U.S. at 484–87.

270. *Id.* at 489. A number of jurisdictions have held under state law that the government must demonstrate that a confession is voluntary beyond a reasonable doubt. *See, e.g.*, State v. Spooner, 404 So. 2d 905, 906 (La. 1981); People v. Crespo, No. 1812/10, 2010 WL 3808691, at *3 (N.Y. Sup. Ct. Sept. 22, 2010); State v. Janis, 356 N.W.2d 916, 918 (S.D. 1984).

271. This would require the Supreme Court to modify its holding in *Lego*, 404 U.S. at 489, but it is a modification that the Court itself recognized as a possibility. When the *Lego* Court established preponderance of the evidence as the standard, it explicitly stated that "[p]etitioner offers nothing to suggest that admissibility rulings have been unreliable or otherwise wanting in quality because not based on some higher standard." *Id.* at 488. Empirical studies in the

There is no litmus test for reliability. To determine if a confession is reliable, the court will have to perform a multifactored analysis. Professors Leo and Ofshe have persuasively argued that the best way to assess a confession's reliability is to analyze the fit between a suspect's postadmission narrative of the crime and the actual crime facts to determine if the postadmission narrative reveals guilty knowledge and is corroborated by independent evidence.[272]

According to Leo and Ofshe, judges should consider (1) whether the confession contains nonpublic information that can be independently verified, would be known only by the true perpetrator or an accomplice, and cannot likely be guessed by chance; (2) whether the confession led the police to new evidence about the crime; and (3) whether the suspect's postadmission narrative fits the crime facts and other objective evidence.[273] As part of this analysis, courts should consider how consistent the suspect was in detailing the facts of the crime. Suspects who confess falsely often supply facts during the interrogation that are inconsistent with important, known facts in the case.[274] Moreover, in cases involving multiple defendants, the courts should consider whether the codefendants' statements are consistent with one another.[275]

The hidden characteristics of a suspect are relevant at this stage of the analysis in ways that they were not under both the offensive-police-methods strand and the threshold *Connelly* inquiry for effect-on-the-suspect involuntariness. Assessing the reliability of a confession requires courts to pay attention to the characteristics of the suspect and the characteristics of the

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past twenty years revealing the problem of false confessions and the inability of the legal system to ferret out false confessions with the current standards suggest that a higher standard is necessary when police use tactics that we know are significantly likely to increase the chance of a false confession. *See* Michael D. Pepson & John N. Sharifi, Lego v. Twomey*: The Improbable Relationship Between an Obscure Supreme Court Decision and Wrongful Convictions*, 47 Am. Crim. L. Rev. 1185, 1206–07 (2010) (noting that the *Lego* Court used provisional language and arguing that it is time to reconsider the standard). Many states already use a heightened burden of proof in voluntariness cases. *See* cases cited *supra* note 270.

272. 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, 438–39 (1998); Ofshe & Leo, *supra* note 240, at 991–92.

273. Richard A. Leo, *False Confessions and the Constitution: Problems, Possibilities, and Solutions*, *in* The Constitution and the Future of Criminal Justice in America 169, 178–80 (John T. Parry & L. Song Richardson eds., 2013). A confession can contain many different types of nonpublic information that might suggest its reliability. It might "include identification of highly unusual elements of the crime that have not been made public" or it might "include an accurate description of the mundane details of the crime scene which are not easily guessed and have not been reported publicly." Leo & Ofshe, *supra* note 272, at 438–39.

274. *See* Garrett, *supra* note 48, at 33 ("In at least 75% of these cases (thirty of forty cases), the exoneree supplied facts during the interrogation that were inconsistent with the known facts in the case.").

275. *See* Richard A. Leo et al., *Promoting Accuracy in the Use of Confession Evidence: An Argument for Pretrial Reliability Assessments to Prevent Wrongful Convictions*, 85 Temp. L. Rev. 759, 805–06 (2013).

resulting confession, whether the police were aware of those characteristics or not. Thus, if a suspect did not appear mentally disabled during the interrogation but turns out to have a very low IQ, that would be relevant when assessing the probable effect of the police tactics used on her and the ultimate reliability of her resulting confession.

Conducting a reliability analysis requires a court to have a reliable record of the entire interrogation process.[276] For the many jurisdictions that require video- or audiotaping of the entire interrogation process,[277] producing this record will be easy. In those jurisdictions that do not record interrogations, courts should consider that as a factor weighing against the reliability of the resulting confession. Just as juries are instructed to infer that a missing witness whose absence has been procured by the state would have testified adversely to the state, courts should consider police failure to record an interrogation when it was feasible to do so as indicative of a reliability problem.[278]

More specifically, the prosecution should not be able to point to consistencies between the suspect's confession and the resulting crime facts to buttress the reliability of the confession if a full record of the confession is not available for review.[279] Without a complete record, courts cannot know whether what appears to be the suspect's inside knowledge of the crime is in fact a product of police contamination.[280] Given that the government has the

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276. Many have advocated for mandatory recording requirements. *See, e.g.*, GARRETT, *supra* note 48, at 43, 248; LEO, *supra* note 3, at 291–305; WHITE, *supra* note 3, 190–96; Kassin et al., *supra* note 41, at 25–26. For a discussion of the movement toward and benefits of recording, see LEO, *supra* note 3, at 291–305.

277. *See* GARRETT, *supra* note 48, at 43, 248 (noting that eighteen states and hundreds of police departments record interrogations); Thomas P. Sullivan, *Arguing for Statewide Uniformity in Recording Custodial Interrogations*, CRIM. JUST., Spring 2014, at 21 (detailing the history of state-by-state requirements to record interrogations).

278. *See, e.g.*, 1A KEVIN F. O'MALLEY ET AL., FEDERAL JURY PRACTICE & INSTRUCTIONS § 14:15 (6th ed. 2008) ("[F]ailure to call that witness may give rise to an inference that this testimony would have been unfavorable to that party."). In 2010, the Uniform Law Commission promulgated a model statute on electronic recording of interrogations recommending that judges consider the failure to record when making voluntariness determinations. *See* UNIF. ELEC. RECORDATION OF CUSTODIAL INTERROGATIONS ACT §§ 2–3, 11–12 (2010); *see also* Leo et al., *supra* note 41, at 531 ("[L]aw enforcement officers should have a higher burden when seeking to admit unrecorded statements."); Andrew E. Taslitz, *High Expectations and Some Wounded Hopes: The Policy and Politics of a Uniform Statute on Videotaping Custodial Interrogations*, 7 NW. J.L. & SOC. POL'Y 400 (2012) (discussing the Uniform Electronic Recordation of Custodial Interrogations Act). Professors Leo & Drizin have since argued that police should be required to record interrogations and that, absent some showing of exigency, any resulting confession should be presumed unreliable and automatically excluded. Leo et al., *supra* note 275, at 799–801.

279. *See* Garrett, *supra* note 3, at 1112 ("Courts should credit 'inside knowledge' offered during interrogations only if police have a record of the entire interrogation.").

280. *See* GARRETT, *supra* note 48, at 42 ("[T]o the extent that facts were disclosed to the suspect, confessions appear uncannily reliable."); Leo et al., *supra* note 41, at 530 ("Without a recording, it is difficult—sometimes impossible—for judges accurately to assess the reliability of confession evidence.").

burden of demonstrating that the confession is reliable and only the government has the ability to record the interrogation, its failure to do so may be dispositive in cases in which the facts are in dispute unless it can show good cause for its failure to record.[281]

No one should pretend that reliability analysis can itself be entirely reliable. The Leo-Ofshe "fit" test has considerable virtues, but it will not work in all situations: if the suspect confesses guilt but gives no narrative, for example, then a court cannot analyze whether the suspect's description fits the facts of the crime.[282] Courts in such circumstances would have to rely on independent evidence of the suspect's guilt to demonstrate the reliability of the confession.[283]

There is reason to think that courts have not been particularly good at policing the reliability of confessions in the past.[284] But without wishing to overstate the case, it is worth pointing out a feature of my proposed analysis that might prompt courts to take reliability more seriously than they have in other contexts.[285] Most extant reliability analyses require courts to ask the reliability question about every confession they see. Because courts begin with the assumption that most confessions are reliable, the search for unreliable ones seems like looking for a needle in a haystack to most judges. As Justice Jackson famously said in the context of habeas corpus review, when courts are tasked with reviewing all cases in an effort to find the small subset of cases in which there might be a problem, many will not find the search

281. *See* Leo et al., *supra* note 41, at 534 (proposing that prosecutors should have to "demonstrate by clear and convincing evidence that recording was infeasible for reasons that were not the fault of law enforcement").

282. Although query whether courts should have reliability concerns about admissions of guilt that are unsupported by a description of the underlying offense.

283. The state should have a high bar. As those who train police interrogators have stated, "[t]he truthfulness of a confession should be questioned . . . when the suspect is unable to provide any corroboration beyond the statement, 'I did it.'" INBAU ET AL., *supra* note 180, at 350.

284. *See, e.g.*, Garrett, *supra* note 3, at 1111 ("Courts credit evidence of reliability without asking whether that evidence is sound.").

285. Many states have *corpus delicti* rules that require independent corroboration that a crime occurred before they will admit a confession into evidence. *See generally* David A. Moran, *In Defense of the Corpus Delicti Rule*, 64 OHIO ST. L.J. 817 (2003) (describing these rules). Because *corpus delicti* rules require corroboration only that a crime occurred (not that the defendant committed the crime), the only unreliable confessions these rules screen out are confessions to nonexistent crimes. *Cf. id.* (arguing that this is an important, albeit small, group of cases). Some jurisdictions have adopted a trustworthiness rule under which the government may not introduce a confession unless it provides substantial independent evidence that would tend to establish the trustworthiness of the confession itself. *See, e.g.*, Opper v. United States, 348 U.S. 84 (1954); State v. Mauchley, 67 P.3d 477 (Utah 2003). But these have been impotent in practice. Leo et al., *supra* note 41, at 488, 501–11; Moran, *supra* note 285, at 852 (describing the trustworthiness rule as "so malleable that almost *any* independent evidence of *anything* can serve to 'corroborate' the confession").

worth the effort, and the natural tendency will be to adopt watered-down doctrines that sanction affirmance of the government's position.[286]

The analysis I recommend, however, narrows the universe of cases in which reliability is at issue to those in which there is some prima facie reason to worry that the defendant's confession might really be false. Under the effect-on-the-suspect form of involuntariness analysis, a court does not confront the question of reliability unless it has already found that the police engaged in behavior that significantly increased the likelihood of a false confession. Having made that finding, the court should be more motivated to conduct a searching reliability analysis.

Of course, it could work the other way: courts wishing to avoid the arduous task of assessing reliability might resist finding that any tactic is likely to significantly increase the likelihood of false confessions.[287] But as more and better data about false confessions comes to light, and as the attendant social science research penetrates the legal culture, such a position will become harder to sustain.[288] Courts might also avoid reliability hearings by finding on the facts before them that the police did not use the disfavored tactics. That too will be more difficult as the recording of confessions becomes more ubiquitous, because appellate courts may show less deference to trial judges' judgments when the videotape is a part of the trial record.[289]

To be clear, one should not expect my proposed reliability review to solve the problem of false confessions. Scholars have rightly argued that the problem will need to be attacked from many different angles and have proposed other significant reforms including better police training,[290] specialized procedures for interrogating vulnerable populations,[291] protocols to

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286. Brown v. Allen, 344 U.S. 443, 537 (1953) (Jackson, J., concurring) ("It must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search."); *cf.* Perry v. New Hampshire, 132 S. Ct. 716, 719 (2012) (rejecting the defendant's argument that an unnecessarily suggestive identification procedure need not be police orchestrated in order to trigger due process review, in part, because "his position would open the door to judicial preview, under the banner of due process, of most, if not all, eyewitness identifications").

287. Some argue that this is what has happened in the identifications context. *See, e.g.*, Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure to "Do Justice"*, 76 Fordham L. Rev. 1337, 1340 (2007) (noting that due process analysis for eyewitness identifications is "practically worthless in most cases and does not serve as an effective guarantee against prosecuting the innocent"); *cf.* Weisselberg, *supra* note 6, at 1599 (recognizing that courts could fail to facilitate the growth of voluntariness doctrine even in a world where *Miranda* is dead).

288. *See* Medwed, *supra* note 39.

289. *Cf.* Leah A. Walker, *Will Video Kill the Trial Courts' Star?: How "Hot" Records Will Change the Appellate Process*, 19 Alb. L.J. Sci. & Tech. 449, 473–74 (2009) (lamenting that appellate courts show less deference to trial courts when there is a videotape).

290. *See, e.g.*, Leo, *supra* note 3, at 305–07; Kassin et al., *supra* note 41, at 31.

291. *See, e.g.*, Garrett, *supra* note 48, at 248.

ensure that interrogators do not know the facts of the crimes being investigated to prevent the possibility of contamination,[292] pretrial reliability assessments under federal and state evidentiary rules or statutes,[293] greater use of false-confession experts in criminal jury trials,[294] and better jury instructions to educate jurors about reliability problems with confessions.[295] These would be wonderful developments to help ensure that innocent people are not wrongly convicted. That said, as a matter of both history and current practice, there is a place and a need for analyzing the reliability of at least a subset of confessions in constitutional criminal procedure.

Conclusion

With the collapse of confession law back into the voluntariness doctrine, courts will be pressured to put some rule-like contours on the amorphous totality-of-the-circumstances voluntariness test. In this Article, I have argued that history and current practice suggest that there are already two different forms of involuntariness analysis. Courts could profit from disentangling them.

Under the offensive-police-methods variant, courts should identify those police tactics that offend our sense of justice and are inconsistent with fairness in an adversarial system. Courts should tell police outright that if they use those per se offensive tactics, the resulting confessions will be suppressed. When addressing claims that a combination of tactics is conscience-shocking, the courts would continue to engage in a totality-of-the-circumstances analysis, but it would be more focused than it is at present: it would examine the police tactics at issue in light of what the police knew or reasonably should have known. It would not incorporate considerations going to aspects of the case not known to the police, such as the hidden characteristics of the suspects, nor would it consider the effect that the tactics actually had on the suspects.

Under the effect-on-the-suspect variant, courts should identify those interrogation tactics that police know or should know are significantly likely to increase the chances of a false confession. If police use tactics that the social science has revealed significantly increase the likelihood of false confessions, the state should be required to produce clear and convincing evidence that

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292. *See, e.g.*, Garrett, *supra* note 3, at 1116.

293. *See, e.g.*, Leo et al., *supra* note 41, at 531 (arguing that Federal Rule of Evidence 403 or its state counterpart should be interpreted to preclude the admission of unreliable confessions as substantially more prejudicial than probative); Leo et al., *supra* note 275, at 817–18 (proposing an exception to hearsay rules that preclude admission of party-opponent statements made to law enforcement during interrogations unless corroborating circumstances clearly indicate their trustworthiness). *But see* Daniel Harkins, *Revisiting* Colorado v. Connelly*: The Problem of False Confessions in the Twenty-First Century*, 37 S. Ill. U. L.J. 319, 335 (2013) ("[U]tilitizing [Federal Rule of Evidence] 403 has the downside of causing admissions of confessions to be effectively non-reversible on appellate review.").

294. *See, e.g.*, Leo, *supra* note 3, at 314–16; Garrett, *supra* note 3, at 1112.

295. *See, e.g.*, Thomas & Leo, *supra* note 74, at 224; Garrett, *supra* note 3, at 1111–12.

the resulting confession is reliable. And if the police use tactics that they should know are significantly likely to increase the chance of a false confession given the particular circumstances of an individual case, that too should trigger reliability scrutiny.

To be sure, many cases will raise both offensive-police-methods and effect-on-the-suspect issues. If the police question a juvenile suspect overnight without a supporting adult present, the resulting confession could be involuntary for any number of reasons. Perhaps it offends our sense of justice that the police would seclude and question a child without a supporting adult present.[296] Or perhaps we are concerned that juveniles subjected to overnight questioning without a supporting adult present will succumb to the pressure and confess falsely. If the concern is about false confessions, a court should ask whether the police knew or should have known that the tactics raised the risk of a false confession and whether they in fact did lead to one. That is a different inquiry than asking whether the police tactics are ones that society will not accept regardless of the ultimate reliability of the confession. Perhaps the court will need to conduct both analyses if the confession is challenged on both voluntariness grounds.

Disentangling these two forms of involuntariness is important because it will help the courts create a workable doctrine going forward. Police will have better ex ante guidance about when their interrogation tactics will run afoul of the law. Defendants will be better protected against offensive police tactics, and fewer unreliable confessions will be admitted into evidence in criminal trials. To be sure, this doctrine will not solve all of the problems in this area of the law, but it will provide significantly clearer guidance than what exists today. The totality-of-the-circumstances standard is too vague to regulate confession law adequately, and with voluntariness back at the forefront, there will be pressure to refine its contours. The best way to do that is to think about the different values that animate the doctrine and tailor the resulting tests to fit those animating rationales.

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296. The Supreme Court came close to so holding in two pre-*Miranda* cases. *See* Gallegos v. Colorado, 370 U.S. 49, 54–55 (1962) ("He would have no way of knowing what the consequences of his confession were without advice as to his rights—from someone concerned with securing him those rights—and without the aid of more mature judgment as to the steps he should take in the predicament in which he found himself. . . . Without some adult protection against this inequality, a 14-year-old boy would not be able to know, let alone assert, such constitutional rights as he had. To allow this conviction to stand would, in effect, be to treat him as if he had no constitutional rights."); Haley v. Ohio, 332 U.S. 596, 599–600 (1948) (suppressing a confession and noting that a fifteen-year-old boy "needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, crush him. . . . No counsel or friend was called during the critical hours of questioning."). *See generally* Feld, *supra* note 265, at 226–27 (describing state requirements that juveniles have an opportunity to consult with a parent, attorney, or other "interested adult").