



2022

The Case for the Abolition of Criminal Confessions

Guha Krishnamurthi
South Texas College of Law

Recommended Citation

Guha Krishnamurthi, *The Case for the Abolition of Criminal Confessions*, 75 SMU L. REV. 15 (2022)
<https://scholar.smu.edu/smulr/vol75/iss1/7>

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THE CASE FOR THE ABOLITION OF CRIMINAL CONFESSIONS

Guha Krishnamurthi*

ABSTRACT

Confessions have long been considered the gold standard of evidence in criminal proceedings. But in truth, confession evidence imposes significant harms on our criminal justice system, through false convictions and other violations of defendants' due process and moral rights. Moreover, our current doctrine is unable to eliminate or even curb these harms.

This Article makes the case for the abolition of confession evidence in criminal proceedings. Though it may seem radical, abolition is sensible and best furthers our penological goals. As a theoretical matter, confession evidence has low probative value, but it is prejudicially overvalued by juries and judges. Consequently, this overvaluation means both that innocent defendants are systemically pressured into proclaiming their guilt and that juries are so swayed by it—even in light of countervailing evidence—that they render wrongful convictions. Indeed, as practice and empirical evidence demonstrate, this is not merely a theoretical possibility: false confessions and resulting miscarriages of justice occur with disturbing frequency. Moreover, confession evidence, and the methods to obtain it, impose significant harms on defendants in terms of their due process and moral rights, due to the pressures of interrogation, investigation, and jeopardy. And our current constitutional and evidentiary doctrines are incapable of addressing these harms, for these doctrines fail to recognize that false confessions are often caused by overwhelming pressures endemic to our criminal justice system. Consequently, solving these problems requires a comprehensive, properly focused solution that goes far beyond our current doctrinal hodgepodge.

The abolition of confession evidence meets that demand. Compared to other solutions that have been proposed, such as further limiting law enforcement and prosecutorial conduct or introducing expert testimony and evidence, the abolition of such evidence best apprehends and mitigates the epistemic and moral concerns arising from confession evidence and inter-

* Assistant Professor, South Texas College of Law. I would like to thank Ronald Allen, Susannah Barton Tobin, Warigia M. Bowman, Joshua Braver, Martin Brenner, Jenny Carroll, the Honorable Paul G. Cassell, Russell Christopher, Ryan William Copus, Colin Doyle, Sheldon Evans, Thomas Ward Frampton, Stephen Galoob, Charanya Krishnaswami, the Honorable Goodwin H. Liu, Alexander Platt, Betsy Rosenblatt, Blaine Saito, Peter Salib, Seth Stoughton, and Carly Zubrzycki. I am grateful and indebted to Alexandre Diniz de Oliveira for excellent research assistance. All errors and omissions are mine.

rogation. In addition, it coheres with and flows from the Constitution's due process requirement of voluntariness in confessions and the evidentiary requirements of reliability. Finally, it would preserve and improve key features of our criminal justice system, namely interrogation, plea bargaining, and the assessment of evidence.

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I. INTRODUCTION

NEMO tenetur seipsum prodere.¹ It is the rule that no person shall be compelled to incriminate themselves.² It finds place in the Constitution’s Fifth Amendment privilege against self-incrimination,³ and it is one that most everyone is familiar with, due to the famous phrase from *Miranda*: “the right to remain silent.”⁴ The *nemo tenetur* rule found footing in England, through the supplantation of ecclesiastical courts and practice by common law courts and practice.⁵ One of the principal reasons for the genesis of the *nemo tenetur* rule was to avoid imposing the cruel choice of criminal inquiry upon the accused.⁶ The ecclesiastical courts would force the accused to adopt an oath to truthfully answer all questions posed, on pain of damnation, in order to learn of the formal charges that were made against them.⁷ The purpose of the oath was to extract a confession, and refusal to accept the oath was itself nearly dispositive evidence of the accused’s guilt.⁸ This posed a cruel choice for the accused to either “cut[] one’s throat with one’s tongue” or “suffer[] eternal damnation.”⁹ The imposition by the state that a defendant testify, and therefore choose between worldly punishment and eternal damnation, was considered below the dignity of the state.¹⁰ This choice is also referred to as the “cruel trilemma”: the Hobson’s choice between perjury, contempt, or self-incrimination.¹¹ In American history,

1. See John H. Wigmore, *Nemo Tenetur Seipsum Prodere*, 5 HARV. L. REV. 71, 71 (1891).

2. *Id.*; Andrew J.M. Bentz, Note, *The Original Public Meaning of the Fifth Amendment and Pre-Miranda Silence*, 98 VA. L. REV. 897, 899–900 (2012).

3. U.S. CONST. amend. V (“No person . . . shall be compelled in any criminal case to be a witness against himself . . .”).

4. *Miranda v. Arizona*, 384 U.S. 436, 467–68 (1966).

5. See LEONARD W. LEVY, *ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION* 43–49, 330–31 (1968).

6. See *id.* at 329–32.

7. See *id.* at 46–47.

8. See *id.* at 133–34.

9. Laurence A. Benner, *Requiem for Miranda: The Rehnquist Court’s Voluntariness Doctrine in Historical Perspective*, 67 WASH. U. L.Q. 59, 75 (1988) (quoting *id.* at 330).

10. See *id.* at 74–75.

11. Peter Westen, *Answer Self-Incriminating Questions or Be Fired*, 37 AM. J. CRIM. L. 97, 112 (2010) (“The ‘cruel trilemma’ is a Hobson’s choice between (1) responding truthfully and being penalized on the basis of one’s answers; (2) responding falsely and being penalized for it; and (3) remaining silent in the face of incriminating questions and being penalized for it.”).

the most stark example is the Salem Witch Trials of 1692, where a number of people, mostly women, were tried for witchcraft on the basis of confessions extracted through torture and threats of damnation.¹²

These considerations evolved into the enshrinement of a defendant's right against self-incrimination in the Fifth Amendment and the requirement that a defendant's incriminating statements be made voluntarily.¹³ Yet despite these general advances in protecting against self-incrimination, a similarly odious choice arises for defendants in our criminal justice system. Consider an innocent defendant investigated for a serious crime, with substantial punishment at stake. The defendant is brought in for interrogation, and through the course of law enforcement's admonitions, the defendant becomes aware of certain facts: they are a suspect in the crime and conviction for the crime can result in substantial punishment. Two further points are impressed upon the defendant: there is evidence sufficient for an actual jury to convict the defendant, and if the defendant confesses, the defendant will receive a substantially lighter punishment than they would face otherwise. Here, the innocent defendant has a terrible choice: risk prosecution, which may result in the harsh penalty, or falsely confess and gain a significant chance of escaping the harsher penalty.

In theory, this is where procedural protections enter to protect the defendant from this choice. Requirements of independent evidentiary corroboration, ensuring the voluntariness of the confession as a matter of due process; the right to remain silent and the right to an attorney before and during interrogation; and the right to access any exculpatory information in the government's possession are supposed to minimize the possibility or the gravity of this terrible choice. However, actual practice shows their implementation has utterly failed to safeguard defendants' due process rights.

There have been multitudes of verified false confessions where tried-and-true law enforcement techniques have succeeded in obtaining false confessions. Consider the Central Park Jogger Case, in which five Black teenagers—Raymond Santana, Kevin Richardson, Yusef Salaam, Antron McCray, and Korey Wise—were detained and subjected to intense, protracted interrogation in connection with the grievous rape and assault of Trisha Meili.¹⁴ As a result, all of them confessed, were convicted, and were incarcerated.¹⁵ But they weren't the perpetrators, as confirmed by DNA evidence.¹⁶ The five teens had falsely confessed.¹⁷ Why? Because the NYPD had used a battery of techniques, including intimidation, isola-

12. See ELIZABETH REIS, DAMNED WOMEN: SINNERS AND WITCHES IN PURITAN NEW ENGLAND 124, 130–32 (1997).

13. See LEVY, *supra* note 5, at 422–32.

14. Robert J. Norris & Allison D. Redlich, *Seeking Justice, Compromising Truth? Criminal Admissions and the Prisoner's Dilemma*, 77 ALB. L. REV. 1005, 1005–06 (2013).

15. *Id.* at 1006.

16. *Id.*

17. *Id.*

tion, and threats and inducements regarding punishment.¹⁸ And this is no rarity: it is the design of interrogation and investigation. Both law enforcement and the prosecution use techniques to capitalize on the pressures of investigation and adjudicative jeopardy to induce confessions from defendants. The results are devastating: defendants are pressured into confessing, and that confession evidence, as potent as it is unreliable, leads to false convictions. In addition, apart from the fact that confession evidence is perilously unreliable, the process of obtaining confession evidence through interrogation and investigation that coerces defendants violates defendants' due process rights and subjects them to moral harm.

Consequently, I argue that we should abolish—or categorically exclude—confession evidence from criminal prosecutions. *First*, I contend that confession evidence is of low probative value yet is prejudicially overvalued by juries and judges. Consequently, any supposed epistemic benefits are vastly outweighed by the costs, especially given our commitment to minimizing the punishment of the innocent. *Second*, as shown by practice and empirical evidence, false confessions, and resulting false convictions, are prevalent to such a degree to undermine confidence in the criminal justice system. *Third*, confession evidence, and the law-enforcement and adjudicative processes of acquiring it, impose significant harms on defendants in terms of their due process and moral rights. *Fourth*, our constitutional and evidentiary doctrine is critically misfocused, such that it is incapable of addressing the persisting harms of confession evidence. Indeed, that misfocus is foundational, and thus even extensions of our current doctrine are doomed to fail.

This Article proceeds in six further Parts. In Part II, I set forth preliminaries and definitions that shape the contours of the analysis. In Part III, I present the theoretical case that confession evidence is epistemically weak. This is primarily because there are rational reasons for any defendant to confess, and thus the fact of confession does not differentiate the innocent from the guilty. Because confession evidence is popularly viewed as dispositive of a defendant's guilt, jurors and judges are likely to overestimate the value of confession evidence, which in turn creates incentives for the state to deploy coercive tactics to extract confessions from innocent defendants. In Part IV, I bolster this theoretical analysis with practical and empirical data. I show that law enforcement practice manuals on interrogation encourage exploiting the defendant to induce confessions, that defendants often encounter the pressures of the criminal jury system in deciding whether to confess, and that studies show a surprising commonality in the occurrence of false confessions. In Part V, I contend that, separate from the perils of false confession and conviction, the process of obtaining confession evidence, by interrogation and investigation that coerces defendants, is practically certain to cause moral harms to the defendant and thus violate the defendant's rights. For this, I

18. *Id.* at 1006–07.

marshal our understanding of torture to elucidate how these due process and moral harms arise.

In Part VI, I explain how current doctrine is failing to address the continuing harms of confession evidence. I show that, under current law, *Miranda*'s prophylactic rules, the due process–voluntariness limitations, and other evidentiary limitations requiring corroboration are too weak or porous to make a difference. I also contend that most all of our current doctrines to combat the harms of confession evidence are misfocused by concentrating on wrongful official conduct or improperly relying on juries to rationally assess evidence that is by its nature prejudicial.

In Part VII, I set forth the solution to the harms of confession evidence: abolishing confession evidence from criminal proceedings. I first provide a prima facie justification for the abolition, explaining how it addresses the problem of the pressures defendants feel in interrogation by reducing the stakes of interrogation and removing the terrible choice from the defendant's hands. Then, I show how abolition is superior to other extant solutions. Finally, I show that abolition does little to disturb key features of our criminal justice system.

II. DEFINING THE ABOLITION OF CRIMINAL CONFESSIONS

I will make the case that we should abolish confessions from criminal prosecutions. For our purposes, I define a “confession” as a statement made by a defendant, claiming that the defendant committed a crime, or satisfied particular elements of a crime, with the knowledge that the statement will be used by the government in a criminal prosecution of the defendant to establish or help establish an element of a crime, based on prior conduct.¹⁹ Importantly here, the confession excludes any corroborating information by the defendant; it is only the statement by the defendant that the defendant committed the crime or satisfied an element of the crime.

One consequence of the definition of confession is that statements made by a defendant to an undercover officer or an informant that the defendant engaged in particular criminal conduct are not confessions, because the defendant would not know that such statements would be used by the government. Also, the definition of confession requires that the defendant know that the statement will be made to the government in order to establish or help establish an element of a crime. If a defendant,

19. Black's Law Dictionary defines confession as follows: “A criminal suspect's oral or written acknowledgment of guilt, often including details about the crime.” *Confession*, BLACK'S LAW DICTIONARY (11th ed. 2019). There is an important distinction between false and untrustworthy confessions:

A false confession may be defined as one in which the facts admitted in the confession appear to be either totally incorrect or materially inaccurate. An untrustworthy confession, on the other hand, should be defined as one that is obtained under circumstances that provide significant doubt as to its accuracy.

Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 109 (1997).

for example, makes false statements to law enforcement and prosecuting authorities because the defendant seeks to avoid liability, and law enforcement and prosecuting authorities determine that the statements are false, the ban on confession evidence would not necessarily exclude those false statements by the defendant from evidence.

By “abolish,” I mean that we should implement a rule that confession evidence should be categorically excluded, without exception, when the particular conditional is satisfied. Importantly, the abolition of confession evidence is a ban on such evidence as confession evidence. It is a separate question whether such evidence can be introduced by the prosecution for other purposes. For example, if a defendant takes the stand and testifies contrary to a prior confession, the abolition of confession evidence does not necessarily exclude using the prior confession to impeach the defendant.²⁰ For purposes of this Article, abolition is limited to criminal prosecutions of the putative confessor. I am not here addressing the question of whether such evidence should be allowed in civil trials, in criminal prosecutions of other individuals, or in any other kind of legal proceeding.

Finally, the term “based on prior conduct” includes criminal offenses based on a concurrent statement to law enforcement and prosecuting authorities. For example, if an individual tells a material lie to authorities, such that the individual commits perjury, then the government will have to use that statement to pursue the perjury charge.²¹ The abolition of confession evidence is therefore restricted to statements about prior crimes, and thus does not address situations where the statements themselves constitute part of the criminal act.

The thesis can be stated as follows: We should exclude all confessions—statements by defendants knowingly made so that the government may use the statement to establish or help establish elements of a crime based on prior conduct—from evidence in criminal proceedings against the defendant, insofar as they are used for the purpose of directly establishing elements of a crime.

III. THE EPISTEMIC FRAILITY OF CONFESSION EVIDENCE

Confession evidence is epistemically weak—so weak that it in fact corrupts the fact-finding process. There are two distinct senses to how confession evidence exhibits epistemic weakness. *First*, where the potential

20. This is similar to the Supreme Court’s holding that a confession obtained in violation of *Miranda*’s strictures on interrogations is still admissible to impeach inconsistent testimony by a defendant. See *Kansas v. Ventris*, 556 U.S. 586, 593–94 (2009).

21. The crime of “perjury” is generally defined as making a false statement, under oath, on a material matter that the utterer does not believe to be true. See 18 U.S.C. § 1621. Without the “prior crimes” limitation, we can envision paradoxical situations where defendants perjure themselves, and thus in some sense know that the government may use those statements to prosecute them. The naïve abolitionist would restrict the government from using those statements. But that is not the intention of abolition, hence the restriction to prior crimes.

punishment is substantial, confession evidence is untrustworthy and therefore cannot meaningfully supply the evidence necessary to prove the criminal charge beyond a reasonable doubt. This means that confession evidence cannot actually make a significant difference in the determination as to whether the criminal charge is proven. *Second*, despite this, confession evidence is weighed greatly by jurors beyond its rational merit. Consequently, confession evidence further skews the rational weighing of evidence in a criminal proceeding.

A. CONFESSION EVIDENCE CANNOT PROVE THE CHARGE BEYOND A REASONABLE DOUBT

I contend that confession evidence cannot make the difference in proving a charge beyond a reasonable doubt. To understand this, we first need to understand the meaning of the beyond-a-reasonable-doubt (BARD) standard. That is a substantial question in itself. Larry Laudan has called the BARD standard “obscure, incoherent, and muddled.”²² James Whitman, while acknowledging BARD as “fundamental” and “familiar,” describes the standard as “vexingly difficult to interpret and apply.”²³ Not surprisingly, jurors, whose understanding of the standard is perhaps most important, are not immune to BARD’s complexities either.²⁴ Compounding the problem, judicial instruction on BARD is typically less than helpful and often erroneous.²⁵

There are two prominent scholarly accounts of how to understand the BARD standard as an epistemic matter. The first, which I call the “narrative account,” considers whether there is a plausible explanation of the evidence that is consistent with the defendant not committing the crime, i.e., innocence.²⁶ The second, which I call the “probabilistic account,” considers whether the likelihood that the defendant committed the crime is over a certain probabilistic threshold—say 90% or 95%.²⁷ I contend that under both accounts, confession evidence cannot make a practical difference in proving the case beyond a reasonable doubt: either (1) confession evidence in addition to the other evidence will not meet the BARD standard; or (2) confession evidence in addition to the other evidence will meet the BARD standard, but so would the other evidence *without* the confession evidence. In either case, confession evidence can-

22. LARRY LAUDAN, TRUTH, ERROR, AND CRIMINAL LAW: AN ESSAY IN LEGAL EPISTEMOLOGY 30 (2006).

23. JAMES Q. WHITMAN, THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL 1 (2008).

24. *Id.*; LAUDAN, *supra* note 22, at 31.

25. LAUDAN, *supra* note 22, at 31.

26. *See, e.g.*, Michael S. Pardo & Ronald J. Allen, *Juridical Proof and the Best Explanation*, 27 LAW & PHIL. 223, 235–36, 238–39 (2008).

27. Jacob Schuman, *Probability and Punishment: How to Improve Sentencing by Taking Account of Probability*, 18 NEW CRIM. L. REV. 214, 220–21 (2015) (providing a summary of using threshold probabilities to understand the beyond-a-reasonable-doubt standard).

not make a significant impact in proving the criminal charge to the BARD standard.

1. *The Narrative Account of BARD*

As discussed, the narrative account of the BARD standard is formulated in terms of whether there is a plausible explanation of the evidence consistent with the innocence of the defendant. To understand this formulation, we need first to investigate its foundations, which are based on the “inference to the best explanation” (IBE).²⁸ IBE, also known as abductive reasoning, is a “method of choosing between competing candidate explanations.”²⁹ IBE states that, “when confronted with a set of different explanations for a given phenomena, we should examine the explanatory virtues of each of the respective explanations—such as consilience, simplicity, coherence, lack of ad hocery, testability, and internal consistency—and defeasibly accept as true” the best explanations.³⁰ “Such an inference pattern is . . . common in the reasoning conducted during daily life”³¹

IBE is grounded in the notion that there are criteria for what makes an explanation a good one, and our assessment of an explanation on those criteria can warrant our inference that such an explanation is true.³² It is an inference—so it allows us to move from certain premises to others in a way that *generally* preserves truth.³³ When there are multiple explanations for a phenomenon, we may infer that the *best* explanation for the phenomenon, in light of the relevant criteria, is true.³⁴

What are the criteria that make an explanation good? Unsurprisingly, there are myriad accounts of how to assess the explanatory virtue of an explanation. Some contend that the “goodness” of an explanation is dependent on its simplicity, plausibility, and the absence of ad hocery.³⁵ Others have argued that goodness is based on coherence with background beliefs, consilience, testability, and simplicity.³⁶ And others look

28. Gilbert H. Harman, *The Inference to the Best Explanation*, 74 PHIL. REV. 88, 88–89 (1965) (coining the term).

29. David A. Schum, *Species of Abductive Reasoning in Fact Investigation in Law*, 22 CARDOZO L. REV. 1645, 1659 (2001); Guha Krishnamurthi, Jon Reidy & Michael J. Stephan, *Bad Romance: The Uncertain Promise of Modeling Legal Standards of Proof with the Inference to the Best Explanation*, 31 REV. LITIG. 71, 72 (2012).

30. *Id.* (footnote omitted) (citing Pardo & Allen, *supra* note 26, at 229–30).

31. *Id.*; see also Pardo & Allen, *supra* note 26, at 223.

32. Pardo & Allen, *supra* note 26, at 229–30.

33. *Id.*

34. *Id.* at 223. For a schematic representation of IBE, see Krishnamurthi et al., *supra* note 29, at 73–74 (citing Larry Laudan, *Strange Bedfellows: Inference to the Best Explanation and the Criminal Standard of Proof*, 11 INT’L J. EVIDENCE & PROOF 292, 295–97 (2007)).

35. See, e.g., Pardo & Allen, *supra* note 26, at 230.

36. See, e.g., WILLIAM G. LYCAN, JUDGMENT AND JUSTIFICATION 129–30 (1988); Paul Thagard, *Why Wasn’t O.J. Convicted? Emotional Coherence in Legal Inference*, 17 COGNITION & EMOTION 361, 361–62 (2003).

to predictive power and internal consistency.³⁷ What the particular explanatory virtues are is of course controversial, but we needn't fix that here. All that is important is that there is some plausible set of explanatory virtues on which we can rely. The steps of IBE—generating explanations and then evaluating them—generally mirrors the trial structure.³⁸ With that in mind, we can formulate the narrative account of BARD as follows: Jurors are searching for a “sufficiently plausible” explanation of the facts that is consistent with a defendant's innocence.³⁹ If such an explanation is found, then the defendant is acquitted, and if no such explanation is found, a defendant is determined to be guilty.⁴⁰ Jurors, unlike in civil trials, are not searching for the best explanation of the events, all things considered.⁴¹

Josephson further elucidates:

Guilt has been established *beyond a reasonable doubt* when there is *no plausible alternative explanation* for the data that does not imply the guilt of the defendant. An explanation is *plausible* if it is internally consistent, consistent with the known facts, not highly implausible, and it must represent a “real possibility” rather than a mere logical possibility. A real possibility does not suppose the violation of any known law of nature, nor does it suppose any behavior that is completely unique and unprecedented, nor any extremely improbable chain of coincidences.⁴²

So, in trial, evidence is presented along with candidate explanations of the evidence. Imagine a tree of possible explanations of the evidence, and as further evidence is added, some of the potential explanations are pruned away. Consider an exemplar murder case: Police officers testify that, while on patrol, they heard three gunshots. They approach an alley and come upon a dead body in the street. They exit the vehicle and see three additional men alive, uninjured, and standing around the body (call them Alex, Eric, and Reid). There is a gun on the ground, hot to the touch, with three bullet casings, matching the number of wounds on the dead body.

At this point, jurors may have a number of plausible explanations of the evidence thus far: Alex was the shooter, Eric was the shooter, or Reid was the shooter. There also may be other plausible explanations: They each took a turn and shot the victim. There also might be other explana-

37. See, e.g., John R. Josephson, *On the Proof Dynamics of Inference to the Best Explanation*, 22 CARDOZO L. REV. 1621, 1626 (2001).

38. Pardo & Allen, *supra* note 26, at 229, 234–35; see also David A. Schum, *Species of Abductive Reasoning in Fact Investigation in Law*, 22 CARDOZO L. REV. 1645, 1645–46, 1672 (2001).

39. Pardo & Allen, *supra* note 26, at 238–39.

40. *Id.* Of course, there must be some plausible explanation of guilt as well. See *id.* But generally if there is no plausible explanation of guilt, we can generate a plausible explanation of innocence. See *id.*

41. See *id.*

42. Josephson, *supra* note 37, at 1642.

tions: The true shooter ran away. Or the victim shot themselves thrice, and these three were rushing to offer assistance.

Then suppose a forensics expert testifies that DNA from skin remnants on the gun's meshed handle matches Alex's DNA and that there is evidence that Alex purchased the gun recently. Moreover, no skin remnants were found on the gun's meshed handle that did not match Alex's DNA. Furthermore, there is testimony by nearby shop owners that locates Eric and Reid at a pizza place together very shortly before the shots. After this evidence, the putative explanations that either Eric or Reid was the shooter may be pruned away—those do not seem plausible.

Then suppose that there is video evidence showing Alex shooting the gun. After that, all of the other putative explanations besides Alex being the shooter are again pruned away, leaving that one. That doesn't mean Alex was guilty of the crime, because this is just about the *actus reus*. But we can replicate this kind of analysis for each of the different elements of the offense.

Suppose, however, the evidence showed that the meshed gun had skin flakes from both Alex and the victim and that there was no security footage. If that were all the evidence, at least one plausible explanation that remains is that the victim, known to Alex, shot himself. On that complete record then, because there is an explanation that is consistent with innocence—Alex didn't commit the *actus reus*—the narrative understanding of BARD would tell us that Alex must be found not guilty.

Now revisit the prototypical confession scenario: A defendant is suspected of committing a crime, conviction of which carries a significant punishment. As part of the investigation, the defendant is interrogated. Through the course of the interrogation, the defendant learns certain facts: they are a suspect in the crime, conviction of the crime carries a significant sentence, there is a significant chance that the defendant will be convicted of the crime and receive a significant sentence, and confessing to the crime may lower the chance of receiving such a significant punishment or may lower the punishment, even if it's still significant. And we will assume that the defendant confesses to the crime.

A confession alone is not enough to sustain a conviction. The Supreme Court has required sufficient corroboration of the confession—that is, evidence other than the confession to support the claims of the confession.⁴³ In *Opper v. United States*, the Court explained the reason for the corroboration rule:

In our country the doubt persists that the zeal of the agencies of prosecution to protect the peace, the self-interest of the accomplice, the maliciousness of an enemy or the aberration or weakness of the accused under the strain of suspicion may tinge or warp the facts of the confession.⁴⁴

43. *Opper v. United States*, 348 U.S. 84, 89–91 (1954).

44. *Id.* at 89–90.

The corroborating evidence can take many forms: It can be independent evidence that the defendant committed the crime—such as physical evidence or other witness testimony; evidence about the reliability of the confession itself;⁴⁵ and evidence that “demonstrates the individual has specific [. . .] knowledge about the crime.”⁴⁶

For simplicity, let’s group the evidence in three buckets: (1) the confession itself; (2) the other evidence that corroborates the confession; and (3) any other evidence in favor of guilt. Suppose that all of the evidence taken together *is sufficient* to establish guilt beyond a reasonable doubt. It will either be the case that (A) the evidence other than the confession—buckets two and three, the alternative evidence—will be insufficient by themselves to establish guilt beyond a reasonable doubt such that bucket one, the confession, is required to establish guilt; *or* (B) the evidence other than the confession is sufficient to establish guilt beyond a reasonable doubt.⁴⁷ We consider each of the cases.

a. The Nonconfession Evidence Is Insufficient

Here, the corroborating and alternative evidence is not sufficient to establish that the defendant is guilty beyond a reasonable doubt. Based on the narrative account of the BARD standard, that means the corroborating and alternative evidence do not prune the set of possible explanations of the evidence to only explanations in which the defendant committed the crime. So there is at least one plausible explanation—call it E_I —consistent with the corroborating and alternative evidence in which the defendant did not commit the crime. So, purportedly, the addition of the confession evidence establishes guilt beyond a reasonable doubt.

However, it is difficult to see how this could be the case, from the vantage point of a neutral observer that is the juror. The explanation E_I resolves all of the corroborating and alternative evidence in a way that is consistent with innocence of the defendant. Now, with respect to the confession, consider the following explanation EC_1 : The defendant did not commit the crime, but rather understood that there was a significant chance that the defendant would be convicted and receive substantial punishment, and the defendant believed that by confessing they would have a significant chance of avoiding or lowering that punishment. Here’s another explanation EC_2 : The defendant did not commit the crime, but in the moment felt so overwhelmed and coerced by the nature of the interrogation and believed that by falsely confessing the interrogation would

45. See Richard A. Leo, Steven A. Drizin, Peter J. Neufeld, Bradley R. Hall & Amy Vatner, *Bringing Reliability Back in: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 509.

46. *Id.* (quoting *State v. Mauchley*, 2003 UT 10, ¶ 54, 67 P.3d 477).

47. This comes from the basic fact known as the Law of Excluded Middle. See Alonzo Church, *On the Law of Excluded Middle*, 34 BULL. AMER. MATHEMATICAL SOC’Y 75, 75 (1928), <https://www.ams.org/journals/bull/1928-34-01/S0002-9904-1928-04516-0/S0002-9904-1928-04516-0.pdf> [<https://perma.cc/7LBP-PTDW>].

end, and thus did so. These are both plausible explanations of the confession evidence, consistent with innocence. If EC_1 or EC_2 are consistent with E_1 , then we have an explanation of all of the evidence, call it E_1+ , that is plausible and consistent with innocence. This then means that the defendant is not guilty under the BARD standard.

This might seem too slick. One might worry whether it is always the case that E_1 and EC_1 or E_1 and EC_2 are always consistent with each other. For example, suppose in the investigation of a murder, the defendant confesses to committing the murder and states with precision the location of a firearm that could not be located before. Thereafter, the firearm is found and confirmed to be the murder weapon. Statements in the confession then seemingly provide us with more information—that the defendant knew the location of the murder weapon—which may allow us to prune the universe of plausible explanations. It might be that the only candidate explanations of innocence are inconsistent with the defendant knowing the precise location of an otherwise unfound murder weapon. Here, it helps to revisit the definition of the confession: A “confession” is a statement made by a defendant, *claiming that the defendant committed a crime or satisfied particular elements of a crime*, with the knowledge that the statement will be used by the government in a criminal prosecution of the defendant to establish or help establish an element of a crime, based on prior conduct.⁴⁸ The defendant’s statements about the whereabouts of the murder weapon and the defendant’s knowledge of the murder weapon are not themselves the confession. The statement that the defendant committed the murder is the confession. The whereabouts and knowledge points are evidence that *corroborate* the confession. In such a case, the corroborating evidence of the firearm, its relation to the crime, and the defendant’s knowledge will do all the work of pruning the tree of possible explanations (which also means, against our assumption, that the nonconfession evidence is sufficient to establish guilt). The defendant’s statement that they committed the murder—i.e., the confession—does no additional work.

Another objection is that there might be situations in which a confession on the record is significantly costly, such that the resulting calculus would favor the credibility of the confession. Consider a heinous crime—for example, a sexual offense against a child. Confessing to such a crime—even if it resulted in a significantly lower offense—carries a huge cost, including social stigmatization. So, the fact that the benefit of confessing is not as clear cut might make us think that the confession is more likely true. But this kind of argument is unconvincing. If there is a benefit, even if marginal, then the defendant would be rational to confess (and perhaps deny it later). That would favor an explanation like EC_1 and at least render it plausible. If there is no benefit, then the defendant acted irrationally, but then that would favor an explanation like EC_2 , or at the least render it plausible.

48. See *supra* note 19 and accompanying text.

Finally, one might also object that neither EC_1 nor EC_2 are plausible and thus E_{I+} too is implausible. But if the antecedent conditions of EC_1 or EC_2 —namely that the defendant faces significant punishment and would have reason to believe that confessing would mitigate the punishment, or the defendant was facing an overwhelming interrogation and would have reason to believe confessing would stop that kind of interrogation—then these are both straightforwardly plausible. There may be a question of whether such antecedent conditions were manifest, and we will revisit those questions shortly.⁴⁹

b. The Nonconfession Evidence Is Sufficient

Now, suppose that buckets two and three—the corroborating and alternative evidence—are sufficient to establish that the defendant is guilty beyond a reasonable doubt. Thus, the corroborating and alternative evidence are enough to prune the universe of possible explanations to only ones in which the defendant committed the crime. Indeed, as we have seen above, it must be the case because the confession itself cannot prune away plausible explanations of the conduct that are consistent with innocence. But then, by hypothesis, the confession is not required to establish that only the plausible explanations are consistent with guilt. Thus, the confession does not do any additional work necessary to establish guilt.

Here, one might object that the confession evidence could still play an important role. Though all of the explanations of the evidence are consistent with guilt, there may be a number of them. And it may be the case that if actual jurors cannot pick between a number of different theories, though all of them are theories in which the defendant is guilty, the jurors may irrationally feel doubt and thus vote to acquit. The defendant's confession may prune some of the potential theories and thereby narrow the set of possibilities—which in turn would better ensure that the juror does not act irrationally. As an initial matter, I think this objection relies upon a blurring between confession evidence and corroborating or alternative evidence; for example, a defendant's statement about where they were is not necessarily confession evidence as defined. Moreover, I think that this objection is impractical and unconvincing. Generally, there might be lots of explanations of the evidence that are immaterially different. For example, it may not matter to a case whether the defendant walked to the spot of the incident or took public transport. It is unlikely that the jury would generate irrational doubt based on such immaterial differences. However, if there are material differences between two explanations—perhaps different murder weapons, different locations, different time periods, etc.—then it is most likely that there will also be *some* plausible explanation of the evidence consistent with innocence. Thus, the jurors' doubt would not be irrational, contra the impractical hypothesis. Moreover, even if juries were to generate irrational doubt because of having to

49. See *infra* Part IV.

choose between different explanations of the evidence in which the defendant is guilty, it is not clear that confession evidence would help. Jurors could rationally *still* disbelieve the veracity of the confession evidence under an explanation, like *EC*₂, that the defendant rambled nonsense because of his being mentally overwhelmed by the criminal process or nature of interrogation. Indeed, juror irrationality of this form can be tackled more directly by effective advocacy that explains the government's standard—it does not require the admission of confession evidence.⁵⁰

Thus, under the narrative account of BARD, we have shown that confession evidence cannot have a significant impact in proving the charge. If the other evidence does not meet the BARD standard, then the confession evidence will not help attain the BARD standard, because there is a plausible explanation consistent with innocence. If the other evidence does meet the BARD standard, then the confession evidence is unnecessary. Either way, the confession evidence is epistemically inert.

2. *The Probabilistic Account of BARD*

In the probabilistic account, we can understand the BARD standard as a probabilistic threshold. In assessing the evidence, if the probabilistic threshold is met, then the juror should render a verdict of guilty; short of that threshold, the juror should render a verdict of not guilty.⁵¹ The threshold is usually quantified in the range of 85%–95% likelihood that the defendant committed the crime.⁵² Thus, if the odds that the defendant is guilty exceed the threshold of probability, then they will be convicted. If not, then they will be “categorically acquitted.”⁵³

50. There is potentially another way in which confession evidence could epistemically aid the jury's determination. That a defendant confessed may instruct the jury that the defendant at one point believed the case against them to be strong. But admission of the confession for this purpose is improper because it is a variety of vouching for the strength of the prosecution's case. See Mary Nicol Bowman, *Mitigating Foul Blows*, 49 GA. L. REV. 309, 321 (2015) (observing that prosecution's vouching for the strength of the case or credibility of witnesses is improper).

51. Schuman, *supra* note 27, at 220–21.

52. See, e.g., RICHARD O. LEMPERT, SAMUEL R. GROSS & JAMES S. LIEBMAN, A MODERN APPROACH TO EVIDENCE: TEXT, PROBLEMS, TRANSCRIPTS AND CASES 1244 n.13 (3d ed. 2000) (describing a survey where most respondents placed the BARD requirement in the 85% to 90% range); Hal R. Arkes & Barbara A. Mellers, *Do Juries Meet Our Expectations?*, 26 LAW & HUM. BEHAV. 625, 631 (2002) (citing C.M.A. McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?*, 35 VAND. L. REV. 1293, 1325 (1982)) (suggesting most judges place the requirement near 90%). We can mathematically deduce the proper probability threshold based on how tolerant we are of wrong convictions. Consider the Blackstone maxim that “the law holds, that it is better that ten guilty persons escape, than that one innocent suffer.” 4 WILLIAM BLACKSTONE, COMMENTARIES *352. Under this ratio of 10:1 the appropriate probability threshold for BARD is around 91%. Daniel Pi, Francesco Parisi & Barbara Luppi, *Quantifying Reasonable Doubt*, 72 RUTGERS U. L. REV. 455, 486 (2019). At 20:1, it would be about 95%. See *id.* at 488. And at 100:1, it would be about 99%. See *id.* at 486.

53. Schuman, *supra* note 27, at 221 (quoting Talia Fisher, *Conviction Without Conviction*, 96 MINN. L. REV. 833, 834–35 (2012)).

The probabilistic account is not without problems. One particularly pressing problem for operationalizing BARD is the conjunction paradox.⁵⁴ The problem arises because of a difference in how the probability threshold is applied: both to the claim as a whole and to the elements of the claim specifically. So, as a matter of practice, “[l]egal doctrine and jury instructions apply . . . standards of proof to the individual elements of a claim, crime, or affirmative defense.”⁵⁵ Thus, “the prosecution must prove each element of a crime beyond a reasonable doubt.”⁵⁶ “[P]arties with the burden of proof will win if they surpass the threshold for each element.”⁵⁷

Assume that a crime has four elements, and assume for simplicity’s sake that the elements are independent of each other.⁵⁸ If we apply the BARD standard to each element, then we will require that each element be shown by the exacting probabilistic threshold—say 90%.⁵⁹ But because of independence and the way probabilities are calculated, this means that there need only be a 66% likelihood of the result (that is, $(90\%)^4$) to convict, and that seems substantively too low.⁶⁰ On the flip side, if we were to require 90% of the overall crime, then each element would have to be shown to be about 97.4% likelihood (that is, $(90\%)^{1/4}$) to convict, which seems substantively too high.⁶¹ Indeed, this is also impacted by the number of elements: a five-element crime could range from an overall 59% likelihood under the former calculation to a 97.9% likelihood under the latter.

There are a number of proposed solutions to the conjunction paradox,⁶² none of which are particularly satisfying. What’s critical for our purposes is to recognize that whatever solution must maintain a significantly high threshold for the overall crime—something over 85% (i.e. the lower part of the designated range). Thus, applying that element-wise, that will require a significantly high likelihood of each element manifesting, at least 85%, but likely much higher.

With that in mind, we can approach how confession evidence fares under a probabilistic understanding of BARD. Again, consider the dis-

54. See Michael S. Pardo, *The Paradoxes of Legal Proof: A Critical Guide*, 99 B.U. L. REV. 233, 267–68 (2019). There are also other concerns, including whether reasonable doubt should be interpreted by the juror as a subjective standard or as an objective one, and whether and to what extent the questions should be individualized or generalized and statistical. *Id.* at 247–48.

55. *Id.* at 267.

56. *Id.*; see also *In re Winship*, 397 U.S. 358, 361 (1970).

57. Pardo, *supra* note 54, at 267.

58. See *id.* at 267–68 (explaining the difference between elements that are independent of each other and dependent on each other and how that impacts their probabilistic calculus).

59. See David S. Schwartz & Elliott Sober, *The Conjunction Problem and the Logic of Jury Findings*, 59 WM. & MARY L. REV. 619, 624–25, 625 n.9 (2017).

60. See *id.*

61. See *id.* This is the conjunction theorem in probability theory. See *id.*; E.T. JAYNES, *PROBABILITY THEORY: THE LOGIC OF SCIENCE* 24–30 (2003).

62. See Pardo, *supra* note 54, at 269–80.

junction: either the corroborating and alternative evidence will not allow a jury to find the defendant guilty beyond a reasonable doubt, or it will.

a. The Nonconfession Evidence Is Insufficient

Again, here, the corroborating and alternative evidence is insufficient to establish that the defendant is guilty beyond a reasonable doubt. On the probabilistic account of the BARD standard, that means the corroborating and alternative evidence allows some nontrivial chance for the defendant to have not committed the crime. And again, purportedly, the addition of the confession evidence establishes guilt beyond a reasonable doubt, beyond the probability threshold.

The problem is that the fact of the confession has little independent probative value, and thus it cannot push the prosecution's case over the threshold. Suppose that the prosecution's case is nearly at the threshold without the confession evidence, but not beyond it. On the state of that information alone, and assuming perfect visibility for the defendant, no defendant—innocent or guilty—would rationally choose to confess, assuming standardly that their main objective was to receive as little punishment as possible.⁶³ On that state of the evidence, because it is short of the probabilistic threshold, the defendant would be acquitted.

But defendants and prosecutors do not have perfect information. And as set forth above, it may be rational for the defendant to confess. A person who is actually guilty of the crime may confess with the awareness that they may be able to avail themselves of a lower sentence. They may confess because of the oppressive nature of the interrogation or law enforcement and prosecution inquiries. And they also might forego that potential benefit and instead not confess in order to see if the state can meet their burden. But very little about this calculus is actually changed by the fact that the defendant in fact committed the crime. An *innocent* defendant also lacks perfect information and may be risk averse or less willing to take risks in the same way. Consequently, whether a defendant confesses to a crime—by itself—is a poor probabilistic indicator of whether the defendant in fact committed the crime.

Consider an example. Suppose Mike is a defendant facing prosecution for aiding and abetting in an armed burglary, which carries a twenty-year sentence. The circumstances are murky: Mike was in a vehicle with his

63. It might be that the defendant has other reasons to confess, such as an obligatory commitment to being truthful, a desire to be personally redeemed by society, and a hope of avoiding harm and receiving sanctuary by being imprisoned. There may also be other considerations that might lead to a confession specific only to innocent defendants, for example, a confession to ensure a loved one escapes investigation. How these varied considerations relate generally is unknown. I am skeptical they are of higher likelihood than confession among guilty defendants. And in the absence of reliable particularized knowledge about the confessing individual, it will be hard to assess the actual impact of these reasons, for theorists and potential jurors. In contrast, we do know that defendants seek to avoid criminal investigation, conviction, and punishment.

friends, and the vehicle stopped at a house, and his friends went into the house and robbed it. Mike remained in the car.

Say the BARD threshold is at 90%, and the state of the evidence would support that Mike was 80% likely to have committed the crime. Suppose Mike is offered a deal: if he confesses to the crime, he will get a three-year sentence instead of the full twenty years. Mike could rationally take this deal because he may not be able to appreciate the 10% deficit, or because he thinks that jurors are fallible and may not apprehend the 10% deficit. And so the resulting risk calculus favors confessing. But that calculus is obviously not changed based on whether Mike committed the crime.⁶⁴

It is possible that Mike may have something against confessing if he did not in fact commit the crime, which would make him less likely to confess if he were innocent. But as a theoretical matter, I see no reason to assume this is generally the case, and I think such intuitions are built largely on a disagreement with a premise of the hypothetical that an innocent defendant and a guilty defendant would ever be so similarly situated. Moreover, based on Bayes's Theorem,⁶⁵ the difference between the likelihood that a defendant would confess when actually guilty and that a defendant would confess when actually innocent would have to be significant to increase the prosecution's case over the threshold.⁶⁶ Filling in some plausible numbers, if the prosecution's evidence shows that Mike is 80% likely to have committed the crime, and they need to attain a 90% likelihood to convict, then a guilty defendant must be 2.3 times as likely to confess than an innocent defendant. All other things being equal, if an innocent defendant is, say, 30% likely to confess, then a guilty defendant must be 69% likely to confess for the confession to make an evidentiary difference.⁶⁷ Even if there was a naturally occurring gap in which innocent defendants would be unwilling to admit to something that they did not do while guilty defendants would be so willing, guilty defendants would be quick to mimic that behavior and avail themselves of the same benefits if the gap bore out favorably in prosecutions—and vice versa. Thus, we would predict any such gap to collapse or narrow significantly.

Notably, this argument and the supporting calculations do not assume that innocent defendants and guilty defendants facing the same risk calculus appear in equal or similar numbers. There will certainly be many more guilty defendants in this situation than innocent ones—assuming

64. As Red said, "Everybody in here is innocent." *THE SHAWSHANK REDEMPTION* (Castle Rock Entertainment 1994).

65. James Joyce, *Bayes' Theorem*, *STAN. ENCYCLOPEDIA OF PHIL.* (Sept. 30, 2003), <https://plato.stanford.edu/entries/bayes-theorem> [<https://perma.cc/J9DX-RNHY>].

66. See Boaz Sangero & Mordechai Halpert, *Proposal to Reverse the View of a Confession: From Key Evidence Requiring Corroboration to Corroboration for Key Evidence*, 44 *U. MICH. J.L. REFORM* 511, 545–50 (2011).

67. This can be calculated using Bayes's theorem. See JAYNES, *supra* note 61, at 86–118.

that our ways of collecting and assessing evidence are truth adaptive.⁶⁸ By hypothesis, Mike is 80% likely to have committed the crime on the available evidence, so we should assume that there will be four times as many guilty defendants in this position than innocent ones. But the point remains that the confession evidence itself is not doing any significant work in separating guilty from innocent defendants.⁶⁹

Consider an analogy from medicine: suppose two patients come in showing very similar symptoms—cough, runny nose, and fever—and we want to determine whether they have, say, influenza. And suppose most people who show these symptoms have influenza. But we add one more test: We hand them a box of tissues, and if they take one, then we deem they have influenza.

The ridiculousness of that test is self-evident. We wouldn't expect them to act any differently—both patients show the same symptoms. Of course, most people who take the tissue will have influenza, but that's solely because they came in with symptoms for influenza. The tissue-box test did nothing. That's confession evidence: its epistemic value is tissue thin.⁷⁰

b. The Nonconfession Evidence Is Sufficient

Assume, on the other hand, that the corroborating evidence and the alternative evidence is sufficient to show that the defendant is guilty beyond a reasonable doubt. On the probabilistic model, that means that on the available evidence, the defendant's likelihood of committing the crime surpasses the probabilistic threshold. If in fact the defendant's likelihood of committing the crime is a high-probability event, then we do not require the confession evidence to establish the guilt of the defendant. The confession evidence is not necessary.⁷¹

One might object that the confession evidence could still be important in bolstering the other evidence to show the increased likelihood that the defendant committed the crime. But just as before, the confession evidence cannot do that because of its epistemic weakness. Innocent defendants have all the same rational reasons to behave as guilty ones do, and if there is any gap in their probable behaviors, as a practical matter, it's negligible, unpredictable, and unreliable. And just as we observed with the narrative understanding of BARD, the better way to tackle the

68. See Welsh S. White, *Miranda's Failure to Restrain Pernicious Interrogation Practices*, 99 MICH. L. REV. 1211, 1230 (2001) (making a similar point).

69. See *id.*

70. One distinction is that the patient may not know whether they have influenza, while the defendant actually knows whether they committed the crime. But I don't think that distinction leads to a disanalogy, because the defendant still may not know whether the evidence is sufficient for conviction—and that is what drives whether they will confess. I thank Betsy Rosenblatt for raising this point.

71. There may be differences in the way that various jurors interpret the information. For present purposes, I assume a prototypical rational juror, but the framework can be adopted for different jurors; if there is any reasonable juror for whom the evidence is insufficient, then we are in the (A) variety of case. Thanks to Thomas Frampton for this question.

problems of jurors not apprehending the strength of the evidence is to persuade them to properly understand the strength of the evidence.

Thus, under the probabilistic understanding of BARD, the addition of confession evidence cannot take a quantum of other evidence that would not sustain a determination of guilt below the BARD threshold to above the BARD threshold. And if the quantum of other evidence is such that it would sustain a determination of guilty above the BARD threshold, then the confession evidence is superfluous.

B. CONFESSION EVIDENCE IS TRUSTED BEYOND ITS PROBATIVE VALUE

Thus far, I have shown that confession evidence cannot make a significant practical difference in a rational jury's assessment of whether the defendant is guilty beyond a reasonable doubt. The reason is that there are scenarios where a defendant has a rational reason to confess, especially if the confession may provide them with an opportunity to face a significantly lower punishment. That rational reason exists whether the defendant is guilty or innocent. Accordingly, the fact that a defendant has confessed provides little reason to think that the defendant is guilty rather than innocent. As a factual matter, it may be the case that guilty defendants are more likely to confess than innocent ones, because, for example, people may have a fidelity to the truth that overwhelms their desire to obtain less punishment, because they may have other goals beyond obtaining less punishment, or because innocent defendants may have a stronger belief in the propriety of the justice system. Nevertheless, I contend that such conditions are of little probabilistic moment. But the fact that evidence is of little value does not necessitate that it be excluded. One might ask then, what is the harm in allowing low-value evidence, along with all the other evidence?

The problem is that juries do not understand confession evidence as low-value evidence. Far from it. Indeed, as the Supreme Court said,

A confession is like no other evidence. Indeed, "the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so."⁷²

As the California Supreme Court has observed, "the confession operates as a kind of evidentiary bombshell which shatters the defense."⁷³ Both

72. *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) (alterations in original) (quoting *Bruton v. United States*, 391 U.S. 123, 139-40 (1968) (White, J., dissenting)).

73. *People v. Schader*, 401 P.2d 665, 674 (Cal. 1965). As noted in *Schader*, California courts at the time held that erroneous admission of a confession was reversible per se under state law. *Id.* at 672 (first citing *People v. Stewart*, 400 P.2d 97 (Cal. 1965); then citing

the U.S. Supreme Court and the California Supreme Court are surely right that the information is the most damaging evidence.⁷⁴ Juries take confession evidence at face value, assuming that the defendant would not confess if they did not in fact commit the crime.⁷⁵ Confessions were found in one study to be more prejudicial than other forms of evidence, such as eyewitness testimony and character evidence.⁷⁶ “Confession evidence (regardless of how it was obtained) is so biasing that juries will convict on the basis of confession alone, even when no significant or credible evidence confirms the disputed confession and considerable significant and credible evidence disconfirms it.”⁷⁷ This has led to the famous maxim “*confessio est regina probationum*, confession is the queen of proof.”⁷⁸

The fact that the jury would overvalue confession evidence is not entirely mysterious. One explanation is simply that jurors do not understand or credit the fact that the defendant may have other reasons to confess—such as the opportunity to lessen punishment or to escape the oppressive nature of law enforcement inquiry and interrogation.⁷⁹ Additionally, it is practically difficult for the defendant to challenge confession evidence. To deny the confession or to question its reliability requires that the defendant question their own statements—which in turn impacts the credibility of the defendant, as both a litigant and a moral agent.⁸⁰ And in a similar vein, jurors may be more likely to believe that the statement against the defendant’s interest is true.⁸¹ Also, jurors are more likely to privilege claimed personal knowledge over other kinds of evidence, thus further bolstering the evidentiary impact of the confession.⁸²

Hence, when the Court in *Arizona v. Fulminante* recited that “the defendant’s own confession is probably the *most probative* . . . evidence that

People v. Dorado, 398 P.2d 361 (Cal. 1965), *overruled by* People v. Cahill, 853 P.2d 1037 (Cal. 1993); then citing People v. Matteson, 393 P.2d 161 (Cal. 1964), *overruled by* Cahill, 853 P.2d 1037; then citing People v. Parham, 384 P.2d 1001 (Cal. 1963), *abrogated by* People v. Caruso, 436 P.2d 336 (Cal. 1968); then citing People v. Brommel, 364 P.2d 845 (Cal. 1961), *overruled by* Cahill, 853 P.2d 1037; then citing People v. Trout, 354 P.2d 231 (Cal. 1960), *overruled by* Cahill, 853 P.2d 1037; and then citing People v. Berve, 332 P.2d 97 (Cal. 1958), *overruled by* Cahill, 853 P.2d 1037). The Supreme Court of California later overturned that rule in 1993. *Cahill*, 853 P.2d at 1059.

74. See Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 *DENV. U. L. REV.* 979, 983–84 (1997).

75. Eugene R. Milhizer, *Confessions After Connelly: An Evidentiary Solution for Excluding Unreliable Confessions*, 81 *TEMP. L. REV.* 1, 4–8 (2008); see also 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, 429, 478 (1998).

76. Saul M. Kassin & Katherine Neumann, *On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis*, 21 *LAW & HUM. BEHAV.* 469, 474–81 (1997).

77. Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 *N.C. L. REV.* 891, 923 (2004).

78. John H. Langbein, *Torture and Plea Bargaining*, 46 *U. CHI. L. REV.* 3, 14 (1978).

79. Milhizer, *supra* note 75, at 13–17.

80. See Sharon L. Davies, *The Reality of False Confessions—Lessons of the Central Park Jogger Case*, 30 *N.Y.U. REV. L. & SOC. CHANGE* 209, 220 (2006).

81. Milhizer, *supra* note 75, at 8; Kassin & Neumann, *supra* note 76, at 482.

82. Milhizer, *supra* note 75, at 8; Kassin & Neumann, *supra* note 76, at 482.

can be admitted against him,”⁸³ the Court was correct, insofar as it meant that the jury understands confession evidence as the most probative. But therein lies the disconnect, because the defendant’s confession is, in fact, not significantly probative.

IV. THE PRACTICAL AND EMPIRICAL TRAGEDY OF CONFESSION EVIDENCE

I have made the case that confession evidence is epistemically weak as a matter of theory. Specifically, I have shown that confession evidence, under standard assumptions, has little probative value and is thus low-value evidence. Moreover, even as theoretically low-value evidence, we have seen that juries credit confession evidence with enormous weight, far outweighing any rational probative value that it could have. As a result, confession evidence is potentially dangerous in causing incorrect and irrational verdicts and results.

I contend that this is not merely theoretical—the practical and empirical evidence makes clear that confession evidence actually causes incorrect and irrational results. First, I argue that the evidence of practice shows us that the theoretical case is one that is truly manifest. Second, I contend that the direct empirical evidence shows us that false confessions are extraordinarily common. Combining that with the robust strength of a confession and its relationship to a probable conviction, confession evidence commonly results in false convictions. Together, this practical and empirical evidence shows that confession evidence poses a real and present danger to the just operation of the criminal justice system.

A. THE TERRIBLE CHOICE IS REAL

The actual practices of law enforcement and prosecutors’ offices in obtaining confessions from defendants commonly impose the choice to confess and potentially obtain lower punishment, or continue the prosecution and potentially face enormous punishment.

To understand this, we first begin with an understanding of what happens when a defendant is under suspicion for having committed a crime. Once under suspicion, at some point, the defendant is made aware of this fact. At that juncture, the defendant has reason to be concerned and anxious, even if completely innocent of the investigated crime. Federal and state criminal codes are voluminous,⁸⁴ and even if the defendant will easily be cleared of the suspected crime, the defendant may be potentially liable for other conduct discovered through the course of investigation.

83. *Arizona v. Fulminante*, 499 U.S. 279 (1991) (emphasis added) (quoting *Bruton v. United States*, 391 U.S. 123, 139–40 (1968) (White, J., dissenting)).

84. Shon Hopwood, *Clarity in Criminal Law*, 54 AM. CRIM. L. REV. 695, 699 (2017) (discussing the problem of overcriminalization under federal law); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 513–17 (2001) (discussing the problem of overcriminalization under state law).

This may create an incentive for the defendant to cooperate in order to avoid further examination by law enforcement.

Now suppose that the defendant is questioned by law enforcement. If the case against the defendant reaches some threshold of plausibility,⁸⁵ law enforcement will seek to interrogate the defendant. As explained by scholars Steven Drizin and Richard Leo,

[T]he goal of interrogation is to elicit incriminating statements, admissions and/or confessions through the use of psychological methods that are explicitly confrontational, manipulative, and suggestive. The purpose of interrogation is not to determine whether a suspect is guilty; rather, police are trained to interrogate only those suspects whose guilt they presume or believe they have already established. The purpose of interrogation, therefore, is not to investigate or evaluate a suspect's alibi or denials. Nor is the purpose of interrogation necessarily to elicit or determine the truth. Rather, the singular purpose of American police interrogation is to elicit incriminating statements and admissions—ideally a full confession—in order to assist the State in its prosecution of the defendant.⁸⁶

The canonical model of law enforcement interrogation,⁸⁷ based on empirical research in social psychology and microeconomics,⁸⁸ understands the defendant's decision making is shaped by: "(1) how the social influence techniques of interrogation cause him to perceive his available courses of action, (2) the [defendant's] subjective perception of the probability of each course of action actually occurring, and (3) the utility values or benefits (as well as corresponding harms) associated with each course of action."⁸⁹ Law enforcement's main course of action is to utilize the dichotomy between negative and positive incentives.⁹⁰ Interrogators at-

85. At an early juncture, where there is no particular suspicion of the defendant, law enforcement may simply interview the defendant—using non-accusatorial, open-ended questions to gather information. During this time, law enforcement is often attempting to determine whether the defendant is being truthful. For this, they may use the Reid technique, which counsels law enforcement to make a determination based on demeanor and behavior. See generally FRED E. INBAU, JOHN E. REID, JOSEPH P. BUCKLEY & BRIAN C. JAYNE, *CRIMINAL INTERROGATION AND CONFESSIONS* 185–310 (5th ed., Jones & Bartlett Learning 2013) (1962). However, such judgments are notoriously unreliable and weak. Richard A. Leo, *False Confessions: Causes, Consequences, and Implications*, 37 J. AM. ACAD. PSYCHIATRY & L. 332, 334 (2009). When law enforcement has determined there is substantial suspicion, law enforcement will escalate to interrogation tactics. See Drizin & Leo, *supra* note 77, at 911.

86. Drizin & Leo, *supra* note 77, at 911 (footnotes omitted).

87. See *id.* at 913 & n.113 (discussing the Decision-Making Model of Confession) (citing GISLI H. GUDJONSSON, *THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS: A HANDBOOK* 120–22 (2003)). In his book, Gisli Gudjonsson reviews five different models of confession, but they all generally utilize the Decision-Making Model of Confession framework, in different terms. See GUDJONSSON, *supra*, at 117–29.

88. Drizin & Leo, *supra* note 77, at 913 & n.114 (first citing REID HASTIE & ROBYN DAWES, *RATIONAL CHOICE IN AN UNCERTAIN WORLD: THE PSYCHOLOGY OF JUDGMENT AND DECISION-MAKING* (2001); then citing ANATOL M. RAPOPORT & ALBERT M. CHAMMAH, *PRISONER'S DILEMMA* (1965); and then citing JOHN VON NEUMANN & OSKAR MORGENTHAU, *THEORY OF GAMES AND ECONOMIC BEHAVIOR* (1944)).

89. *Id.* at 913.

90. *Id.* at 912.

tempt to convince the defendant that they should confess because they will inevitably be convicted due to the strength of the case against them, while at the same time intimating that the magnitude of punishment will be lessened if the defendant confesses.⁹¹

Indeed, the interrogation handbooks and manuals offer details of how law enforcement accomplishes this. The key steps in the interrogation are shifting the defendant from “confident to hopeless,”⁹² and then eliciting the confession from the hopeless defendant.⁹³ To do this, law enforcement uses various psychological techniques.⁹⁴ They will isolate the defendant for some time.⁹⁵ They will use incessant, powerful accusations that cut off and overwhelm the defendant’s denials.⁹⁶ They will attack the defendant’s alibi claims.⁹⁷ They will also make general claims of strong evidence, which may be true or false.⁹⁸ Law enforcement might appeal to the defendant’s demeanor to suggest that the defendant is guilty and that it will appear that way to a judge and jurors.⁹⁹ They may also simply appeal to fabricated evidence during the interrogation, such as “nonexistent eyewitnesses, false fingerprints, make-believe videotapes, fake polygraph results, and so on.”¹⁰⁰ And, for any evidence that law enforcement has, officers will exaggerate the amount and strength of the evidence.¹⁰¹

Law enforcement will also make explicit or implicit inducements to the defendant.¹⁰² With respect to intangible inducements, law enforcement may appeal to moral concerns or social and community standing that the defendant can improve or benefit by confessing.¹⁰³ These may proceed by appeals to community catharsis, societal forgiveness, forgiveness from any victims, and being truthful to family and friends.¹⁰⁴ Then there are systemic inducements, in which law enforcement suggests that the defendant’s case will fare better in the criminal justice system by confessing—because law enforcement, prosecutors, and judges look more favorably on one who tells the truth and seeks remorse.¹⁰⁵ Finally, there are transactional inducements, where law enforcement will more directly commu-

91. See *id.* at 912 & n.110 (citing Saul M. Kassin & Karlyn McNall, *Police Interrogations and Confessions: Communicating Promises and Threats by Pragmatic Implication*, 15 *LAW & HUM. BEHAV.* 233, 234–35 (1991)).

92. *Id.* at 915 & n.122 (citing Ofshe & Leo, *supra* note 74, at 1004–50).

93. *Id.* at 916 & n.129 (citing Ofshe & Leo, *supra* note 74, at 1050–06).

94. *Id.* at 911–12.

95. FRED E. INBAU, JOHN E. REID & JOSEPH E. BUCKLEY, *CRIMINAL INTERROGATION AND CONFESSIONS* 24–30 (3d ed. 1985).

96. Ofshe & Leo, *supra* note 74, at 1004–08.

97. See NATHAN J. GORDON & WILLIAM L. FLEISHER, *EFFECTIVE INTERVIEWING AND INTERROGATION TECHNIQUES* 27–29 (3d ed. 2011); Ofshe & Leo, *supra* note 74, at 1006, 1043; INBAU ET AL., *supra* note 95, at 73–76.

98. Ofshe & Leo, *supra* note 74, at 1008–14; Drizin & Leo, *supra* note 77, at 915.

99. See Ofshe & Leo, *supra* note 74, at 1014–15.

100. Drizin & Leo, *supra* note 77, at 915.

101. *Id.*

102. Ofshe & Leo, *supra* note 74, at 1053.

103. *Id.* at 1056–60.

104. See *id.*

105. *Id.* at 1060–61.

nicate that the defendant will receive less punishment through avoiding charges from the prosecution, the ability to avoid a conviction through some theory of defense, or leniency in sentencing.¹⁰⁶ This may also come in the converse formulation, that not confessing will increase punishment.¹⁰⁷ There are of course guardrails that purportedly limit law enforcement's use of these techniques, but as discussed below,¹⁰⁸ in practice these limitations are largely ineffective to protect defendants from various pressures that impact the confession calculus.

Law enforcement uses techniques that effectively create the rational calculus in the defendant where falsely confessing to criminal conduct for the opportunity for less punishment is a rational choice.¹⁰⁹ Indeed, creating that calculus is law enforcement's goal in interrogation.¹¹⁰ Moreover, even if law enforcement attentively and vigilantly ensures not to make explicit or implicit inducements to the defendant, a defendant may come to the belief that falsely confessing may bring them favor in avoiding greater punishment.¹¹¹ For any falsely confessing defendant, given the practical knowledge of how law enforcement operates, it is highly likely that the defendant confronted the choice of whether to confess for purposes of obtaining lesser punishment.¹¹²

B. THE OVERWHELMING PRESSURE IS REAL

Separate and apart from the choice of whether to confess for lesser punishment, defendants face another force that may influence their actions. The atmosphere of the interrogation and the investigation may itself be so overwhelming that a defendant feels compelled to confess in order to escape that condition. Indeed, it is clear that law enforcement

106. *Id.* at 1077, 1084.

107. *Id.*

108. *See infra* Part VI.

109. Ofshe & Leo, *supra* note 74, at 985–86.

110. *Id.* at 985.

111. *See id.* at 1114 n.336 (quoting DAVID SIMON, *HOMICIDE: A YEAR ON THE KILLING STREETS* 201 (1991)).

112. There have been innovations in the style of interrogation that look to increase the accuracy of information obtained. One prominent example is the PEACE technique, developed in the United Kingdom. Gisli H. Gudjonsson & John Pearse, *Suspect Interviews and False Confessions*, 20 *CURRENT DIRECTIONS PSYCH. SCI.* 33, 34 (2011).

The PEACE technique is a nonconfrontational approach to interrogation developed by police officers, lawyers, and psychologists. The technique consists of five stages: “preparation and planning,” “engage and explain,” “account,” “closure,” and “evaluate.” The PEACE method instructs interrogators to use a nonaccusatory approach, in which new information is compared to the suspects’ previous statements and other available evidence. PEACE does not permit police to lie to suspects and prioritizes obtaining accurate information over eliciting confessions. This approach would prevent interrogators from using coercive techniques on juveniles and help reduce the risk of false confessions. The goal of PEACE is not to decrease the rate of confession, but merely to improve the accuracy of the confessions obtained.

Hannah Brudney, Note, *Confessions of a Teenage Defendant: Why a New Legal Rule Is Necessary to Guide the Evaluation of Juvenile Confessions*, 92 *S. CAL. L. REV.* 1235, 1267 (2019) (footnotes omitted). The use of the PEACE approach, however, has not been adopted broadly in the United States. *See generally* Gudjonsson & Pearse, *supra*.

uses techniques to create an overwhelming atmosphere of discomfort. The law enforcement techniques of isolation, continued rejection of the defendant's explanations and positions, and confrontation with claims of strong evidence against the defendant are all used to make the defendant feel the weight of the case against them—to make the defendant feel abject, alone, and without support.¹¹³ “Over and over again, the investigator conveys the message that the suspect has no meaningful choice but to admit to some version of the crime because continued resistance—in light of the extensive and irrefutable evidence against him—is simply futile.”¹¹⁴ The implicit or explicit promise, then, is that the confession will allow that pressure to dissipate and the defendant to be relieved. And this is not hypothetical—this is the very design of the techniques employed by law enforcement.¹¹⁵

The prospect of escaping this overwhelming atmosphere through confessing falsely is easily understandable. In particular, the atmosphere may be so acutely overwhelming—akin to the experience of being tortured—that the act of false confession may be reflexive and involuntary. In that case, there is no question about whether it is rational because the defendant has little to no control over that act of confession. But beyond that, it still may be rational to falsely confess, as a matter of voluntary choice, because the experience is so overwhelmingly terrible and terrifying. An innocent defendant may believe that falsely confessing is rational because it will relieve the pressure, yet he may at the same time believe the confession to be ineffectual, because he did not in fact commit the crime, and that fact should be revealed by the other evidence.¹¹⁶ Ultimately, the practical evidence clearly reveals that it is very likely that defendants face an atmosphere of overwhelming pressure and discomfort that in turn incentivizes the defendant to falsely confess.

On this picture, it is no surprise then that many of the defendants that capitulate to these pressures are young or mentally disabled. As the Gross, Jacoby, Matheson, and Montgomery study of exonerations reveals, “False confessions are heavily concentrated among the most vulnerable groups of innocent defendants.”¹¹⁷ Of the exonerees in their comprehensive study, 42% of minors falsely confessed; 69% of twelve- to fifteen-year-olds falsely confessed; and 69% of those with severe mental disabilities falsely confessed.¹¹⁸ But the fact is that many, including high-functioning adults, could fall prey to these tactics and pressures.¹¹⁹

113. Drizin & Leo, *supra* note 77, at 911–12; Ofshe & Leo, *supra* note 74, at 1004–13.

114. Drizin & Leo, *supra* note 77, at 915.

115. *Id.* at 911.

116. *Id.* at 977–79 (discussing the false confession of Jonathan Kaled made on this reasoning).

117. Samuel R. Gross, Kristen Jacoby, Daniel J. Matheson, Nicholas Montgomery & Sujata Patil, *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 545 (2005).

118. *Id.*

119. Gisli Gudjonsson has argued that certain people with vulnerabilities are particularly susceptible: those with mental disorders, like mental illness or personality disorders;

C. THE DISASTROUS RESULTS ARE REAL

The prior sections reveal that the theoretical reasons for an innocent defendant to falsely confess are fostered by law enforcement techniques and the nature of the criminal process. Given that, and assuming rational actors, we would predict that this would result in a significant risk of false confessions by innocent defendants, which would then also translate into a substantial number of false confessions and consequent wrongful convictions. The empirical data strongly supports these conclusions. From a number of studies of exonerated convictions, we know the following: (1) that an innocent defendant would falsely confess is plausible and there's a significant chance that it would occur; (2) that such a false confession may be done for reasons of rational calculus and overwhelming pressure; and (3) that the evidentiary value of a confession is very impactful to, and greatly overestimated by, jurors and judges.

That said, there are serious limitations to what we can learn from empirical data. For one, we have no good sense of how many false confessions there are. One obvious, antecedent reason is that we do not have a good sense of how many false convictions there are.¹²⁰ A huge percentage of cases are resolved by plea agreement, which often involve some kind of confession evidence,¹²¹ or functionally similar actions by the defendant.¹²² If a significant percentage of these cases are in fact false convictions based on false confessions, then we may have a large number of

those with abnormal mental states, including anxiety, drug-related issues, or depression; those with low intellectual functioning; and those with certain personality traits, such as suggestibility, high compliance, and acquiescence. Gisli H. Gudjonsson, *Psychological Vulnerabilities During Police Interviews. Why Are They Important?*, 15 LEGAL & CRIMINOLOGICAL PSYCH. 161, 167 (2010) (citing Gisli H. Gudjonsson, *The Psychological Vulnerabilities of Witnesses and the Risk of False Accusations and False Confessions*, in WITNESS TESTIMONY: PSYCHOLOGICAL, INVESTIGATIVE AND EVIDENTIAL PERSPECTIVES 61 (Anthony Heaton-Armstrong, Eric Shepherd, Gisli Gudjonsson & David Wolchover eds., 2006)).

120. Some commentators, such as Laurie Magid, argue that there is not enough reason to believe that false confessions are a problem to rectify. See, e.g., Laurie Magid, *Deceptive Police Interrogation Practices: How Far is Too Far?*, 99 MICH. L. REV. 1168, 1171–72, 1194–95 (2001). But such a standard fails to take into account how difficult it is to discover false convictions. The direct empirical evidence shows a significant number of miscarriages of justice, and the indirect empirical evidence demonstrates that the conditions that would give rise to false confessions are commonly present.

121. See, e.g., Lucian E. Dervan, *Bargained Justice: Plea-Bargaining's Innocence Problem and the Brady Safety-Valve*, 2012 UTAH L. REV. 51, 84–86, 84 n.256 (Federal prosecution statistics of how non-dismissed defendants' cases are resolved demonstrate that "over 95 percent of defendants in the criminal justice system plead guilty and, in most cases, such confessions are prompted by offers of leniency or other benefits from the prosecution."); Anna Roberts, *Arrests as Guilt*, 70 ALA. L. REV. 987, 1010–11 (2019) (explaining that a high proportion of non-dismissed defendants' cases are resolved by guilty or *nolo contendere* pleas).

122. An *Alford* plea and a *nolo contendere* plea, which allow the defendant to plead guilty without admitting or denying guilt, are possibilities that do not require the defendant to confess. Mark Gurevich, *Justice Department's Policy of Opposing Nolo Contendere Pleas: A Justification*, 6 CAL. CRIM. L. REV. 2, ¶¶ 1, 20 (2004) (citing *North Carolina v. Alford*, 400 U.S. 25, 37 (1970)). But these pleas are functionally very similar to guilty pleas, with the main difference being that they allow for some saving face for the defendant. *Id.* ¶¶ 10–16.

false confessions of which we may never be aware. Moreover, as observed by Leo, many of our exonerations come from DNA evidence, but “the documented cases appear to represent the proverbial tip of the iceberg.”¹²³ There are many cases where there is no DNA to test.¹²⁴ Indeed, there is good reason to think that, for example, many robbery convictions—where DNA evidence is less common—are false convictions.¹²⁵ “They also do not include false confessions that were dismissed or disproved before trial, . . . those given for crimes that were not subject to postconviction review (especially less serious crimes), and those given in cases that contain confidentiality provisions (e.g., juvenile proceedings).”¹²⁶ Selection biases predominate here: Our exonerations tend to also focus on crimes with serious penalties—such as those where the defendant has been sentenced to death.¹²⁷ That raises the concern that we may be missing scores of false convictions for lesser crimes, where false confessions or pleading guilty are much more prevalent. Similarly, resources towards exoneration focus on the most promising cases, and so cases involving confessions or guilty pleas face an obstacle in attracting the attention of those working for exoneration, because those cases seem inherently difficult to overturn. But with that caveat, the empirical evidence is robust enough to give us strong reason to support the above conclusions and, consequently, to be concerned about the epistemic value and practical dangers of confession evidence.

First, the empirical evidence shows that it is entirely plausible that an innocent defendant would falsely confess, with a substantial chance of it occurring. Consider Garrett’s monumental study of the first 200 cases involving exoneration based on DNA evidence.¹²⁸ Of these 200 cases, the vast majority involved serious crimes: 141 involved rape, forty-four involved rape–murder, and twelve involved murder.¹²⁹ Among other reasons, these crimes also are the most likely to involve DNA evidence.¹³⁰ Of the 200 cases, 16% involved false confessions, and a further thirteen cases involved self-inculpatory remarks short of a confession, for a total of 22% of these convictions tainted with the defendant’s false confession or self-inculpatory statements.¹³¹ Focusing on the cases involving murder

123. Leo, *supra* note 85, at 332.

124. *Id.*

125. Gross et al., *supra* note 117, at 530–31 (comparing robbery to rape and explaining that many of the risk factors for false rape convictions manifest, and are bigger risks, in robberies, but that robberies generally lack the potential for DNA-evidence exonerations).

126. Leo, *supra* note 85, at 332.

127. Gross et al., *supra* note 117, at 531–33.

128. See generally Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55 (2008).

129. *Id.* at 73–74.

130. *Id.* at 73, 117.

131. *Id.* at 88 & n.124; see also EDWARD CONNORS, THOMAS LUNDREGAN, NEAL MILLER & TOM McEWEN, U.S. DEP’T OF JUST., NCJ 161258, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL 16–17 (1996), <https://www.ojp.gov/pdffiles/dnaevid.pdf> [<https://perma.cc/4LJS-P84K>] (detailing that approximately 21%, or 6 of 28, exonerations involved false confessions or self-inculpatory statements).

and rape–murder, a staggering 37.5% of cases involved false confessions.¹³² This conclusion is reinforced by the data collected on the National Registry of Exonerations, which has found that over 12% of exonerations involve a false confession, and over 22% of murder convictions stemmed from false confessions.¹³³ And as discussed, there is good reason to think that exonerations are under-representative with respect to false confessions.¹³⁴ Thus, the empirical data strongly points to the conclusion that it is entirely plausible that an innocent defendant will actually falsely confess.

What’s more, there is good reason to think that the chances that an innocent defendant will falsely confess are similar to the chances that a guilty defendant will truly confess. Garrett included a “matched comparison group” as part of his study, which paired “each of the exonerees [in the innocence group] with a case in which no DNA testing was conducted.”¹³⁵ Garrett’s method was to randomly select convictions from the set of reported decisions that “matched” the exoneration cases, in terms of the same criminal charges, in the same state, and in the same time period as the paired exoneration case.¹³⁶ These matched cases could not themselves be verified as innocent or guilty.¹³⁷ Notwithstanding, 19% of the cases in this group involved confessions.¹³⁸ Assuming that all of these cases involved true guilty convictions, the confession rate of the guilty

132. See Garrett, *supra* note 128, at 90; see also Welsh S. White, *Confessions in Capital Cases*, 2003 U. ILL. L. REV. 979, 984 (The Innocence Project at Cardozo School of Law reported that out of thirty-five intentional homicide case exonerations, twenty-three (over 65%) involved false confessions.); Gross et al., *supra* note 117, at 544 (finding over 20% of murder exonerations involved false confessions); Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 26–27, 31–36, 57–58 (1987) (Out of 350 homicide and rape exonerations with sufficient records for analysis, in forty-nine cases (14.3%), the false confession was the primary or contributing cause of the false conviction.).

In contrast to the high percentage of murder and rape–murder cases that involve false confessions (25% and 41%, respectively), only 6% of rape cases involve a false confession. Garrett, *supra* note 128, at 90. The discrepancy in confession rates between rape, on the one hand, and murder and rape–murder, on the other, is perhaps surprising. One potential explanation is that in serious cases, law enforcement and the prosecution have less interest in incentivizing the defendant to confess through the promise of less punishment. See *id.* This default remains in cases of rape, where there is more likely to be victim identification evidence that obviates the need for a confession. See *id.* at 75, 78–79, 90. In contrast, in murder or rape–murder cases, a confession may be more necessary, and so law enforcement and the prosecution may be more likely to incentivize or pressure the defendant to obtain a confession. See *id.* at 75, 90.

133. *Percentage of Exonerations by Contributing Factor and Type of Crime*, THE NAT’L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx> [https://perma.cc/34AP-ZMGJ].

134. See *supra* notes 121–27 and accompanying text.

135. Garrett, *supra* note 128, at 59–60, 69–70. The “match[ing]” here does not seem to look at the actual evidence in the case, like whether there is a confession or not. *Cf. id.* at 60. If Garrett’s matching does not look at the evidence, then we cannot make strong conclusions about the likelihood of confession in a random (true) conviction, but we can observe that the conditions under which some innocent people and some guilty people confess are materially the same.

136. *Id.* at 60.

137. See *id.* at 69.

138. *Id.* at 78.

defendants is strikingly similar to the proven-innocent defendants' confession rate.¹³⁹

Second, the empirical data tells us that false confessions do occur for the reasons of rational calculus and overwhelming pressure. Unfortunately, there is not clear visibility on the nature of the interrogations in the various studies of false confessions and exonerations, so it can be hard to discern the confessors' motivations or reasons. But from what is available, it is clear that the combination of rational calculus and overwhelming pressure is often at play. In a study by Richard A. Leo and Richard J. Ofshe, of twenty-nine false confessions that resulted in conviction, seven, or 24%, resulted from guilty pleas made to avoid a harsher penalty—typically the death penalty.¹⁴⁰ That is the prototypical example of rational calculus—because falsely confessing to avoid the death penalty is obviously rational. Welsh S. White has noted that threats and promises regarding whether a capital defendant will be executed and misrepresentations of forensic evidence—both tactics that appeal to the defendant's rational calculus—appear to be particularly problematic in leading to unreliable and false confessions.¹⁴¹ In Drizin and Leo's study of false confessions in which the length of the interrogation could be determined, 84% of interrogations that led to false confessions lasted over six hours, with average and median lengths of sixteen and twelve hours, respectively.¹⁴² These numbers are shocking. And, given what we know about the nature of law enforcement interrogation methods, it is pellucid that defendants experience an overwhelming atmosphere of pressure to confess. In the Gross, Jacoby, Matheson, and Montgomery study of exonerations, of thirty-three cases involving false confessions with sufficient records, twenty-eight (over 84%) revealed law enforcement coercion.¹⁴³ The empirical studies confirm what we would predict in light of the theoretical motivations of rational defendants and the practices of law enforcement: Defendants are regularly incentivized and pressured—both in terms of rational decision-making on punishment and in terms of the atmosphere of anxiety, isolation, and hopelessness—to confess.

Third, and finally, the evidentiary value of a confession is greatly overestimated by judges and jurors. One particularly telling fact is that, from Garrett's study, when there was a false confession, the government would frequently rely on very little else to convict.¹⁴⁴ Out of thirty-one convictions involving a false confession, the confession was the central evidence of guilt in only seven cases, and in nine cases “the confession was accompanied by only one other type of evidence (a jailhouse snitch, an eyewitness

139. *See id.* at 76 (finding that the confession rate of proven-innocent defendants was 16%).

140. Leo & Ofshe, *supra* note 75, 478–79.

141. White, *supra* note 132, at 1008–19.

142. *See* Drizin & Leo, *supra* note 77, at 948.

143. *See* Gross et al., *supra* note 117, at 544 n.47 (noting that there were fifty-one false confessions in total: eighteen with insufficient records, five voluntary confessions, and twenty-eight that involved coercion).

144. Garrett, *supra* note 128, at 89.

ness, or blood or hair evidence).”¹⁴⁵ This tells us that both law enforcement and prosecution officials often view the confession as so powerful that further investigation and evidentiary support is unnecessary to determine the true perpetrator or to convict the defendant. Now, as Drizin and Leo’s study of 125 “proven false” confessions shows, false confessions do not always lead to convictions.¹⁴⁶ But nevertheless, the data reveals the potency of confession evidence: Out of the 125 proven false confessions, forty-four (or 35%) still led to convictions.¹⁴⁷ Given that these confessions were provably false and given the high BARD standard of review, we would expect these false confessions to have led to false convictions far fewer than 35% of the time. The disconnect occurs because all of the relevant actors misapprehend the probative value of false confessions.¹⁴⁸ With respect to law enforcement, that misapprehension is in large part due to the documented misconception by officers that they can detect truth from falsity in defendants’ statements.¹⁴⁹

The problem is compounded by the public’s misperception of confession evidence as strong, because of the “myth” that a false confession would only occur with the imposition of torture on the defendant or the defendant’s mental illness.¹⁵⁰ In Jacqueline McMurtrie’s words, “The idea that an individual would [falsely] confess to a crime, particularly a horrific crime such as murder or rape, without being subject to physical torture, runs counter to the intuition of most people.”¹⁵¹ An experimental study by Saul Kassin and Katherine Neumann showed that confession evidence was “uniquely potent,” compared to eyewitness testimony and character evidence.¹⁵² That study provided sixty-two undergraduate psychology students with summaries of four criminal trials (murder, rape, aggravated assault, and automobile theft).¹⁵³ “Each trial contained weak circumstantial evidence plus a confession, eyewitness identification, or character witness,” or nothing further (as control).¹⁵⁴ In every case, the confession was far more likely to garner a conviction than the character witness; and in all but the automobile theft case, the confession was stronger than the eyewitness identification, where they were similar in strength.¹⁵⁵ Another study, by Sara Appleby, Lisa Hasel, and Saul Kassin, further confirmed

145. *Id.* at 88–89.

146. Drizin & Leo, *supra* note 77, at 950–51 (emphasis omitted).

147. *Id.* at 951.

148. *See* Leo, *supra* note 85, at 341.

149. *Id.* at 334.

150. Drizin & Leo, *supra* note 77, at 910.

151. Jacqueline McMurtrie, *The Role of the Social Sciences in Preventing Wrongful Convictions*, 42 AM. CRIM. L. REV. 1271, 1280 (2005).

152. Kassin & Neumann, *supra* note 76, at 475–76, 482.

153. *Id.* at 472–74.

154. *Id.* at 472.

155. *Id.* at 476. The researchers also suggested that the eyewitness testimony may have been stronger in the automobile theft case, because the control summary of the circumstantial evidence in the automobile theft case included an eyewitness, unlike the others, so the additional eyewitness served to corroborate the control summary. *Id.*

the potency of confession evidence.¹⁵⁶ There, 141 college students served as jurors in a mock trial and were presented a summary of a rape–murder case.¹⁵⁷ They were partitioned in nine groups, receiving either no confession or one of eight written versions of a signed confession that differed along three dimensions: presence or absence of details, presence or absence of motive explanation, and presence or absence of apology.¹⁵⁸ In the no-confession group, 30% of the jurors voted to convict, but in the other eight confession groups, 95% voted to convict, with little difference among the confession groups—even bare admissions of guilt were sufficient to render a guilty verdict.¹⁵⁹

Furthermore, “When courts fail to dismiss these false confession cases at the pretrial stage, the overwhelming majority of defendants will be wrongfully convicted. In a 1998 study of sixty false confessions, 73 percent of the false confessors whose cases went to trial were wrongly convicted[.]”¹⁶⁰ Indeed, in Drizin and Leo’s study of 125 false confessions, of the thirty-seven cases that went to jury trial, the jury convicted twenty-eight (or 75.7%) of them.¹⁶¹ And the specific empirical results arise from cases where it has become clear that there was a wrongful conviction, but there may be numerous cases which escape such realization, which then further increase the true likelihood of conviction in light of a false confession.

The conclusion is clear: Whether it be law enforcement, prosecutors, or jurors, the impact of a confession is dramatic and often dispositive of the defendant’s case, beyond the rational and probative weight that the confession actually confers.

V. THE MORAL HAZARDS OF CONFESSION EVIDENCE

Apart from the potential for engendering false confessions and consequent false convictions, confession evidence also inflicts moral harms on defendants. To understand the nature of that harm, consider again the choice that innocent defendants in our criminal justice system may face: risk a prosecution, which may result in the harsh penalty, or falsely confess and gain a significant chance of escaping the harsher penalty. That is an odious choice for the defendant and is why we need robust procedural protections to ensure that innocent defendants are not subjected to wrongful punishment. But it is more than the consequences of the choice

156. See Sara C. Appleby, Lisa E. Hasel & Saul M. Kassin, *Police-Induced Confessions: An Empirical Analysis of Their Content and Impact*, 19 *PSYCH., CRIME & L.* 111, 121 (2013).

157. *Id.* at 119–21.

158. *Id.* at 120–21.

159. *Id.* at 121, 124.

160. Leo et al., *supra* note 45, at 484–85.

161. See Drizin & Leo, *supra* note 77, at 953 (stating that of the thirty-seven false confessions that went to trial, twenty-eight were convicted by jury, two by judge, and seven acquitted).

that cause harm. The presentation of the choice to the defendant is itself harmful.

Consider the definition of torture under the international treaty, the 1984 Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (CAT):

For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.¹⁶²

Other philosophically minded definitions of torture include “an assault on the defenseless”;¹⁶³ the creation of the experience of pain, fear, and uncertainty by use of the target’s own body and emotions—in an act of self-betrayal;¹⁶⁴ and the “intentional saturation of [the target’s] consciousness with panic.”¹⁶⁵ There are a number of theories on the locus of the immorality of torture, including in violating human dignity, violating human autonomy, and treating people as means rather than ends.¹⁶⁶

As we have seen from practice and empirical evidence, interrogation imposes significant mental harms—in the forms of pain, suffering, fear, uncertainty, anxiety, and panic—and it demands of defendants that they confess to potentially alleviate themselves of these harms.¹⁶⁷ Furthermore, as we have seen, the canonical interrogation techniques employed by law enforcement are indeed designed to isolate defendants and create feelings of hopelessness and anxiety in them.¹⁶⁸ Moreover, even without explicit use of these techniques, in the context of our criminal justice system, interrogation in the course of an investigation itself would succeed in inflicting the same impact on defendants.¹⁶⁹ Indeed, by creating outlets for the defendant to potentially escape the harms, namely by confession,

162. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, Dec. 10, 1984, 108 Stat. 382, 1465 U.N.T.S. 85.

163. See Henry Shue, *Torture*, 7 PHIL. & PUB. AFFS. 124, 130 (1978).

164. David Sussman, *What’s Wrong with Torture?*, 33 PHIL. & PUB. AFFS. 1, 4–7 (2005).

165. Jacob Bronsther, *Torture and Respect*, 109 J. CRIM. L. & CRIMINOLOGY 423, 447 (2019).

166. See *id.* at 473–76; Sussman, *supra* note 164, at 14.

167. See *supra* Sections IV.I.A & IV.I.B.

168. See *supra* Sections IV.I.A & IV.I.B.

169. Indeed, the Court in *Miranda* recognized that even without law enforcement utilizing particular “stratagems” to induce confessions, custodial interrogation itself imposes pressures on defendants and “trades on [their] weakness[es].” *Miranda v. Arizona*, 384 U.S. 436, 455 (1966). My point extrapolates to say that even when a defendant is not in custody, interrogation in the course of an investigation can impose many of those pressures.

interrogation capitalizes on the defendant's self-betrayal as well. And, as discussed below, the inefficacy of procedural protections to insulate defendants from the overwhelming pressures of the criminal justice system leaves defendants largely defenseless when subjected to interrogation.¹⁷⁰ They must either bear the brunt of the mental pain caused by those pressures or capitulate. Consequently, interrogation in our criminal justice system—when it exploits and manipulates defendants by use of mental pain—inflicts moral harms on defendants.¹⁷¹

Importantly, interrogation in our criminal justice system does not merely pose the risk of such moral harms—they are a practical certainty. The moral harms persist even if the defendant does not capitulate and confess because the defendant would still be subjected to the experience of mental pain. Indeed, the moral harms persist even if law enforcement does not use tactics that overtly seek to exploit and manipulate the defendant through mental pain because pressures that interrogation will inevitably capitalize on, such as the rational calculus of punishment and the overwhelming nature of investigation, are endemic to the criminal justice system.¹⁷² Indeed, the moral harms persist even if the defendant is not innocent of the crime. Prior to conviction, the defendant enjoys due process rights and a presumption of innocence that should shield the defendant from such tactics that impose harm on the defendant.¹⁷³

One might object that some of these pressures are unavoidable, for they are embedded in the foundations of the criminal justice system. This is true: criminal investigation does impose mental and physical harms on defendants. And we should endeavor to reduce those harms as much as possible. This is precisely my contention with respect to confession evidence. Given its severe epistemic inadequacies *and* the moral harms it causes, we should exclude confession evidence. As I discuss below, excluding confession evidence is no panacea to the problem of moral harm—some of these moral harms will arise from interrogation and investigation itself. But in excluding the potent confession evidence, we may reduce the incentives of law enforcement and thus mitigate the moral harms that defendants face.

170. See *infra* Section VI.I.B.

171. Such moral illegitimacy is presumptive. There may be particular situations where torture is morally justified. Seumas Miller, *Torture*, STAN. ENCYCLOPEDIA OF PHIL. (May 5, 2017), <https://plato.stanford.edu/entries/torture> [<https://perma.cc/7J7U-9F92>]. That is a controversial question. See *id.* But what should be uncontroversial is that it is morally wrongful for the state generally to torture criminal defendants through interrogation as a matter of course. See *id.*

172. See *Miranda*, 384 U.S. at 455.

173. Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 HASTINGS L.J. 457, 457–58 (1989). But see Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 724–25 (2011) (“Despite the historical import of the presumption of innocence, changes in federal and state statutes have increased the opportunity for judges to predict guilt before trial.”).

VI. THE DOCTRINAL INEFFECTACY IN ENSURING RELIABLE CONFESSIONS (AND PROTECTING DEFENDANTS)

I have shown that there is a distinct epistemic weakness to confession evidence and that interrogation inevitably imposes moral harms on defendants, whether they are innocent or guilty. Confession evidence is inert as a theoretical matter, but its probative value is vastly overestimated by the relevant actors in our criminal justice system—law enforcement, prosecutors, and jurors. What’s more, this is not merely theoretical: the practical and empirical evidence tells us that conditions that give rise to false confessions—such as the difficult rational calculus and the overwhelming pressure of investigation—are created and exploited by government actors.¹⁷⁴ As a consequence, many defendants are so pressured, and false confessions likely abound. And the use of overwhelming pressure to exploit and manipulate defendants to confess, which results in mental pain in the form of fear, uncertainty, anxiety, and panic, is morally wrongful and imposes moral harms on defendants.

Of course, the dangers of confession evidence are not unknown. And there are many doctrines that attempt to limit these problems of confessions—in terms of the impact of interrogation on defendants, the occurrence of false confessions, and the devastating results. But these doctrines have been substantially ineffective in solving these problems. Specifically, there are three key doctrinal buckets aimed at addressing these problems: (1) due process limitations on confession evidence to ensure that the evidence was produced from the defendant’s voluntary action;¹⁷⁵ 2) prophylactic rules on interrogation, primarily those from *Miranda*, to ensure the defendant’s voluntariness and intelligence in producing the confession evidence;¹⁷⁶ and (3) evidentiary limitations to ensure the reliability of the confession evidence.¹⁷⁷ I contend that these doctrines fail to protect against the harms of confession evidence. *First*, the doctrines have stringent preconditions, are applied with capacious discretion, and have evolved to incorporate various exceptions such that they do not practically stop the kind of law enforcement and prosecutorial behavior that engenders the problems of confession. *Second*, insofar as these doctrines focus narrowly on the behavior of government officials, these doctrines fail to address the most serious concerns of the rational calculus and oppressive atmosphere, which arise from the foundations of the criminal justice system.

174. See *supra* Section IV.C.

175. See *infra* notes 179–209 and accompanying text.

176. See *infra* notes 210–13 and accompanying text.

177. See *infra* notes 214–24 and accompanying text.

A. THE HISTORY AND LANDSCAPE OF THE DOCTRINE ON
CONFESSION EVIDENCE

1. *Constitutional Doctrines*

The starting point, of course, is the privilege against self-incrimination. That comes from the *nemo tenetur* maxim and finds itself in the text of the Fifth Amendment,¹⁷⁸ which states in relevant part, “No person . . . shall be compelled in any criminal case to be a witness against himself.”¹⁷⁹ The Supreme Court made clear that the self-incrimination privilege extends beyond the courtroom in *Bram v. United States*.¹⁸⁰ Decided in 1897, the case concerned a murder on the high seas.¹⁸¹ The defendant, Bram, who was part of the crew of a ship, allegedly murdered the captain and two others.¹⁸² He was apprehended by the Canadian police when the ship docked in Halifax, Nova Scotia, Canada.¹⁸³ There he was interrogated and confronted with the supposed testimony of an eyewitness and with the suggestion that Bram should say if he had an accomplice to “not have the blame of this horrible crime on [his] own shoulders.”¹⁸⁴ Bram denied the claims, but in so doing, he made incriminating statements that were treated as a confession.¹⁸⁵ At a jury trial, Bram was convicted and then appealed his conviction to the Supreme Court on the basis that the interrogation that led to the incriminating remarks violated the Fifth Amendment’s self-incrimination clause.¹⁸⁶ The Supreme Court agreed and reversed his conviction.¹⁸⁷ Most relevantly, in so doing, the Court introduced a voluntariness standard in determining whether the incriminating remarks were admissible.¹⁸⁸ The Court quoted an influential treatise to state,

‘But a confession, in order to be admissible, must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. A confession can never be received in evidence where the prisoner has been influenced by any threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has

178. *See supra* notes 1–3 and accompanying text.

179. U.S. CONST. amend. V.

180. *See* 168 U.S. 532, 557–58 (1897).

181. *Id.* at 534.

182. *Id.* at 534–37.

183. *Id.* at 536–37.

184. *Id.* at 539.

185. *Id.* The statements made by Bram are beyond what I consider “confession” evidence. They did not consist of “I did it” statements, but rather they unknowingly implied he committed the crime.

186. *Id.* at 534, 540, 542–43.

187. *Id.* at 565, 569.

188. *Id.* at 542–43. *Bram* was also the first case from the Supreme Court that held that the Fifth Amendment applied beyond the courtroom to other kinds of interrogations, including by law enforcement. *See id.* at 557–58.

been exerted.¹⁸⁹

In light of that, the Court stated that the language of “not hav[ing] the blame of this horrible crime on your own shoulders” implicitly suggested a benefit of mitigated punishment in exchange for confession, thus rendering the incriminating statements involuntary.¹⁹⁰

Notably, *Bram*’s theory of involuntariness is considerably robust and broad because even an oblique suggestion at the possibility of the benefits of confession was enough to render the confession involuntary and therefore inadmissible. *Bram* unearthed this principle from the English and early American common law—indeed, citing the *nemo tenetur maxim*—and imported it into the Fifth Amendment.¹⁹¹

Following *Bram*’s limitation on confessions arising from the Fifth Amendment, the Supreme Court decided cases arising from state prosecutions, such as *Brown v. Mississippi*¹⁹² and *Chambers v. Florida*,¹⁹³ finding limits in the Fourteenth Amendment’s Due Process Clause.¹⁹⁴ *Brown*, decided in 1936, dealt with murder charges against Black defendants who confessed after being whipped, beaten, and tortured by a police officer and local mob.¹⁹⁵ Thereafter, they were convicted, based only on the confessions.¹⁹⁶ On appeal, the Supreme Court reversed the sham convictions, reasoning that they violated the Due Process Clause of the Fourteenth Amendment.¹⁹⁷ Similarly, in *Chambers*, four Black defendants were arrested on a murder charge.¹⁹⁸ They were then jailed without any formal charges and questioned for five days.¹⁹⁹ During the five days, they were subjected to numerous interrogations, on the backdrop of the threat of mob violence;²⁰⁰ in the Court’s words, the police interrogators showed “relentless tenacity which ‘broke’ petitioners’ will and rendered them helpless to resist their accusers further.”²⁰¹ Thus, the Court reversed the convictions under the Due Process Clause of the Fourteenth Amendment, stating that “[t]o permit human lives to be forfeited upon confessions thus obtained would make of the constitutional requirement of due process of law a meaningless symbol.”²⁰²

Both of these cases arose under the Fourteenth Amendment in part due to a historically contingent circumstance: at the time they were decided, the protections for criminal defendants in the Fifth Amendment

189. *Id.* at 542–43 (quoting 3 WILLIAM OLDNALL RUSSELL, A TREATISE ON CRIMES AND MISDEMEANORS 478 (Horace Smith & A.P. Perceval Keep eds., 6th ed. 1896)).

190. *Id.* at 563–65.

191. *Id.* at 543–61.

192. 297 U.S. 278 (1936).

193. 309 U.S. 227 (1940).

194. See *Brown*, 297 U.S. at 286–87; *Chambers*, 309 U.S. at 238–41.

195. *Brown*, 297 U.S. at 281–83.

196. *Id.* at 284.

197. *Id.* at 287.

198. *Chambers*, 309 U.S. at 229.

199. *Id.* at 239.

200. *Id.* at 239–40.

201. *Id.* at 240.

202. *Id.* at 239–41.

was only applicable to the federal government (as in *Bram*) and had not yet been incorporated against the states.²⁰³ Thus, the Court looked to due process in the Fourteenth Amendment to develop a requirement of voluntariness and hold these confessions constitutionally inadmissible.²⁰⁴ The doctrine on voluntariness continued to develop through cases like *Spano v. New York*,²⁰⁵ *Colorado v. Connelly*,²⁰⁶ *Arizona v. Fulminante*,²⁰⁷ and others.²⁰⁸ Ultimately, the due process–voluntariness limitations require a showing, in the totality of the circumstances, that law enforcement conduct caused the will of the defendant to be overborne so that the defendant’s statements were not free and voluntary acts.²⁰⁹

Then came the watershed case of *Miranda v. Arizona*, which involved hard interrogations and resulting confessions that resulted in convictions.²¹⁰ In reversing the convictions, the Court set forth the requirement of its now famous *Miranda* warnings:

[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. . . . Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him.²¹¹

203. Mark A. Godsey, *Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination*, 93 CALIF. L. REV. 465, 488 (2005).

204. *See id.* at 488–89.

205. 360 U.S. 315, 320–24 (1959) (Eight-hour long confession, persisting through defendant’s repeated requests of counsel, violated due process, not only because of the untrustworthiness of the confession but also because “police must obey the law while enforcing the law” and “in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.”).

206. 479 U.S. 157, 161, 167 (1986) (rejecting defendant’s claim that his confession was involuntary as it was made when mentally ill, because in order for due process voluntariness to be violated there must be wrongful police conduct that caused the confession).

207. 499 U.S. 279, 282–84, 287 (1991) (holding that defendant’s incriminating statements violated due process because they were made to a co-inmate, a paid informant, on the promise of protection from other inmates, which was enough to raise a credible threat of violence that in turn made the confession a product of coercion).

208. *See* Paul Marcus, *It’s Not Just About Miranda: Determining the Voluntariness of Confessions in Criminal Prosecutions*, 40 VAL. U. L. REV. 601, 640 (2006) (first citing *State v. Sawyer*, 561 So. 2d 278 (Fla. Dist. Ct. App. 1990); and then citing *State v. Marshall*, 642 N.W.2d 48 (Minn. Ct. App. 2002)).

209. *See id.* at 607, 642; Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 867 (1981) (explaining the development of the due process–voluntariness test).

210. *Miranda v. Arizona*, 384 U.S. 436, 456–57, 492 (1966).

211. *Id.* at 444–45.

The strictures of *Miranda* and the limitations on law enforcement conduct continued to evolve. For example, in *Michigan v. Mosley*, the Court held that law enforcement is not required to cease interrogation upon the defendant's invocation of the right to remain silent; they can resume questioning some time after.²¹² And then in *Edwards v. Arizona*, the Court held that questioning must cease immediately after a defendant's exercise of the right to counsel and can only recommence when the defendant reinitiates.²¹³

2. *The Evidentiary Doctrine*

Apart from the constitutional limitations, there are also evidentiary doctrines to ensure the reliability of confession evidence. The most important of these is the requirement of corroboration of the confession. The corroboration rule has its foundations in the *corpus delicti* rule that requires that the prosecution "introduce some evidence independent of the confession to establish that the crime described in the confession actually occurred."²¹⁴

Though initially adopted widely, the *corpus delicti* rule seemed to have lost some of its footing, with concerns that it was overbroad and too stringent.²¹⁵ In *Opper v. United States*, the Supreme Court rejected the *corpus delicti* rule in favor of a more lenient corroboration rule.²¹⁶ Jurisdictions across the United States are split on adoption of the corroboration rule or the *corpus delicti* rule.²¹⁷ But even the jurisdictions that have continued with the *corpus delicti* rule have relaxed the threshold of evidence required.²¹⁸ And part of this is because there is a sense that the constitutional doctrines that safeguard the confessing defendant have made the concerns animating the *corpus delicti* rule less salient and concerning.²¹⁹

Apart from the *corpus delicti*/corroboration requirement, the operation of the other evidentiary rules and the adversarial system may limit the dangers of confession evidence. For example, the test of relevance, prototypically in Federal Rules of Evidence Rule 401, provides that evidence is relevant if "(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of

212. *Michigan v. Mosley*, 423 U.S. 96, 104–05 (1975).

213. *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981).

214. David A. Moran, *In Defense of the Corpus Delicti Rule*, 64 OHIO ST. L.J. 817, 817 (2003). *Corpus delicti* literally means "body of the crime." *Id.* at 817 n.1 (citing *Corpus delicti*, BLACK'S LAW DICTIONARY (7th ed. 1999)).

215. *See id.* at 818, 831–35.

216. *Opper v. United States*, 348 U.S. 84, 93 (1954).

217. *See Moran*, *supra* note 214, at 832 n.103, 833 n.106.

218. Thomas A. Mullen, *Rule Without Reason: Requiring Independent Proof of the Corpus Delicti as a Condition of Admitting an Extrajudicial Confession*, 27 U.S.F. L. REV. 385, 416–18 (1993).

219. 1 MCCORMICK ON EVIDENCE § 148, at 913 (Robert P. Mosteller ed., 8th ed. 2020) ("Given the development of other confession law doctrines, especially Fifth Amendment protections as promulgated in *Miranda v. Arizona* and the voluntariness requirement, concerns regarding law enforcement interrogation practices do not provide significant support for the corroboration requirement." (footnote omitted)).

consequence.”²²⁰ Rule 402 provides that the default rule is to admit all relevant evidence,²²¹ but Rule 403 allows for exclusion if the evidence would be unduly prejudicial.²²² Thus, if confession evidence shows obvious failures of reliability and is not captured by a constitutional filter, Rules 401, 402, and 403 could provide an additional protection. Moreover, presenting expert testimony on the nature of false confessions, presented under the prototypical Rule 702,²²³ may be useful to defendants seeking to undermine the jury’s credence in any confession evidence offered against the defendant. That said, courts have been split on whether such testimony passes muster for admission.²²⁴

B. THE PRACTICAL PROBLEMS WITH THE ACTUAL DOCTRINES

Each of these three types of doctrines has substantial problems in safeguarding defendants. Of course, as a preliminary point, the practical and empirical evidence already presented robustly establishes the inefficacy of the current doctrine. That is, the practical and empirical evidence demonstrates that false confessions occur at a significantly high rate; that the conditions of interrogation, investigation, and prosecution are fertile ground for false confessions to occur; and that when false confessions occur, they often lead to false convictions.²²⁵

And this is not merely accident, but it comes out of the design of the doctrines, the problems of the doctrines are that they have stringent preconditions, are applied with capacious discretion, and have substantial exceptions. Specifically, the *Miranda* prophylactic rules can be waived by the defendant and require clear exercise by the defendant.²²⁶ The due process–voluntariness protections are only triggered by government action, generally require extreme conduct, and provide unclear guidance about what is allowed. Finally, the evidentiary limitations are capacious, without an understanding of the jury’s capabilities.

1. *Miranda* Prophylactic Rules Are Absent

The structure of *Miranda*’s rules require that the defendant who faces interrogation and investigation exercise the protections afforded.²²⁷ Thus, the primary way in which *Miranda* is supposed to protect the defendant is through the defendant’s behavior. If law enforcement delivered *Miranda*

220. FED. R. EVID. 401.

221. *Id.* at 402.

222. *Id.* at 403.

223. *Id.* at 702.

224. For a comprehensive analysis of the state of the case law on admission of expert testimony on confessions, see Nadia Soree, Comment, *When the Innocent Speak: False Confessions, Constitutional Safeguards, and the Role of Expert Testimony*, 32 AM. J. CRIM. L. 191, 227–55 (2005).

225. *See supra* Part IV.

226. *See* *Miranda v. Arizona*, 384 U.S. 436, 444–45 (1966) (explaining that the person must indicate that he wants to speak with an attorney or that he does not wish to be questioned for the *Miranda* protections to take effect).

227. *See id.*

warnings but did nothing further to change their interrogation style, and no defendants exercised their rights under *Miranda*, then we would expect no changes in outcomes.

Consequently, there are at least two ways in which these *Miranda* rules do not take effect: waiver and the requirement of clear and continued exercise. First, *Miranda* rights can be waived by defendants,²²⁸ which then blocks the primary prophylactic effect. And the data tells us that defendants very frequently waive their *Miranda* rights. In a study by Leo, over 78% of defendants waived their *Miranda* rights and proceeded with interrogation.²²⁹ In an empirical study by Paul Cassell and Bret Hayman, almost 84% of defendants waived their *Miranda* rights and proceeded with interrogation.²³⁰ Thus, for a great number of cases, *Miranda*'s primary pathway of protecting defendants does not materialize. Indeed, after the *Miranda* warnings are given, *Miranda* "provides virtually no restrictions on interrogation practices designed to induce *Miranda* waivers."²³¹ Thus, for the people who are most vulnerable to the perils of interrogation, *Miranda* has little effect because it rarely comes into play.

Second, the post-*Miranda* case law has required of defendants a high degree of clarity and resolve in the exercise of their *Miranda* rights. The Supreme Court has allowed law enforcement tools to continue pressure on defendants, even after defendants have attempted to invoke their rights.²³² In *Michigan v. Mosley*, the Court held that law enforcement can reapproach a defendant after the defendant exercises their right to remain silent.²³³ And in *Davis v. United States*, the Court required that a defendant articulate the desire for counsel's presence sufficiently clearly that a reasonable officer would understand it to be a request for an attorney.²³⁴ In the abstract, these requirements seem reasonable enough. But the impact of these decisions in practice is far-reaching. Law enforcement interrogators wield a great deal of power in the actual interrogation.²³⁵ *Miranda* itself recognized this: "The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators."²³⁶

Indeed, the manuals on interrogation instruct investigators on how to deflect and circumvent potential invocations of *Miranda* by defendants. For an illustrative example, suppose a defendant says, "Maybe I need an attorney." Post-*Miranda* case law would allow interrogators to ignore the

228. *Id.* at 444.

229. Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 276, 286 (1996).

230. Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839, 859 (1996).

231. White, *supra* note 68, at 1217.

232. See *Michigan v. Mosley*, 423 U.S. 96, 105–06 (1975); *Davis v. United States*, 512 U.S. 452, 459 (1994).

233. *Mosley*, 423 U.S. at 105–06.

234. *Davis*, 512 U.S. at 459.

235. White, *supra* note 68, at 1215.

236. *Miranda v. Arizona*, 384 U.S. 436, 469 (1966).

comment and proceed, or respond to convince the defendant otherwise. The influential Inbau Interrogation Manual suggests *inter alia* that the interrogator could respond, "I'm only looking for the truth, and if you're telling the truth, that's it. You can handle this by yourself."²³⁷ Here again, the defendants most vulnerable to falsely confess will often not be able to exercise the kind of resolve over time and clarity of desire to invoke *Miranda* rights, especially against law enforcement tactics that are specifically devised to counter the defendants' ability to do so. So, we have an even further diminished ability of defendants to exercise their *Miranda* rights.

2. *Due Process–Voluntariness Limitations Are Failing*

The due process–voluntariness limitations serve as a backstop to the *Miranda* prophylactic rules, guarding against violations when the prophylactic rules are ineffectual. As we have seen, because *Miranda* rights are often waived or not exercised, the due process–voluntariness limitations must operate to protect defendants from the harms of confession evidence. However, because of the requirements of government action and extreme conduct, and the lack of clear guidance on these requirements, the due process–voluntariness limitation has proven ineffectual.

In *Connelly*, the Court made a prerequisite for the due process–voluntariness test that there be some offending conduct by law enforcement for purposes of the constitutional protection.²³⁸ George Dix noted that this was a striking change because the focus no longer was the defendant's mental state but rather the nature of the official conduct in coercing the defendant.²³⁹ However, given the potentially oppressive nature of interrogation and the broader investigation, a focus on official conduct rather than the defendant defangs the due process–voluntariness test. The practical facts reveal that law enforcement can dress their conduct in a way that meets the strictures of any requirements imposed upon them and yet still impose a great deal of pressure on the defendant. Consequently, the due process–voluntariness test, by searching for wrongful official conduct, will be blind to many occasions where voluntariness is lacking.

This is made worse by the nature of the examination of official conduct. Under the due process–voluntariness test, what is clearly excluded is extreme conduct by law enforcement, such as "confessions induced by force, threats of force, [or] promises of protection from force" and con-

237. FRED E. INBAU & JOHN E. REID, CRIMINAL INTERROGATION AND CONFESSIONS 112 (1962). These requirements of clarity in exercising *Miranda* rights also impact waivers because most *Miranda* waivers are oral. *See, e.g.*, Cassell & Hayman, *supra* note 230, at 859 (observing in the study that virtually all of the waivers were verbal and not written). As such, law enforcement can interpret a failure to clearly exercise *Miranda* rights as a waiver operationally.

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

239. George E. Dix, *Federal Constitutional Confession Law: The 1986 and 1987 Supreme Court Terms*, 67 TEX. L. REV. 231, 272, 289–90 (1988).

fessions conducted under odious conditions.²⁴⁰ This kind of conduct—likely due to the operation of the due process–voluntariness test itself—is considerably rare.²⁴¹ And though it is laudable that the due process–voluntariness test has curbed the occurrence of this kind of extreme conduct, we know that such extreme conduct is not necessary for the harms of confession evidence to manifest.

Absent such extreme conduct, however, the due process–voluntariness test operates as a totality-of-the-circumstances test that considers both the nature of the putative offending official conduct and the characteristics and circumstances of the defendant.²⁴² This seems not to have constrained law enforcement, who have largely decided to employ tactics that have not been explicitly ruled impermissible.²⁴³ And a review of the case law shows that law enforcement is still allowed to use tactics that can pressure and overwhelm defendants.²⁴⁴

This is further bolstered by the history—where it was the ineffectiveness of the due process–voluntariness test—that led to *Miranda*.²⁴⁵ But, after *Miranda*, the due process–voluntariness test has not become any more restrictive on law enforcement than its pre-*Miranda* incarnation. Indeed, it is arguably less restrictive *because of Miranda*, as the *Miranda* warnings and rights were supposed to serve to protect the defendant.²⁴⁶ As such, there has seemingly been some weakening of the due process–voluntariness test after *Miranda*.²⁴⁷

What emerges from this is a due process–voluntariness test that is blind to a plethora of potential cases of harm arising from confession evidence. That is because the due process–voluntariness test only applies to cases with putative offending official conduct and only clearly prohibits extreme conduct. Consequently, there are a number of cases—where the pressure arises from the broad nature of the interrogation and investigation or where the law enforcement conduct is borderline—that the due process test does not certainly reach and thus does not protect the defendant.

240. White, *supra* note 68, at 1218 (footnotes omitted).

241. *See id.* at 1217–19.

242. *Id.* at 1218.

243. *Id.* at 1218–19; *see also* Lawrence Herman, *The Supreme Court, the Attorney General, and the Good Old Days of Police Interrogation*, 48 OHIO ST. L.J. 733, 752 (1987).

244. *See, e.g.*, *United States v. Villalpando*, 588 F.3d 1124, 1129–30 (7th Cir. 2009) (holding that an officer’s promise to defendant that the officer would aid defendant in avoiding revocation of probation did not render the confession involuntary); *United States v. Turner*, 674 F.3d 420, 433 (5th Cir. 2012) (holding that an officer’s promise that if the defendant “could ‘get it straight,’ he could see his four-year-old daughter’s first day of school” did not render defendant’s incriminating statements involuntary).

245. White, *supra* note 68, at 1219; *see also* Geoffrey R. Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 102–03 (stating that the limitations of the voluntariness test led the Court to decide *Miranda*).

246. White, *supra* note 68, at 1219; Louis Michael Seidman, *Brown and Miranda*, 80 CALIF. L. REV. 673, 744–45 (1992).

247. White, *supra* note 68, at 1219; Seidman, *supra* note 246, at 744–45.

3. *The Evidentiary Limitations Are Feeble*

With the ineffectiveness of the constitutional protections, the evidentiary limitations are the last line of defense. But these too have failed to do the required work. The main problem with these evidentiary limitations is that they leave too much to the jury, where the jury lacks precisely the rational capabilities to competently assess the evidence.

The *corpus delicti* rule and the more limited corroboration rule are useful insofar as they exclude confessions in obviously wrong cases, but they do not significantly protect against the current problems of confession evidence. That is because they serve as a low bar. So long as there is independent evidence of a crime's commission, that is sufficient to pass through the tests.²⁴⁸ That serves an important purpose. It ensures that baseless, false confessions, which are the ones most likely caused by egregious conduct, do not result in false convictions. But the *corpus delicti* and corroboration rules do not help much in the troublesome cases that have persisted. In prototypical cases of interrogation, there is sufficient suspicion of defendants to subject them to interrogation²⁴⁹—and that will be enough to pass through the *corpus delicti* and corroboration tests.

Similarly, the test for relevance of evidence is not a significant bar to confession evidence.²⁵⁰ Though I have shown that confession evidence is of low probative value, with high potential for undue prejudice, courts have rarely barred confession evidence on the basis of relevance or prejudice.²⁵¹ Insofar as these rules do restrict confession evidence, they would likely be duplicative of the constitutional rules. That is, for example, a confession produced by means of physical threat may be also restricted as a matter of reliability, in addition to the constitutional violations.

From an evidentiary perspective, the prevailing attitude and justification for the leniency of these rules is that the adversarial system is the best check on the epistemic value of the evidence and that the jury should be allowed to make the determination.²⁵² However, this is precisely the wrong view, given the incompetencies of the jury. As shown above, juries irrationally overestimate the probative value of evidence to prove the necessary facts and are infected with prejudicial bias.²⁵³ In particular, jurors do not properly understand the rates of confessions and false confessions, the nature of interrogation, and the potential reasons for

248. See Mullen, *supra* note 218, at 416–17.

249. See *supra* note 85 and accompanying text.

250. See FED. R. EVID. 401–03.

251. See, e.g., Milhizer, *supra* note 75, at 4 (“[C]onfessions of even questionable reliability are often treated as dispositive by police, prosecutors, judges, juries, and even defense attorneys.”); Drizin & Leo, *supra* note 77, at 922 (“Judges are conditioned to disbelieve claims of innocence and almost never suppress confessions, even highly questionable ones.”). I have not been able to find any case, state or federal, in WestLaw’s database where a confession was barred for failure of relevance on the basis of its unreliability.

252. The Federal Rules of Evidence place great emphasis on the role of the jury as the fact finder and are hesitant to usurp the jury’s role. See FED. R. EVID. 703–04.

253. See *supra* Sections III.I.B, IV.I.C.

confession. What's more, the most potent evidence for defendants on these issues—namely, defendants' own testimonies—is severely compromised because defendants must discredit their own words (in the confession) and thus themselves.

The other evidence that may be useful on these topics is expert testimony. But courts have been mixed in their reception of expert evidence on confessions.²⁵⁴ They either do not think that the testimony is reliable under scientific standards, prototypically under Rule 702²⁵⁵ and the *Daubert*²⁵⁶ or *Frye*²⁵⁷ standards, or they believe that such evidence would be potentially confusing and prejudicial to the jury.²⁵⁸ In cases where the expert evidence is barred, there does seem to be an overarching sensibility in judges that juries are competent to assess confessions subjected to the adversarial process, without the need for expert intervention.²⁵⁹ That is because anything that experts may add could be brought to the jury's attention through case-specific facts about the nature of the interrogation and the psyche of the confessing defendant.²⁶⁰

The most promising pathway is the use of expert evidence. It has the best chance of educating jurors about the pressures and decision-making of the confessing defendant. But it is not yet clear how such expert evidence impacts the jurors' understanding.²⁶¹ One cause of concern is that, because both sides will submit experts, expert testimony will simply result in the dreaded "battle of [the] experts."²⁶² In such a battle, both sides

254. See Soree, *supra* note 224, at 227–55.

255. FED. R. EVID. 702.

256. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

257. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

258. See Soree, *supra* note 224, at 243, 262.

259. *Id.* at 236–37, 247–51; Brian Cutler, Keith A. Findley & Danielle Loney, *Expert Testimony on Interrogation and False Confession*, 82 UMKC L. REV. 589, 600 (2014) ("Frequently, however, the testimony is excluded on the basis that the evidence will not 'help' the jury because it is within the common experience and knowledge of ordinary people and therefore the testimony invades the province of the jury to decide credibility questions for itself."); Danielle E. Chojnacki, Michael D. Cicchini & Lawrence T. White, *An Empirical Basis for the Admission of Expert Testimony on False Confessions*, 40 ARIZ. ST. L.J. 1, 21–26 (2008); Christopher Slobogin, *The Structure of Expertise in Criminal Cases*, 34 SETON HALL L. REV. 105, 114–15 (2003) (examining the admissibility of expert testimony on false confessions); see also *United States v. Adams*, 271 F.3d 1236, 1245 (10th Cir. 2001); *People v. Son*, 93 Cal. Rptr. 2d 871, 883 (Cal. Ct. App. 2000); *People v. Gilliam*, 670 N.E.2d 606, 619 (Ill. 1996); *People v. Polk*, 942 N.E.2d 44, 63–64 (Ill. App. Ct. 2010); *State v. Davis*, 32 S.W.3d 603, 608–09 (Mo. Ct. App. 2000); *State v. Free*, 798 A.2d 83, 95–96 (N.J. Super. Ct. App. Div. 2002).

260. See, e.g., *Free*, 798 A.2d at 96.

261. See Neil Vidmar & Shari Seidman Diamond, *Juries and Expert Evidence*, 66 BROOK. L. REV. 1121, 1160–66 (2001) (surveying studies on experts' testimony on eyewitness testimony, which show some increased sensitivity to relevant considerations but not an overall increased skepticism of eyewitness testimony); Kelsey S. Henderson & Lora M. Levett, *Can Expert Testimony Sensitize Jurors to Variations in Confession Evidence?*, 40 LAW & HUM. BEHAV. 638, 647–48 (2016) (showing some promise of expert testimony in sensitizing jurors to features of confessions); Stephen J. Ceci & Richard D. Friedman, *The Suggestibility of Children: Scientific Research and Legal Implications*, 86 CORNELL L. REV. 33, 98–103 (2000) (arguing for expert testimony regarding the suggestibility of children but recognizing the problem of the "battle of the experts").

262. Vidmar & Diamond, *supra* note 261, at 1162.

may be able to inundate the jury with information to an equal duel, and the expert testimony does little work in effectively educating the jury.²⁶³

Ultimately, in practice, the standard evidentiary limitations—the *corpus delicti*/corroboration rule and the rules on relevance and prejudice—do little to protect defendants beyond the constitutional protections. They do not tackle the main problem—the gap between the real probative value of confession evidence and potential for prejudice and the jury’s estimation of these facts. Expert testimony offers potential recourse in this regard, but the realities of the adversarial system may also undercut the ability to practicably educate the jury and improve its decision-making.

C. THE MISFOCUS OF DOCTRINAL LIMITATIONS

As seen, the constitutional doctrines focus on law enforcement conduct, seeking to eliminate a narrow set of practices. Outside of those practices, the constitutional doctrine is inert. The doctrines fail to understand the key point that innocent criminal defendants may have strong reasons to falsely confess, even without any intervening offensive conduct by law enforcement and the prosecution, due to pressures inherent in the criminal justice system. The doctrines fail to reach the problem that the entirety of the criminal justice system—among other things, the nature of interrogation and investigation, the overcriminalization of various types of conduct, the exceedingly lengthy sentences for crimes and the nature of plea bargaining, and the horrific conditions of incarceration—imposes sufficient pressures on the innocent defendant to falsely confess.²⁶⁴ The evidentiary rules fail to recognize that jurors are by-and-large unfamiliar with the fact that innocent criminal defendants have strong reasons to falsely confess, instead assuming that the adversarial system is capable of

263. See, e.g., Mark S. Brodin, *Behavioral Science Evidence in the Age of Daubert: Reflections of A Skeptic*, 73 U. CIN. L. REV. 867, 903–12, 928, 939 & n.334 (2005) (discussing the concerns of the “battle of experts” with respect to eyewitness testimony); see also *infra* Section VII.B (discussing the problems with the solution of expert evidence at greater length).

264. See, e.g., Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 223–24 (2007) (discussing the dangers of overcriminalization); Stuntz, *supra* note 84, at 519–20, 576–78 (discussing the positive relationship between expansive laws and the rate of plea bargaining); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2487–91 (2004) (explaining how high maximum sentences impact plea bargaining); James E. Robertson, *A Clean Heart and an Empty Head: The Supreme Court and Sexual Terrorism in Prison*, 81 N.C. L. REV. 433, 440–45 (2003) (detailing the prevalence of sexual violence in U.S. prisons); Charles Fried, *Reflections on Crime and Punishment*, 30 SUFFOLK U. L. REV. 681, 683–88 (1997) (describing the deplorable conditions of prisons); Matt Ford, *The Everyday Brutality of America’s Prisons*, NEW REPUBLIC (Apr. 5, 2019), <https://newrepublic.com/article/153473/everyday-brutality-americas-prisons> [https://perma.cc/X5JA-3EB9]; HUM. RTS. WATCH, PRISON CONDITIONS IN THE UNITED STATES 33–89 (1991), <https://www.hrw.org/sites/default/files/reports/US91N.pdf> [https://perma.cc/7DCL-NMCJ]; Thea Johnson, *Fictional Pleas*, 94 IND. L.J. 855, 860–68 (2019) (explaining the practices of “creative plea bargaining” and “fictional pleas,” where defendants plea to criminal acts with sanctions less serious than they might generally obtain or where defendants plea to criminal acts they did not commit in order to avoid collateral consequences, including deportation and sex offender registration).

bringing this fact to light and that juries are competent to consider this in assessing confession evidence. But, unfortunately, these assumptions have proven to be false. Without rectifying these misapprehensions, confession evidence continues, and will continue, to pose serious risks of harm to defendants.

VII. THE SOLUTION OF ABOLISHING CONFESSION EVIDENCE

I have made the case that confession evidence poses a significant potential for harm to defendants, as a matter of theory, practice, empirical evidence, doctrine, and considerations of due process and morality.

I propose a simple solution: We must abolish confession evidence against the defendant in criminal trials. Thus, I suggest the following text for the rule of the abolition of confession evidence:

In any criminal proceeding, confession evidence is not admissible. Confession evidence is defined as:

- (1) A statement by a defendant;
- (2) claiming that the defendant committed a crime or satisfied particular elements of a crime;
- (3) where the defendant knows that the statement will be used by the government in a criminal prosecution of the defendant to establish or help establish an element of a crime based on prior conduct.²⁶⁵

As stated above, this rule excludes incriminating statements made by a defendant to an undercover agent or informant, for example, because in such a situation, the defendant does not have knowledge that the statement would be used to establish the crime. Also, importantly, the proposed rule does not necessarily exclude all incriminating statements, such as statements merely evincing that a defendant had knowledge of key facts of the crime.

The confession abolition rule could and should apply to plea bargains as well. The language of the rule says “any criminal proceeding,” which includes plea allocutions, not just trials. Allowing confessions, or their functional equivalent, in plea bargains but excluding them from trials may not change the detrimental results from confession evidence. That is, it could be that the pressures imposed by law enforcement and felt by defendants at the investigatory stage can be levied by prosecutors at the adjudicatory stage. This is especially true of the rational calculus of punishment, but it may also be true of the pressures of being subjected to the jeopardy of trial.

We could envision a rule that only applies to trial proceedings and not plea proceedings. And such a rule may have useful impact. Though few

265. The rule is itself inspired by and modeled on the Federal Rules of Evidence Rule 412, entitled “Sex-Offense Cases: The Victim’s Sexual Behavior or Predisposition” and governing sexual proclivity and predisposition evidence against a victim of a sex offense. *See* FED. R. EVID. 412.

criminal cases go to trial, and the vast majority are handled by plea bargain,²⁶⁶ the rule's impact on what evidence is available at trial would then also impact the negotiation of pleas. If confession evidence is not allowed because of its potency, the chances of conviction are diminished, even if they remain high. Defendants can use that to negotiate from a position of greater strength than they had before. But such a rule again fails to recognize that the pressures of the criminal justice system—in terms of the sentences that a defendant faces and the overwhelming nature of investigation and jeopardy—can lead to false confession.²⁶⁷ Further restricting law enforcement conduct in obtaining confessions does not substantially mitigate those pressures,²⁶⁸ and thus does not adequately solve the problems of confession evidence.

A. THE AFFIRMATIVE CASE FOR THE ABOLITION OF CONFESSION EVIDENCE

The rule may, at first glance, seem radical. In one sense, it is: it would be a great departure from practice as usual. Confessions, and pleas that rely on confessions or their functional equivalents, occur in the vast majority of criminal cases.²⁶⁹ Thus, the proposal would impact almost all criminal cases. But in the more important sense—what rationally comports with our legal commitments to defendants—abolishing confession evidence is not radical. It is the most sensible solution.

As we have seen above, confession evidence is, theoretically and empirically, weak in terms of probative value, but prejudicially overestimated by juries and judges. This is precisely when evidence should be inadmissible. Consider Federal Rules of Evidence Rule 403: “The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”²⁷⁰ The term “misleading the jury” refers “to the possibility of the jury incorrectly evaluating the probative value of a particular item of evidence, usually by overvaluing.”²⁷¹

266. John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do Are Found Guilty*, PEW RSCH. CTR. (June 11, 2019), <https://pewrsr.ch/2F1Qxn7> [<https://perma.cc/ND98-WYT7>].

267. The Court has recognized that, in certain circumstances, the adverse consequences that might arise from trial may lead defendants to plead guilty, rather than exercise their trial rights. *See* *United States v. Jackson*, 390 U.S. 570, 571–72, 583 (1968) (holding that a sentencing regime that made death penalty available only on asserting the right to a jury trial impermissibly burdened defendant). Unfortunately, the Court has not embraced this realization. *See* *Brady v. United States*, 397 U.S. 742, 755, 758 (1970) (holding that the fear of receiving the death penalty does not render a guilty plea involuntary or invalid).

268. *See supra* notes 243–44 and accompanying text.

269. Howard B. Terrell & William Logan, *The “False Confession”: Manipulative Interrogation of the Mentally Disordered Criminal Suspect*, 13 AM. J. FORENSIC PSYCHIATRY 29, 29 (1992).

270. FED. R. EVID. 403.

271. MICHAEL H. GRAHAM, *EVIDENCE: AN INTRODUCTORY PROBLEM APPROACH* 22 (2002).

Now, the exclusion of evidence under Rule 403 is a considerably rare remedy,²⁷² but the language of the rule is clear and, given what we know about confession evidence, demands exclusion as a matter of law.

Of course, Rule 403 operates on individualized determinations of pieces of evidence. But the Federal Rules of Evidence also include Rule 412, which operates to exclude most evidence regarding the sexual proclivity and sexual predisposition of victims of sexual offenses in cases involving alleged sexual misconduct.²⁷³ The animating idea behind Rule 412 was, in Congress's view, to protect victims from "invasion[s] of privacy, potential embarrassment and sexual stereotyping."²⁷⁴ This protects victims and thus encourages reporting, and it safeguards the proceedings from unnecessary information that could corrupt the fact-finding mission of the jury.²⁷⁵

Rule 412 also provides an analogy in that it has a significant moral component. One of the motivating reasons for its promulgation was to ensure that victims of sexual assault would not suffer retraumatization through the process of investigation and adjudication of the crimes they suffered.²⁷⁶ The other motivating reason for its promulgation was to counteract the wrongful association of sexual behavior and untrustworthiness.²⁷⁷ That is, allowing evidence of victims' unrelated sexual behavior tended to cause jurors to believe the victim deserved these harms, and it was morally wrongful to allow that to continue. This too is similar to confession evidence—not only does confession evidence have detrimental epistemic results, but its continued use causes significant moral harms.

Consider also Rule 404(b)'s prohibition that "[e]vidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character."²⁷⁸ Though Rule 404 is subject to potentially capacious exceptions in criminal cases,²⁷⁹ the justification for excluding the prior-act-propensity evidence in the first instance is on point:

Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man and to punish the bad man

272. *Id.* at 21 ("Exclusion of relevant evidence under Rule 403 is employed sparingly as it is an extraordinary remedy.")

273. FED. R. EVID. 412.

274. GRAHAM, *supra* note 271, at 386.

275. Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 794–96, 800 (1986) (explaining that the rationale behind the law was to avoid embarrassment of the victim, which was harmful in itself, but also that such "character assassination" resulted in unfair prejudice against the victim that skewed the results of trials).

276. *Id.* at 795 (explaining that the rationale behind the law was to avoid embarrassment and retraumatization of the victim).

277. *Id.* at 800–01 (explaining that the rationale behind the law was to avoid embarrassment of the victim).

278. FED. R. EVID. 404(b)(1).

279. *See id.* at 404(a)(2), 404(b)(2).

because of their respective characters despite what the evidence in the case shows actually happened.²⁸⁰

That is what we have with confession evidence: evidence with low probative value that is highly and prejudicially overvalued by the jury.

The proposed rule can operate as an evidentiary rule. In that form, the proposed rule could be passed by the appropriate legislature.²⁸¹ But the rule could be properly imposed as a constitutional matter as well. As a constitutional matter, a defendant has the right to due process of law.²⁸² The Supreme Court has stated that “the Due Process Clauses of the Fifth and Fourteenth Amendments may constitute a further bar to admission of, for example, unreliable evidence.”²⁸³ That is precisely what we have with confession evidence: unreliable evidence.²⁸⁴

The truth is that the interventions to protect defendants from the harms of confession evidence have always been radical, or at least perceived that way. For example, scholars have observed that the decision in *Bram* was substantially untethered to the prior case law and prior understanding of the Fifth Amendment.²⁸⁵ Similarly, *Miranda* is often understood as a “[w]atershed” moment in the history of the Supreme Court.²⁸⁶ Indeed, the *nemo tenetur*, and thus the Fifth Amendment privilege against self-incrimination, were dramatic grants of rights against the State.²⁸⁷ Tackling the harms of confession evidence is a behemoth that has historically required exceptional action.

280. *Id.* at 404 advisory committee’s note.

281. For state criminal proceedings, the state legislature would need to pass the legislation. Cornell L. Sch., *Evidence*, LEGAL INFO. INSTIT., <https://www.law.cornell.edu/wex/evidence> [<https://perma.cc/958X-HZ3L>]. For federal criminal proceedings, Congress would have to ultimately pass the legislation. See 28 U.S.C. § 2074. Under 28 U.S.C. §§ 2071–2074, the Supreme Court may pass rules, subject to the disapproval of Congress, unless the rule “create[es], abolish[es], or modif[ies] an evidentiary privilege,” in which Congress’s express approval is required. At first glance, this would appear to create a privilege, which would then need Congress’s approval.

282. See U.S. CONST. amends. V, XIV.

283. *Michigan v. Bryant*, 562 U.S. 344, 370 n.13 (2011) (first citing *Montana v. Egelhoff*, 518 U.S. 37, 53 (1996) (plurality opinion); and then citing *Dutton v. Evans*, 400 U.S. 74, 96–97 (1970) (Harlan, J., concurring)).

284. In an insightful article, David Crump explains the affirmative reasons why we do allow confession evidence in, homing in on the usefulness of confessions as evidence in prosecution, the fact that when not compelled “confessions are ‘fair’ evidence,” and the civic duty of citizens to account for their behavior by admitting their criminality. David Crump, *Why Do We Admit Criminal Confessions into Evidence?*, 43 SEATTLE U. L. REV. 71, 72–73 (2019). My arguments here undercut the first two reasons for the admission of confession evidence. As far as the civic duty rationale, I am skeptical that citizens have such a duty, but even if they did, I contend that confession evidence would not be more likely to lead to upholding of that duty, rather than capitulation in the face of the pressures of the criminal justice system. Thus, the third rationale cannot alone support the admission of confession evidence, in the face of its unreliability and potential for harm. Crump also raises the concern that widespread exclusion of confession evidence would lead to legitimacy concerns for the criminal justice system. *Id.* at 73. But I think that is countermanded by the legitimacy concerns of false confessions.

285. See, e.g., Godsey, *supra* note 203, at 477.

286. See, e.g., Mark R. Brown, *Weathering Constitutional Change*, 2000 U. ILL. L. REV. 1091, 1103.

287. See Godsey, *supra* note 203, at 479–80.

Notwithstanding, a rule abolishing confession evidence would not be unmoored from the law. Recall the sweeping language of *Bram*:

‘But a confession, in order to be admissible, must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. A confession can never be received in evidence where the prisoner has been influenced by any threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted.’²⁸⁸

Abolition embodies this principle, for it recognizes that overwhelming pressures on defendants to falsely confess pervade the criminal justice system. Thus, the conditions set forth by *Bram* are nearly always present and thus require the exclusion of confession evidence.

“Nearly” is not always, and so one might question why we need abolition, as opposed to individualized determinations based on new criteria for determining voluntariness that take into account the rational calculus or the pressure of investigation and jeopardy. Suppose, for example, there is strong evidence that a criminal defendant was not impacted by these pressures of the criminal justice system and confessed voluntarily. Why should we eliminate confession evidence in those cases?

This kind of case should not concern us for several reasons. *First*, most all cases will involve defendants who are impacted by the rational calculus or the pressures of jeopardy. And if that does impact the defendants, the problem—as enunciated by *Bram*—is that we cannot easily quantify that impact and thus must exclude it. The cases where the confessing defendant is not affected by the pressures of the criminal justice system would be exceedingly rare. And then we must ask what is motivating the defendant to confess. Among other reasons, it could be that the defendant seeks atonement, that the defendant seeks to protect some other party, that the defendant has notoriety or political goals,²⁸⁹ or it could be that the defendant has no rational reason at all. The first such reason for confession may coordinate with truth, but we have no obligation to provide a criminal defendant atonement through the criminal justice system. And, given that such a reason being the sole reason is rare, we shouldn’t contort the rule to save this possibility. The other reasons do not actually coordinate with truth: a defendant confessing to protect another could be sacrificing themselves; a defendant seeking notoriety or some political goal could also be falsely confessing; and a defendant confessing with no rational reason is generally unpredictable such that their confession is unreliable.

288. *Bram v. United States*, 168 U.S. 532, 542–43 (1897) (quoting 3 RUSSELL, *supra* note 189).

289. Gail Johnson, Commentary, *False Confessions and Fundamental Fairness: The Need for Electronic Recording of Custodial Interrogations*, 6 B.U. PUB. INT. L.J. 719, 726–27 (1997).

Second, such a confessing defendant could still otherwise provide useful information to investigators and prosecutors that would allow for the defendant's proper conviction. Recall that the definition of "confession" includes only statements by a defendant knowingly stating the defendant's guilt for the purpose of helping the prosecution establish guilt. That would prototypically be a defendant's statement of the form "I did it." Other statements by the defendant—for example, evincing uncommon knowledge of the crime—is corroborating and supporting evidence, which *prima facie* can still be admitted under the abolition rule.²⁹⁰

Third, in a similar vein, any harm in excluding the evidence is *de minimis* anyway. The confession evidence is, as shown above, so low in actual probative value that excluding it is no matter.²⁹¹ Certainly, the abolition will impact conviction rates because juries value confession evidence so highly, but that is a feature of the proposal—not a bug—because confession evidence is irrationally overvalued by juries. The corroborating and supporting evidence is the probative evidence—and that is still *prima facie* allowed in as it is beyond the scope of confession evidence.

My arguments here, however, may generate a concern from the other side: If confession evidence is so limited in definition, will this abolition rule do anything? I maintain that it will. The evidence of the bare confession is extremely powerful, without the actual probative value to back it up. But what can make a confession much more reliable is corroborating evidence, such as when confessing defendants know particular details of the crime, which increases the chance that the defendant actually committed the crime.²⁹² If the defendant knows, say, where the bodies of victims are buried or what and where the murder weapon was, that increases the chance that the defendant was the culprit. Such corroborating evidence is epistemically useful. But the fact of confession itself—the "I did it"—adds very little in terms of probative value. Omitting that confession evidence from the evidentiary record, but keeping the corroborating evidence, gets us substantially closer to an epistemically fair assessment of the evidence by the jury. Lose the bad, keep the good—it's a good strategy.

That said, there are potential gray areas. Courts may have to use their discretion to exclude or alter the presentation of statements that have some probative value but may strongly indicate that the defendant did in fact confess. Consider an example: Suppose in the opening statement, the prosecution says it will show that the "defendant knew the victim, hated the victim, met the victim that day, and murdered the victim." Then the prosecutor introduces statements from an interrogation where the defendant stated that they "knew the victim," "hated the victim," and "met the victim that day." That *may* indicate to the jury that the defendant also confessed to murdering the victim. Or it may not. But if it does convey to

290. See *supra* Part VII.

291. See *supra* Part IV.

292. See Leo et al., *supra* note 45, at 509.

the jury, with a wink and a nod, that there was a confession, the court could and should, in the vigilant application of the abolition rule, either omit this evidence—because perhaps it is cumulative—or ask the prosecution to alter the opening or presentation of evidence. These can be tough judgment calls, but trial courts are equipped to handle them. What this makes clear is that the abolition of confession evidence—though sensible and beneficial—is not self-executing, but it is nevertheless workable.

B. THE SUPERIORITY OF ABOLITION OVER OTHER SOLUTIONS

I have thus far explained why the abolition of confession evidence is justified. And part of that justification was observing that the current existing doctrine is not a solution to the harms of confession evidence. Thus, another solution is necessary. But, nevertheless, abolition may seem like an axe when a scalpel would do. To see why that is not the case, it's useful to see why the other commonly proposed solutions are lacking.

Further limiting or scrutinizing law enforcement behavior. One schema of solutions proposed by scholars is to call for further limiting what law enforcement can do in interrogation, such as limiting threats and offers of leniency, limiting misrepresentation of evidence and use of deception, and recording all interrogation proceedings.²⁹³ Though I would welcome further limitations, I do not think that type of solution is sufficient. For one, law enforcement is sufficiently capable to cope with and circumvent these limitations on behavior. There will also be vague lines, such as whether law enforcement has properly represented the quality of evidence, and that will result in very little practical oversight. Moreover, with respect to recording interrogations, I also worry that much will happen beyond the scope of the recording—as happens from time to time with body cameras, for example.²⁹⁴ And more fundamentally, these solutions' narrow focus on law enforcement conduct miss the forest for the trees: the criminal justice system as a whole imposes these pressures on defendants, and that is sufficient to cause the harms of confession evidence.

293. See White, *supra* note 68, at 1236, 1241, 1243; White, *supra* note 132, at 1007; Amelia Courtney Hritz, Note, “Voluntariness with A Vengeance”: *The Coerciveness of Police Lies in Interrogations*, 102 CORNELL L. REV. 487, 501–02 (2017); Johnson, *supra* note 289, at 749–50; Leo & Ofshe, *supra* note 75, at 494.

294. See, e.g., Connie Fossi & Willard Shepard, *Body Cameras Turned Off During Miami PD Arrest*, NBC MIAMI (Feb. 20, 2020, 5:54 PM), <https://www.nbcmiami.com/investigations/body-cameras-turned-off-during-miami-pd-arrest/2193518> [<https://perma.cc/UZ3F-VDK5>]; Megan Cassidy, *San Francisco Police Turned Off Body Cameras Before Illegal Raid on Journalist, Memo Says*, S.F. CHRON. (June 18, 2020, 5:27 PM), <https://www.sfchronicle.com/crime/article/San-Francisco-police-turned-off-body-cameras-15349795.php> [<https://perma.cc/SP7N-F7XU>]; Eddy Rodriguez, *Chicago Mayor Calls Out Officers Who Turn Off Body Cams, Says ‘We Will Strip You of Your Police Powers.’* NEWSWEEK (June 6, 2020, 10:45 AM), <https://www.newsweek.com/chicago-mayor-calls-out-officers-who-turn-off-body-cams-says-we-will-strip-you-your-police-1509167> [<https://perma.cc/6XAB-89TP>]; Claudia Vargas, *Body Cameras Are Ineffective Because Some Philly Cops Misuse Them, Advocates Say*, NBC PHILA. (July 23, 2020, 5:18 PM), <https://www.nbcphiladelphia.com/investigators/body-cameras-police-departments-philadelphia-septa-protests/2458223> [<https://perma.cc/62V9-T5WB>].

Presumption or per se exclusion in potential death penalty cases. Another solution embraces the points about the rational calculus to suggest exclusion of confession evidence when the potential for the death penalty is on the table.²⁹⁵ The animating idea is that the defendant's actions, in the face of the possibility of death, cannot be a reliable indicator of truth. And with that, I wholeheartedly agree. But I see no reason why that is limited to the death penalty. If a defendant faces a statutory maximum of fifty years and confesses with the hope of getting five or ten years, it is the same calculus of punishment that is motivating the decision to confess. The death penalty makes the rationality of that calculus stark and obvious, but it is no less true of other defendants facing (what they perceive to be) stiff sentences. This holds similarly with the pressures of jeopardy.

Expert testimony. A now familiar solution is to introduce expert testimony regarding the nature of confessions, the tactics used by law enforcement in interrogation, and the pressures confessing defendants face.²⁹⁶ This is a promising solution because it can elucidate for the jury the heart of the problem about how the criminal justice system as a whole can instigate false confessions from defendants. But as explained above, the problem is with the efficacy of expert evidence in an adversarial system. Both sides get to present expert evidence, which results in the infamous "battle of [the] experts."²⁹⁷ That can bury the critical information for juries such that misconceptions about confessions persist. Indeed, because the fact of confession is so viscerally powerful, expert evidence may not be able to pierce through to the jury.²⁹⁸ At the baseline, we know that juries are not able to rationally process the true probative value of confession evidence.²⁹⁹ Among other reasons, that occurs because defendants challenging their own confession are self-defeating in the sense that it impacts their own credibility and moral standing. Adding dueling experts is unlikely to significantly change this baseline because many of these jury intuitions are about ground facts of credibility that are fixed, or at least resistant to reassessment.

Requiring more indicia of reliability from confessions. A final solution to consider is the requirement that confessions exhibit further indicia of reliability. Leo and Ofshe suggest indicia such as whether the confession leads law enforcement to new evidence, includes details about non-public unusual elements of the crime, or includes details about non-public mun-

295. See Lauren Morehouse, Note, *Confess or Die: Why Threatening a Suspect with the Death Penalty Should Render Confessions Involuntary*, 56 AM. CRIM. L. REV. 531, 538–39 (2019).

296. See, e.g., Cutler et al., *supra* note 259, at 590–91.

297. See Vidmar & Diamond, *supra* note 261, at 1133–34, 1162.

298. See *id.* at 1163. There are studies that suggest that expert testimony is able to make jurors more sensitive to issues with criminal evidence—mainly confession evidence and witness identifications. See, e.g., Henderson & Levett, *supra* note 261, at 647–48; Steven D. Penrod & Brian L. Cutler, *Eyewitness Expert Testimony and Jury Decisionmaking*, 52 LAW & CONTEMP. PROBS. 43, 83 (1989). However, given the relative resource advantages between the government and criminal defendants, it may be the case that expert testimony further disadvantages criminal defendants.

299. See *supra* Sections III.B, IV.C.

dane elements of the crime.³⁰⁰ The idea here is that, as you cannot squeeze blood from a stone, you cannot obtain such details from an innocent defendant. One concern about this potential solution is, with respect to known information, that law enforcement may, in the course of interrogation, suggest to the defendant information about the crime that in turn the defendant parrots back.³⁰¹ This would undercut the truth adaptiveness of the putative indicia of reliability. But perhaps that too can be rectified with recording all the proceedings of interrogation, with a special focus on whether the indicia of reliability were indeed genuine. But there is another point here: this proposed solution is not far from the abolition of confession evidence. The principal difference is the exclusion of the confession, the “I did it.” The indicia of reliability—that is, the corroboration evidence—is doing the epistemic work. Abolition preserves the admissibility of that evidence. And as is now familiar, the confession evidence itself is low probative value, while highly and irrationally overestimated by the jury. If it is the indicia of reliability that is useful, keep it and use it. But that provides no warrant for the use of the epistemically flawed confession evidence.³⁰²

Finally, none of these alternative solutions deal with the moral harm of confession evidence. By allowing confession evidence, all of these other solutions still allow for and indeed encourage the process and pathologies of interrogation. That puts the defendant in harm’s way. Abolition does best in substantially mitigating these harms. Because no confession is admissible, the innocent defendant will not likely face the same kind of choice of confessing for lowering punishment. Moreover, the stakes of interrogation are reduced, leading to less overt pressure from law enforcement and the prosecution, which in turn leads to less pressures on the defendant.

300. Leo & Ofshe, *supra* note 75, at 438–39. Eugene Milhizer suggested an evidentiary rule that would look to individualized confessions and exclude them if they were unreliable on the preponderance of the evidence standard. Milhizer, *supra* note 75, at 47. I do not think this is much of a change from the present evidentiary standards. For the stated reasons, I prefer the categorical approach.

301. An examination of exonerations where there were false confessions reveals that the defendants often provided detailed and accurate information of the crimes. Brandon L. Garrett, *The Substance of False Confessions*, 62 *STAN. L. REV.* 1051, 1053–57 (2010). It is most likely that the defendants were informed of these details through the interrogation process. *Id.* at 1054.

302. Another potential solution would be for the prosecution to vigilantly pursue perjury charges against falsely confessing defendants. See Drizin & Leo, *supra* note 77, at 993–95 (discussing cases of David Saraceno and Teresa Sornberger, where false confessors were prosecuted for obstructing justice after falsity came to light). That might change the calculus of innocent defendants who are considering whether to confess to obtain a lighter punishment, for example. But this is a problematic solution because it requires the acceptance by prosecutors, who institutionally benefit from defendants being pressured by the punishment calculus to confess. Moreover, it does not obviously address the defendants who confess because of the pressure of interrogation and investigation. Indeed, it seems particularly unjust to subject defendants to the overwhelming pressures of interrogation, and then prosecute them for succumbing to those pressures.

C. THE CONSEQUENCE OF THE ABOLITION OF CONFESSION EVIDENCE

Abolition is by design a sweeping change to fix the pervasive pathologies created by confession evidence. But despite its being a far-reaching solution, I contend that the peripheral consequences are appropriately limited. Most pressingly, abolition remains consistent with, and leaves room for, interrogation and plea bargaining.

Interrogation. The abolition of confession evidence does not directly impact the practices of law enforcement interrogation. It merely states that particular evidence produced from interrogation—namely confession evidence of the form “I did it”—is not admissible in criminal proceedings. That may mean interrogation is less useful in the production of potent evidence against a defendant. Indeed, interrogation would be much more about the production of actual and true information about the crime. These are welcome changes.

But it does not mean interrogation is useless. Interrogation can still be extraordinarily helpful in genuine investigation and in learning the facts of the crime. By operation of the rule, the prosecution may not be allowed to use the defendant’s confessing statements to affirmatively prove the case, but the prosecution can use the information gleaned from an interrogation to build the theory of the case. Moreover, the proposed rule *could* allow a defendant’s statements to be used for other purposes, such as impeachment, to help ensure that the defendant does not lie.

Plea bargaining. One of the more striking consequences of the proposed rule is that confession evidence would not be allowed in *any* criminal proceeding, including plea allocutions. However, given that most cases are handled by guilty plea, where the plea is supported by the confession and slight other corroborating evidence (which may be little more than that the stated crime occurred), what would this mean for plea bargaining?

There would be a room, and indeed an important place, for plea bargaining, but it would be different and improved. Under current law, a guilty plea must still be supported by evidence,³⁰³ and even if that evidence is a confession, it must be corroborated.³⁰⁴ If there was no confession, then the plea would still need to be supported with other evidence. Thus, under the abolition rule, the prosecution must build a case that convinces the court that the defendant is guilty of the charged crime beyond a reasonable doubt.

Thus, the abolition rule allows for meaningful plea bargaining. It requires law enforcement and prosecution to build a case against the defendant, without use of confession evidence. That may take further resources, which in turn may mean that fewer perpetrators are charged and convicted. But that is primarily because law enforcement and prose-

303. *McCarthy v. United States*, 394 U.S. 459, 467 (1969) (Under Rule 11, the judge must “personally inquire” into whether the defendant understands the charges and “satisfy himself that there is a factual basis for the plea.” (citing FED. R. CIV. P. 11)).

304. *Opper v. United States*, 348 U.S. 84, 89–91 (1954).

cution would be required to meet their evidentiary burden without the use of extraneous, illegitimate background pressures that arise from the criminal justice system. Insofar as that is the case, it is a design feature of the abolition rule—one that gives effect to our societal beliefs about criminal justice.³⁰⁵

VIII. CONCLUSION

Confession evidence is epistemically weak: it has low probative value but is nevertheless overvalued by juries and judges. This is true as a theoretical matter, and it is also borne out and verified through the practices of law enforcement and prosecutors in our criminal justice system and empirical data on false confessions. Furthermore, confession evidence engenders substantial moral harms on defendants because the process of investigation and interrogation in our criminal justice system imposes mental pain on defendants in order to induce confessions. This perilous state of affairs calls for action. The doctrinal solutions, both constitutional and evidentiary, have made significant strides in reducing the most flagrant types of wrongful law enforcement conduct and consequent unreliable confession evidence. But the further potential of these doctrines in solving the persisting harms of confession evidence is limited. To best address the numerous harms introduced by the existence of confession evidence in criminal proceedings, we must abolish confession evidence. Though the solution is drastic in comparison to our current practice, it is also the most sensible in terms of preserving and furthering the foundational goals of our criminal justice system.

As dramatic and ambitious as the solution of abolishing confession evidence may seem, it is in fact merely a patch on our criminal justice system. Indeed, it leaves much to be desired: From an evidentiary perspective, it is suboptimal in that it isolates information from the jury, where we would rather have transparency and elucidation. From a moral harms perspective, even excluding confession evidence leaves remaining the practices of interrogation and investigation, along with the pressures of jeopardy that are imposed on defendants. Excluding confession evidence is a substantially effective solution, given the current state of our criminal justice system, but it should be a stopgap measure. To rectify still-persistent epistemic and moral harms, the criminal justice system must be radically transformed. It must be one where judges, juries, and the public at large understand fully and engage reflectively with the mechanisms by which we attempt to obtain justice. And it also must be a system that employs mechanisms genuinely interested in and responsive to the welfare of the public—including the welfare of defendants and their comprehensive rehabilitation. In that world, confessions may be trustworthy and reliable, as well as reconciliatory and progressive.

305. In particular, requiring firm and reliable evidence not afflicted with prejudice is how we ensure the BARD standard is meaningfully applied, and consequently that the Blackstonian ratio is upheld. *See supra* Section III.A..

