REVISITING *COLORADO V. CONNELLY*: THE PROBLEM OF FALSE CONFESSIONS IN THE TWENTY-FIRST CENTURY

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I. INTRODUCTION

One day in the mid-seventeenth century, an Englishman named William Harrison disappeared at the end of a day of work.[1] After an investigation, the police's "suspicion fell upon Harrison's servant, John Perry."[2] Once taken into custody for questioning, Perry initially denied any involvement in his employer's disappearance and repeatedly pressed his innocence.[3] After hours of pointed and aggressive questioning, however, Perry switched his story and confessed that he and his family robbed and murdered Harrison and later dumped his body in a nearby swamp to conceal the crime.[4] In the ensuing trial, the court convicted Perry and his family "entirely on the strength of [his] confession," despite the fact that Harrison's body was never recovered.[5] To the shock of the town, Harrison returned home years later and explained that he had been sold into slavery in Turkey and had only recently escaped.[6]

At the time of *Perry's Case*, the rare instance of a presumed-to-be-dead victim showing up alive was one of the only types of evidence that could conclusively prove that a convicted defendant had falsely confessed to a murder. While there have been other similar cases,[7] the prevalence of these types of fact patterns has been fairly low, meaning that definitive proof that people sometimes confess to crimes they did not commit had also been lacking. At first glimpse and without evidence to the contrary, it seems logical that anyone would tend to view confessions as some of the

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1. David A. Moran, *In Defense of the Corpus Delicti Rule*, 64 OHIO ST. L.J. 817, 828 (citing Perry's Case, 14 Howell St. Tr. 1312, 1313 (1660)).
2. *Id.* (citing *Perry's Case*, 14 Howell St. Tr. at 1314).
3. *Id.* (citing *Perry's Case*, 14 Howell St. Tr. at 1314-15).
4. *Id.* (citing *Perry's Case*, 14 Howell St. Tr. at 1315-16).
5. *Id.* (citing *Perry's Case*, 14 Howell St. Tr. at 1317-19).
6. *Id*. (citing *Perry's Case*, 14 Howell St. Tr. at 1319-22).
7. *See id*. at 829 (citing The Trial of Stephen and Jesse Boorn, 6 Am. St. Tr. 73 (1819)); Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 501-05 (2006) (discussing *Perry's Case*, Stephen and Jesse Boorn's convictions, and other early documentations of false confessions).

most damning evidence that could be introduced against a defendant. After all, "police, prosecutors, judges, jurors, and the media all tend to view confessions as self-authenticating and see them as dispositive of guilt."[8] Jurors, in particular, "tend to discount the possibility of false confessions as unthinkable, if not impossible,"[9] and a 2004 study actually demonstrated that over 80% of false confession cases that went to trial ended with a wrongful conviction.[10]

While the above logic still holds true today, the advent of DNA testing has provided a powerful new way to conclusively demonstrate that false confessions occur much more frequently than was previously understood. With DNA exonerations, trials like the one in *Perry's Case* are no longer needed to prove that a person is serving time for a crime he did not commit. In fact, recent studies have illustrated that roughly one-fourth of all DNA exonerations involved a false admission of guilt—a staggering figure that is indicative of the power of confession evidence.[11]

This newfound awareness of the prevalence of false confessions begs the questions of what factors cause false confessions and whether current checks, constitutional or otherwise, provide an adequate basis to prevent such evidence from being admitted at trial. In this Article, I will analyze how current police interrogation techniques are responsible for causing innocent people—especially juveniles and those with diminished mental capacity—to confess to crimes they did not commit. Moreover, I will argue that the Supreme Court's lax constitutional standard for the admission of confessions at trial is responsible for causing such confessions, which are *by definition* unreliable, to lead to wrongful convictions. Finally, I will examine a series of reforms intended to cut down on the prevalence of false confession-based wrongful convictions. These reforms involve altering police interrogation techniques, reinterpreting the Supreme Court's precedent on the voluntariness of confession evidence, and using pre-trial hearings and evidentiary rules to shine light on the potential unreliability of such confession evidence. These changes draw on the lessons from recent DNA exonerees' cases and are necessary to give credence to the long-standing belief in the English common law system that it is better for

8. Leo et al., *supra* note 7, at 485.

9. *Id*.

10. Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 960 (2004) (emphasis added) ("In other words, approximately four out of every five innocent individuals who chose to take their case which was typically based on nothing more than a confession that was subsequently *proven* false—were wrongfully convicted!").

11. *Understand the Causes: False Confessions*, INNOCENCE PROJECT, http://www.innocenceproject.org /understand/False-Confessions.php (last visited April 18, 2012).

multiple guilty people to escape than for one innocent man to suffer for a crime he did not commit.[12]

II. CURRENT POLICE INTERROGATION TECHNIQUES AND THE CAUSES OF FALSE CONFESSIONS

As psychological coercion is well-noted as the main cause of interrogation-induced false confessions,[13] it is important to understand what such practices entail and how they affect a suspect facing police interrogation. Police interrogation techniques produce false confessions in two ways. First, while questioning a suspect, police will often leak important non-public facts, allowing an innocent suspect to be able to say more than merely "I did it" and provide a detail-rich narrative that artificially creates a sense of reliability that judges often credit when ruling on the admissibility of such statements.[14] Second, police tactics play a role as well, as deception, threats, lengthy interrogations, and other coercive practices can interact with the particularities of a given suspect, overcoming his will to profess his innocence and causing him to falsely confess.[15] It is important to understand both of these causes, as they often interact to cause the production and admission of this evidence. After all, an innocent suspect's mere assertion of guilt (without providing any crime details) is unlikely to produce a convincing confession,[16] and that same suspect is unlikely to confess to a crime he did not commit without facing some intolerable degree of police coercion in the first place. While police interrogations are certainly an important investigative tool and do not always result in false confessions, examining cases of blatant overreaching and the tactics used are helpful in finding the proper balance between

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12. *See* Alexander Volokh, *Aside: N Guilty Men*, 146 U. PA. L. REV. 173, 174-77 (1997). Originally coined by the English legal scholar William Blackstone in the eighteenth century, such an idea demonstrates the purported value that the English legal system attaches to a presumption of innocence and the proof beyond a reasonable doubt standard in criminal trials. *See id*. at 198 (quoting In re Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring)).
13. Leo et al., *supra* note 7, at 517; Richard A. Leo et al., *Psychological and Cultural Aspects of Interrogations and False Confessions: Using Research to Inform Legal Decision-Making*, *in* PSYCHOLOGICAL EXPERTISE IN COURT 25, 34 (Daniel A. Krauss & Joel B. Lieberman eds., 2009); Drizin & Leo, *supra* note 10, at 917.
14. *See* Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1111 (2010); Leo et al., *supra* note 13, at 33. While the Supreme Court has adopted a due process-based voluntariness standard for the admissibility of confession evidence and has expressly stated that the Due Process Clause is not concerned with reliability, Garrett's study on the litigation of false confessions has demonstrated that many judges nevertheless use this artificial sense of reliability to conclude that a confession must have been voluntarily made and is hence admissible. *See* Garrett, *supra*, at 1111; *see also infra* Section III (discussing the evolution of the Supreme Court's jurisprudence on the admissibility of confession evidence).
15. Leo et al., *supra* note 13, at 33.
16. *See* Garrett, *supra* note 14, at 1057.

obtaining necessary information and protecting the rights of the particularly vulnerable.

A. Coercive Police Tactics

Innocent suspects might confess to crimes due to a variety of different police techniques. Some confess after being presented with some sort of award, such as the opportunity to go home if they admit guilt.[17] Others might confess after the mental exhaustion and confusion that sets in after an endless marathon of questioning, sometimes in excess of twelve hours.[18] Still others might relent to avoid a threat from the police, such as the prospect of receiving the death penalty after trial.[19] The use of "fabricated evidence, such as nonexistent witnesses, false fingerprints, make-believe videotapes, [and] fake polygraph results"[20] is also common in many interrogations. The police use this fabricated evidence as a tool to persuade a suspect that he is "psychologically, materially and/or legally better off by cooperating with police and confessing than he is by continuing to deny any [involvement] in [a] crime."[21] In these cases and others, there is a common thread:

> The conditions and techniques of interrogation are inherently distressing; they are designed to induce anxiety in order to break down the suspect's anticipated resistance and motivate compliance. Accusatorial interrogation may also induce fear, confusion, physical exhaustion, and mental fatigue. American interrogation is a multi-stage process that relies on basic principles of social influence, deception, and coercion to manipulate a suspect's perception of his situation, and his available options.[22]

For decades the gold standard on how to conduct interrogations has been Fred Inbau and John Reid's *Criminal Interrogation and Confessions*.[23] Inbau and Reid generally agree with the above assessment of American interrogation techniques, as they are quick to point out that the practical need for confession evidence (many crimes simply do not involve eyewitnesses, physical clues, or any other sources of information), coupled with the fact that "it is impractical to expect any but very few confessions to

17. *Id*. at 1064.
18. *See id*.; Leo et al., *supra* note 13, at 34.
19. Garrett, *supra* note 14, at 1062-63. When Anthony Gray, one of the DNA exonerees that Garrett studied, was asked why he confessed, he stated, "They were trying to get me the death penalty for something I didn't do . . . . Why should I die for something I didn't do?" *Id.*
20. Drizin & Leo, *supra* note 10, at 915.
21. *Id*.
22. Leo et al., *supra* note 13, at 34 (citation omitted).
23. FRED E. INBAU, JOHN E. REID & JOSEPH P. BUCKLEY, CRIMINAL INTERROGATION AND CONFESSIONS (4th ed. 2001).

result from a guilty conscience unprovoked by an interrogation,"[24] means that certain coercive tactics are simply a necessary evil.[25] They also state that they are opposed to *any* techniques that "might well induce an innocent person to confess"[26] (such as physical force or the threat of such force), but that they approve of trickery and deceit as "frequently indispensable" tools to help secure a confession.[27] The implication here seems to be that the leading experts on police interrogation are not cognizant of the fact that deceitful tactics can be just as likely to cause an innocent person to confess as the threat of force.[28] As the Reid Technique is taught to thousands of police officers throughout the country,[29] this is a problematic realization that starts to unpack the vast potential for false confessions in the American legal system, as well as the need to formulate new tests to keep such confessions out of evidence.[30]

It is important to note that the Reid Technique does not always have the same effect on different suspects. Due to individual particularities, some types of suspects may be more susceptible to coercion than others.[31] Moreover, one can argue that what exactly constitutes illegal coercion varies according to the attributes of the individual under interrogation. The mentally handicapped, for example, have been shown to be more susceptible to confess falsely than individuals with normal intelligence due to "poor problem-solving abilities; a tendency to mask or disguise their cognitive deficits; the tendency to look to others . . . for appropriate behavior cues; and a generally lower ability to withstand the same level of

24. *Id*. at xiv.
25. Inbau and Reid admit, however, that the use of these tactics borders on "unethical" if evaluated in terms of "ordinary, everyday social behavior." FRED E. INBAU, JOHN E. REID & JOSEPH P. BUCKLEY, CRIMINAL INTERROGATION AND CONFESSIONS xiv (3rd ed. 1986).
26. *Id*.
27. *Id*.
28. This lack of cognizance has been a major critique of the way Reid and Inbau have gone about their recommendations for police interrogation. Steven Drizin and Richard Leo, in particular, go so far as to argue that Reid and Inbau have given "no thought to how the methods they advocate" can sometimes produce confessions from innocent suspects. Drizin & Leo, *supra* note 10, at 919.
29. State v. Schofield, 1999 WL 1033547, at *2 n.4 (Wash. Ct. App. 1999); *See also id.* at *4 (holding that use of the Reid Technique during interrogation did not constitute coercion and that the defendant's confession was voluntary); Eugene R. Milhizer, *Rethinking Police Interrogation: Encouraging Reliable Confessions While Respecting Suspects' Dignity*, 41 VAL. U.L. REV. 1, 31 (2006) (discussing how the Reid Technique has become "the preeminent social-process approach to confessions").
30. *See infra* Section IV (discussing a number of reforms of the standards for admissibility of confession evidence).
31. *See infra* Section III (discussing how the constitutional standard for the admissibility of confession evidence is a voluntariness test that is predicated on a showing of coercion before a confession can be declared involuntary).

pressure, distress, and anxiety."[32] Children and juveniles, in addition, possess many of these same qualities and have a tendency to be highly acquiescent and trusting of authority.[33] Moreover, juveniles lack the judgmental maturity to comprehend the long-term (and potentially irreversible) consequences of their answers to police and may not understand the gravity of the situation they are facing.[34] All these issues illustrate that these two groups are much more likely to succumb to the deceit and trickery of the Reid Technique and confess to crimes they did not commit. In fact, a recent study by Brandon Garrett found that in a whopping 65% of DNA exoneration cases involving false confessions, "the defendant was either mentally disabled, under eighteen at the time of the offense, or both."[35] Clearly, any vision to reform the standards for admissibility of confession evidence must pay particular attention to these vulnerable individuals.

The above discussion is not intended to suggest that false confessions are common or that police pressure is likely to produce more false confessions than truthful ones.[36] After all, DNA exonerations, a subset of criminal cases composed of some of the most blatant and egregious examples of police and prosecutorial misconduct, have been the primary cases where false confessions have been studied.[37] While it is difficult to quantify exactly how often false confessions are procured outside of this narrow sample, it is hard to deny that some degree of police pressure, albeit possibly a less coercive form than is currently used, is often needed to secure a confession from the guilty.[38] Moreover, "in the typical case, the suspect who is subjected to interrogation is likely to be guilty,"[39] as police are taught only to apply the Reid Technique to "suspects whose guilt seems

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32. Leo et al., *supra* note 7, at 518; *see also* Morgan Cloud et al., *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495, 511-14 (2002).

33. Leo et al., *supra* note 7, at 518. In a particularly disturbing case, police in Nebraska pressured an eleven-year-old child to falsely confess to murdering his elderly neighbor. Drizin & Leo, *supra* note 10, at 961. The boy's interrogation ran for over seven hours well into the night. *Id.* at 961 n.403. Police "repeatedly accused [the boy] of lying, and den[ied] his requests to see his mother" until he confessed. *Id.*

34. Leo et al., *supra* note 7, at 517.

35. Garrett, *supra* note 14, at 1064.

36. For a claim that the number of false confessions is substantial, see Welsh S. White, *What Is an Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001, 2036 (1998).

37. *See* Saul M. Kassin, Daniel Bogart & Jacqueline Kerner, *Confessions That Corrupt: Evidence from the DNA Exoneration Case Files*, PSYCHOLOGICAL SCIENCE, Jan. 2012, at 41, 42 (indicating that out of the 240 DNA exonerations for which data on contributing causes was present, 131 (54.58%) contained multiple types of police and prosecutorial errors or misconduct).

38. The Supreme Court has correctly stated that "[q]uestioning suspects is indispensable in law enforcement" and that "the public interest requires that interrogation . . . not completely be forbidden, so long as it is conducted fairly, reasonably, within proper limits and with full regard to the rights of those being questioned." Culombe v. Connecticut, 367 U.S. 568, 578-79 (1961).

39. White, *supra* note 36, at 2036.

definite or reasonably certain."[40] While one could certainly question whether police are better than anyone else at making a pre-interrogation determination of a suspect's guilt,[41] police are certainly trained to make their best guess. Nevertheless, just because false confessions may not be the norm does not mean that they are not a serious concern. The most egregious examples of police coercion and overreaching during interrogation should be used to help teach reformers about ways to perfect the process to ensure that valuable evidence is secured from the guilty without using tactics likely to break down the will of the innocent to resist.[42]

B. Leading Questions and Leaking Non-Public Facts

While psychological pressure may be the leading *cause* of false confessions,[43] the artificial sense of corroboration that results when an innocent suspect supplies a rich crime scene narrative is likely the leading cause of the *admission* of such evidence at trial. While the Supreme Court's current test for the admissibility of a confession is based on a voluntariness standard that specifically disavows a consideration of reliability factors,[44] many trial judges nevertheless credit the supposed "inside knowledge" that suspects were able to produce while assessing the admissibility of such statements. After all, how believable is a criminal defendant who recants his confession, professes his innocence, and yet somehow provided a vivid account of crime scene details that only the police and the true perpetrator would be privy to? Outside of the unlikely chance of guessing such details, the only way innocent defendants are able

40. INBAU, REID & BUCKLEY, *supra* note 25, at 78.

41. Many psychological studies undermine the idea that police can pre-determine the guilt of their targets and thus spare the innocent from the Reid Technique. *See, e.g.*, Saul M. Kassin, *On the Psychology of Confessions: Does Innocence Put Innocents at Risk?*, AM. PSYCHOLOGIST, Apr. 2005, at 215, 219 (noting that police who hold "a strong a priori belief about the target . . . [are] not merely blinded by their initial beliefs but motivated to reinforce them" and that "psychology research suggests that once people form an impression, they unwittingly seek, interpret, and create behavioral data that verify it"). If this is the case, one of the central tenants of the Reid Technique is actually undermined by psychological realities.

42. *See infra* Section IV (discussing reforms to the current constitutional standard for the voluntariness of a confession that take into account the fact that impermissible coercion may take different forms for different suspects).

43. *See supra* note 13 and accompanying text.

44. *See* Colorado v. Connelly, 479 U.S. 157, 167 (1986) (reasoning that a statement produced by a schizophrenic suspect "might be proved to be quite unreliable, but this is a matter to be governed by the evidentiary laws of the forum . . . and not by the Due Process Clause of the Fourteenth Amendment"); *see also infra* Section III for a complete discussion of the evolution of the Supreme Court's standard for the admissibility of confession statements.

to provide non-public crime facts is if the police or some other knowledgeable party somehow leaks the information to the suspect.[45]

The problem that leaking non-public facts to criminal suspects creates is fairly straightforward. As Reid and Inbau discuss, "The truthfulness of a confession should be questioned . . . when the suspect is unable to provide any corroboration beyond the statement, 'I did it.'"[46] Additionally, once an innocent suspect becomes privy to inside knowledge about a crime, investigators lose the opportunity to independently verify his knowledge. At this point, how do police decide whether a suspect is innocent and telling them what they want to hear (due to mental illness, youth, or other unique susceptibilities to coercion) or if he is guilty and could have provided detailed crime scene facts on his own? To avoid this problem, Reid and Inbau stress that leading questions are to be avoided, emphasizing that open-ended queries are necessary to let the suspect independently volunteer as much information as possible.[47] Police are trained to ensure that a confessor supplies more than a "bare admission of culpability," as it is unlikely that such statements will persuade jurors.[48] If police are careful to follow these rules, it is fair to say that a confessing suspect who supplies rich details of a crime will probably be telling the truth (absent other non-police sources of information leaks).

Unfortunately, police do not always adhere to the industry recommendations on interrogation practices. During the litigation of many DNA exonerees' cases, judges and juries appeared impressed by the extent to which many defendants supplied non-public facts that were corroborated by actual crime scene evidence.[49] Moreover, many police officers added to the perception of the defendant's guilt by testifying that they neither asked leading questions nor otherwise volunteered crime information, insisting instead that the defendant supplied all the details.[50] In some cases, police may have simply forgotten or overlooked their transgressions.[51] In others, it is possible that the officer under oath at trial was not the only one who

45. Besides obtaining inside knowledge through a police officer's questioning, an innocent suspect might obtain such information from news reports, rumors, other witnesses, etc.

46. INBAU, REID & BUCKLEY, *supra* note 23, at 425.

47. INBAU, REID & BUCKLEY, *supra* note 25, at 183. For example, if the police are questioning a suspect about a rape where the police found the victim's bloody clothes underneath her house, police should not ask, "After the rape you threw her clothes under the house, didn't you?," as this method of questioning supplies critical facts to the suspect before he has a chance to independently volunteer such information. Moreover, this form of questioning allows the suspect to simply give a "yes" answer, which neither helps the police build a more complete crime narrative nor helps them verify the suspect's knowledge.

48. Garrett, *supra* note 14, at 1067.

49. *See id.* at 1078 (explaining how many exonerees who falsely confessed had trials where prosecutors' closing arguments focused heavily on how unlikely it was that the defendants could simply have guessed unique crime facts).

50. *See id.*

51. *See id.* at 1074-79.

questioned the defendant, leaving open the chance that someone else leaked the critical information. Either way, the fact that twenty-seven of thirty-eight recent false confession-based DNA exonerations involved police denying under oath any fact-leaking suggests that law enforcement is not always forthcoming or reliable in detailing the nature of their interrogations.[52] Consequently, any efforts to keep false confessions out of evidence must not only focus on police coercion, but also on tactics that artificially augment the persuasive strength of a confession.[53]

As the above discussion indicates, the contamination of confessions and subsequent appearance of reliability is a serious and common cause of the admission of such statements into evidence, notwithstanding the current constitutional standard. When faced with a motion on the admissibility of such statements, trial judges will often sneak the apparent reliability of these types of confessions into their coercion analysis. As Garrett has explained:

> Courts routinely . . . emphasize that there was not coercion by focusing on the apparent reliability of confession statements. Such reasoning may ignore that the apparent reliability could be the product of the very coercion that the defendant challenges. Courts credit evidence of reliability without asking whether that evidence is sound . . . . [and without] assess[ing] whether crucial facts were actually volunteered by the suspect.[54]

In a true perversion of justice, trial judges appear to be dismissing indicia of unreliability when admitting confession evidence (citing the constraints of the current voluntariness constitutional standard), yet crediting indicia of reliability in other cases to bolster their determination of a lack of coercion and inform their finding of voluntariness. Notwithstanding the need for confession statements in many cases, judges and prosecutors should not be able to have it both ways on the reliability issue. Considering that jurors—and to some extent the majority of people in the criminal justice system—view confessions as the most believable and powerful indications of culpability,[55] it is critical that our criminal justice system do a better job of weeding out unreliable confessions and preventing wrongful convictions.

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52. *Id*. at 1074.
53. *See infra* Section IV (describing potential reforms to cut down on the extent of coercive interrogation techniques and leading questions).
54. Garrett, *supra* note 14, at 1110-11.
55. *See supra* notes 8-9 and accompanying text.

III. THE CURRENT AND PAST CONSTITUTIONAL STANDARDS FOR THE ADMISSIBILITY OF CONFESSION EVIDENCE

Before one can understand the reforms needed to prevent false confessions and wrongful convictions, one must not only understand the current test for admissibility of such confessions, but also the evolution of the standard up to its current formulation. While the current constitutional test, developed in *Rogers v. Richmond*[56] and *Colorado v. Connelly*,[57] focuses on the voluntariness of a confession and specifically states that reliability is not a consideration, reliability has nevertheless played a role at common law and is often considered a significant justification for admitting only voluntary confessions into evidence.[58] As reliability was often a rationale for the rule at common law,[59] many of the reforms discussed in the next Section naturally revolve around bringing this consideration back to the forefront, either through evidentiary rules or through the back door of the voluntariness test.

As alluded to in previous Sections, the modern voluntariness test was first spelled out by the Supreme Court in 1961 in *Rogers*, where the Court held that the admissibility of a confession would be determined by examining whether interrogation techniques could "overbear [a] petitioner's will to resist and bring about confessions not freely self-determined—a question to be answered with complete disregard of whether or not [a] petitioner in fact spoke the truth."[60] Courts were instructed that, under due process, confessions that are "the product of coercion, either physical or psychological, cannot stand"[61] because they violate the underlying premise that our criminal justice system is accusatorial, not inquisitorial.[62] Throughout the 1960s, however, vestiges of reliability still remained in the Court's dicta on the admissibility of confessions. In *Culombe v. Connecticut*, decided the same year as *Rogers*, the Court reaffirmed that the Due Process Clause and the voluntariness test were primarily concerned with impermissible coercion, but acknowledged that this was an "independent . . . and historically diverse reason for the rule," citing reliability concerns and fairness in the use of evidence as another basis for

56. 365 U.S. 534 (1961).
57. 479 U.S. 157 (1986).
58. *See* Leo et al., *supra* note 7, at 489.
59. The common law exclusionary rule came about in 1783 in *The King v. Warickshall*, where the Court "established a clear exclusionary rule for involuntary confessions . . . based entirely on the broader goal of excluding unreliable evidence." *Id*. at 488-89 (citing The King v. Warickshall, 168 Eng. Rep. 234, 234-35 (K.B. 1783)).
60. *Rodgers*, 365 U.S. at 544.
61. *Id*. at 540.
62. *Id*. at 541.

any exclusionary rule.[63] As these cases suggest, "the Supreme Court relied on different and sometimes conflicting rationales" as it crafted its due process voluntariness test.[64]

Nevertheless, if there was any doubt about the subordinated status of reliability in the voluntariness test, the Supreme Court put this to rest in 1986 when it decided *Colorado v. Connelly* and clarified the meaning of the "overbearing of will" standard and what evidence could be used to show unconstitutional coercion. In *Connelly*, a schizophrenic and psychotic man approached a police officer and said he wanted to discuss a murder he had recently committed.[65] After quickly waiving his *Miranda* rights, the man made a series of incriminating statements, but later moved to suppress them as involuntary through a pre-trial motion.[66] At a hearing, a psychologist stated that the defendant was suffering from "command hallucinations," which interfered with his ability to "make free and rational choices."[67] Essentially, the defense was trying to argue that Connelly was coerced to confess based on pressure from *within his own mind*, rather than from state-imposed coercion. The lower courts accepted this argument, but the Supreme Court reversed, insisting that that Due Process Clause is concerned only with state-sponsored coercion and holding that "[a]bsent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law."[68] The Court also stated that a "mere examination of the confessant's state of mind can never conclude the due process inquiry," but rather that it is only one factor to consider in the totality-of-circumstances assessment of whether *state* coercion overcame a defendant's will to resist.[69] After *Connelly*, it became entirely possible that confessions with multiple indicia of unreliability could be admitted after a determination that police coercion was absent.

Understanding *Connelly* is critical to understanding why the overwhelming majority of false confession-based DNA exonerations involved defendants who were juveniles or mentally incapacitated.[70] As discussed in the previous Section, many of these individuals are particularly susceptible to types of police pressure that courts would not rule impermissibly coercive, but that nevertheless could easily overcome their

63. 367 U.S. 568, 583 n.25 (1961).
64. Leo et al., *supra* note 7, at 494.
65. Colorado v. Connelly, 479 U.S. 157, 160 (1986).
66. *Id*. at 160-61.
67. *Id.* at 161.
68. *Id.* at 164.
69. *Id*. at 165; *see also* Noel Moran, *Confessions Compelled by Mental Illness: What's an Insane Person To Do?*, 56 U. CIN. L. REV. 1049, 1058 (1988).
70. *See supra* note 35 and accompanying text.

will to resist and profess their innocence.[71] The story of false confessions and the limitations of the voluntariness test, however, are not limited to these individuals. Perfectly cognizant DNA exonerees who were adults at the time they were convicted also fell victim to deceitful police tactics, but had judges rule that their confessions were voluntary because of the absence of overt police overreaching.[72] Moreover, in the wake of *Rogers* and *Miranda*, many trial judges not only stopped assessing confessions for reliability, but also started to "short-circuit a meaningful inquiry" into voluntariness, often ruling that a properly given *Miranda* warning and waiver was dispositive on admissibility.[73]

The combined effect of the Supreme Court's jurisprudence has been to allow trial judges to admit into evidence confessions that have multiple indicia of unreliability, often under an artificial aura of voluntariness. As juries tend to view such evidence as self-authenticating,[74] it is imperative that reformers find a way to reintroduce the reliability rationale into questions of admissibility and help prevent wrongful convictions. While it is impossible to quantify exactly how often police interrogation techniques lead to false admissions of guilt, DNA exonerations have proved that such

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71. Richard Ofshe and Richard Leo call these "stress compliant" false confessions, where there is no illegal coercion but the suspect nevertheless succumbs to police pressure to confess. Richard J. Ofshe & Richard A. Leo, *The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions*, 16 STUD. L. POL.& SOC'Y 189, 211 (1997). Recognizing that "interrogation is stressful by design," Ofshe and Leo argue that the mere presence of an isolated and unfamiliar environment, coupled with a hostile and confrontational police tone, is often enough to cause a suspect (guilty or innocent) to be compliant in order to leave the uncomfortable situation as soon as possible. *See id.* at 211-12. The Supreme Court, in addition, has explicitly sanctioned police interrogation tactics involving misrepresentation, deceit, and trickery, notwithstanding the fact that social psychologists have indicated that applying such tactics on particularly vulnerable suspects could lead to involuntary confessions. *See* Frazier v. Cupp, 394 U.S. 731 (1969).

72. In fact, some studies show that falsely confessing may in fact be the most rational decision to make when facing certain police pressure. Ofshe and Leo have studied how psychological interrogation causes a rational decision maker to "optimize choices given the alternatives they consider" and the likely utilities of each choice. *See* Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENVER U. L. REV. 979, 985-86 (1997). If this is the case, the prospect of falsely confessing is not just a problem for the mentally compromised. Garrett, for example, cites Eddie Lowery as an example of an exoneree who had "no congenital susceptibility to suggestion," but confessed anyway after a long interrogation with lots of verbal pressure. Garrett, *supra* note 14, at 1100. Ruling on his motion to suppress the confession, the trial judge stated:

> [Lowery] was not coerced into staying under the circumstances and looking at the totality of the case and all of the facts and circumstances this Court would find that the admissions given by this defendant were voluntarily made and were not a result of coercion, duress, or unfairness on the part of the officers conducting the interrogation.

Id.

73. Garrett, *supra* note 14, at 1093-94.

74. *See supra* note 9 and accompanying text.

admissions have occurred at least fifty-nine times in the recent past.[75] If our criminal justice system is to prevent such miscarriages of justice, it must do a better job of policing for *both* voluntariness and reliability, just as the original common law test prescribed.[76]

IV. REFORMS

A. Limiting the Court's Holding in *Colorado v. Connelly*

One option for bringing reliability back into the equation is to allow for a wider, more open-ended inquiry into police coercion. While the language of *Connelly* was fairly adamant that reliability was not a foundation of the due process admissibility test, the Court did recognize that "mental condition [was] surely relevant to an individual's susceptibility to police coercion," even if it was never sufficient to "conclude the due process inquiry."[77] As a corollary, why not recognize that a suspect's mental condition is also relevant to determining *exactly what constitutes* police coercion? The *Connelly* Court did not flesh out this detail, but at least two lower courts have attempted to take this path and use reliability considerations to inform the determination of voluntariness by applying a more fluid conception of coercion.

In *State v. Xiong*, a Wisconsin appellate court discussed the proper factors to be considered when ruling on the voluntariness of a defendant's consent to a police search.[78] While holding that the defendant's consent was voluntary, the court nonetheless stated that *Connelly* did *not* stand for the idea that "the absence of obviously coercive police tactics negates the need to consider the characteristics of the person giving his or her consent."[79] In fact, the court argued "that police coercion and a defendant's personal characteristics are interdependent concepts" and that "evidence

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75. *See* Kassin, Bogart & Kerner, supra note 37, at 2. Moreover, the "overwhelming majority" of false confessions involve admissions to "murders that involve sexual assaults—precisely the kinds of murders in which prosecutors seek death sentences." Steven A. Drizin & Marissa J. Reich, *Heeding the Lessons of History: The Need for Mandatory Recording of Police Interrogations to Accurately Assess the Reliability and Voluntariness of Confessions*, 52 DRAKE L. REV. 619, 635 (2004) (citing Phyllis L. Croker, *Crossing the Line: Rape-Murder and the Death Penalty*, 26 OHIO N.U. L. REV. 689, 702 (2000)). In other words, part of the imperative for working to prevent false confessions and keep them out of trials stems from the fact that those who falsely confess are often faced with the problem of paying with their life for a crime they did not commit. *See id.*

76. *See* The King v. Warickshall, 168 Eng. Rep. 234, 234-35 (K.B. 1783); *supra* note 59 and accompanying text.

77. Colorado v. Connelly, 479 U.S. 157, 165 (1986).

78. State v. Xiong, 504 N.W.2d 428, 430 (Wis. Ct. App. 1993). While *Xiong* dealt with consent to a police search—admittedly a different topic than the voluntariness of a confession—other cases in Wisconsin have applied the same logic to confession analyses. *See, e.g.*, State v. Hoppe, 661 N.W.2d 407, 413 (Wis. 2003).

79. *Xiong*, 504 N.W.2d at 431.

that police are taking subtle advantage of a person's personal characteristics . . . may be a *form* of coercion."[80] In other words, *Xiong* opened up the possibility that what might be illegal coercion for one criminal suspect might be barely any pressure at all for another, depending on the unique mental attributes of each. While the *Connelly* Court ruled that "a defendant's mental condition, by itself and apart from its relation to official coercion, should [n]ever dispose of the inquiry into constitutional 'voluntariness,'"[81] the *Xiong* court taught us that these inquiries can never really be conducted on their own anyway.

Once one accepts the logic of *Xiong*, it becomes clear that a trial court can surreptitiously include indicia of reliability when performing the constitutional voluntariness test. For example, for a juvenile suspect with a low IQ, interrogators who merely assert the uselessness of denying guilt or "falsely confront[] [him] with 'incontrovertible' evidence of his guilt"[82] could be engaging in illegal coercion, overcoming his will to resist,[83] and causing him to falsely confess simply to remove himself from an intolerable situation. For mentally cognizant adults, however, this treatment may be perfectly permissible as it may not overwhelm their decision-making powers. The point is, if trial judges could consider coercion along a sliding scale for different suspects, our criminal justice system could produce a set of rules where more types of tactics—even trickery and deceit, which were previously deemed non-coercive by the Supreme Court[84]—would be deemed unconstitutionally coercive for the most vulnerable defendants. Put differently, if one reads *Connelly* to stand for the idea that a suspect's mental condition is probative not just of his *susceptibility* to coercion, but also of *what constitutes* coercion, previously sanctioned police conduct could be deemed unconstitutional in some cases and the rate of false confessions would fall. Taking this view would allow trial judges to rule that confessions with the most indicia of unreliability are inadmissible without expressly overruling *Connelly*. Considering that many of the false confession DNA exoneration cases involved deceptive police techniques

80. *Id*. (emphasis added); *see also* White, *supra* note 36, at 2018 (reasoning that "Connelly need not be read as significantly altering the Due Process voluntariness test," and that *Connelly* can stand for the proposition that "interrogation methods legitimate in some contexts will be impermissible when employed against suspects with known vulnerabilities").

81. *Connelly*, 479 U.S. at 164.

82. Ofshe & Leo, *supra* note 71, at 212.

83. *See id*. at 211-12. Sociologists and social psychologists have long recognized that many aspects of police interrogation are inherently coercive, especially for the most vulnerable suspects. *See id.* at 211. As Richard Ofshe argued, "[N]o matter how 'soft' an interrogator's style, the interrogation experience will inevitably be distressing and anxiety provoking to a significant degree." *Id.* at 212. For juveniles and the mentally ill, these tactics can easily cross the line from stressful to coercive. *Id.*

84. *See supra* note 71.

applied to these vulnerable groups,[85] limiting the scope of *Connelly* in this manner could have a significant effect in decreasing the admissibility of confessions based on the due process voluntariness test.

B. Employing Federal Rule of Evidence 403 To Screen for Unreliable Confessions

Besides working within the constitutional voluntariness test, courts can also look elsewhere, to evidentiary rules, to prevent unreliable confessions from reaching the jury at trial. After all, the *Connelly* Court essentially sanctioned such a technique by ruling that a "statement rendered by one [with a severe mental illness] might be proved to be quite unreliable, but this is a matter to be governed by the evidentiary laws of [a] forum . . . and not by the Due Process Clause of the Fourteenth Amendment."[86] This Section will analyze the ability of evidence-based strategies to keep false confessions out of court and, in turn, see how these proposals ultimately point back to the need for the constitutional voluntariness test to consider trustworthiness factors before the fastest progress can be made.

Richard Ofshe and Richard Leo, in particular, have sanctioned evidence-based exclusions as the best realistic alternative, given the constraints of the voluntariness test, to bring reliability back into the admission analysis.[87] Federal Rule of Evidence 403 (FRE 403) (and its many state analogues) states that a court may "exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice."[88] While FRE 403 demonstrates an intent to err on the side of admission (by virtue of the "substantially" qualifier in the balancing test), confession evidence with multiple indicia of unreliability can nevertheless still be excluded as unfairly prejudicial. After all, a confession that appears patently false is by definition unreliable and would thus be excludable.[89] The challenge, however, lies in formulating a list of factors for judges to use to best assess the warning signs of false confessions.

Ofshe and Leo have proposed a three-part balancing test that focuses on the "fit" of a suspect's confession with the actual crime evidence.[90] If there is a disparity in this juxtaposition, a trial judge has a good reason to believe that a confession is not truthful and, thus, a good basis to find the

85. Garrett, *supra* note 14, at 1064, 1097-98.
86. *Connelly*, 479 U.S. at 167.
87. *See* Ofshe & Leo, *supra* note 72, at 991.
88. FED R. EVID. 403.
89. *See* Leo et al., *supra* note 7, at 524.
90. Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 438-39 (1998).

confession overly prejudicial and, thus, inadmissible. The test proposes a consideration of the following three indicia of reliability:

> Does the statement [during interrogation]: (1) lead to the discovery of evidence unknown to the police . . . ; (2) include identification of highly unusual elements of the crime that have not been made public? (e.g., an unlikely method of killing, mutilation of a certain type, use of a particular device to silence the victim, etc.); or (3) include an accurate description of the mundane details of the crime scene which are not easily guessed and have not been reported publicly? (e.g., how the victim was clothed, disarray of certain furniture pieces, presence or absence of particular objects at the crime scene, etc.).[91]

Applying this test, a mentally-compromised suspect who is facing police pressure, but not enough to be ruled coercive under *Connelly*, may provide a confession full of generalities that does not help the police build any sort of narrative about how a crime occurred. A truly false confessor will not be able to provide much information besides a bare assertion of guilt—"I did it"—and thus his confession will not lead to the discovery of new evidence, identify unique nonpublic facts, or provide a good fit with the emerging crime narrative that the police have been building. Based on this assessment, it seems likely the suspect confessed only to remove himself from a stressful situation, please authority figures, or for any of the other reasons discussed *supra* in Section II.B. Faced with a pretrial motion for exclusion under FRE 403, a judge could consider this balance and reasonably conclude that the confession was false, meaning that its lack of probative value can *easily* be outweighed by its prejudice to the defendant. The fact that empirical studies show that jurors are incredibly likely to credit *any* confession demonstrates that the prejudice would be severe—and likely dispositive of guilt in the jurors' eyes—should the evidence be admitted.[92]

While Ofshe and Leo's proposal is certainly a step in the right direction, it is not without faults. The limitations of FRE 403 in screening for reliability, however, serve to illustrate that the constitutional due process voluntariness test must change before sweeping progress in preventing the admission of false confessions can be made.

First, Ofshe and Leo downplay the extent to which police contamination can create a false fit between the suspect's story and the real crime facts.[93] For example, prongs one and two of the test will suggest a

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91. *Id.*

92. *See id.* at 524; *supra* note 9 and accompanying text.

93. *See supra* Section II.B for a complete discussion of the methods and frequency of police contamination of confessions. As stated previously, contamination is a huge problem because it takes away from the police a means to independently assess a suspect's true knowledge of a

confession is reliable if a police officer surreptitiously coaxed some unusual crime fact out of a suspect through asking leading questions. Far from isolated instances, Garrett's research demonstrates that police will often deny contaminating the interrogation, serving to reinforce the false aura of reliability.[94] In other words, the effectiveness of using FRE 403 to keep out false confessions depends largely on interrogators holding back evidence during questioning so the suspect, if guilty, can be the one to provide the crime narrative. Moreover, it also depends on ensuring the suspect does not obtain unique crime facts from any other source.

Second, utilizing FRE 403 has the downside of causing admissions of confessions to be effectively non-reversible on appellate review. The standard of review is a critical difference between an evidentiary exclusion and a constitutional one: due process voluntariness rulings are reviewed on either a de novo or clear error standard, while evidentiary rulings are almost always reviewed under the more deferential "abuse of discretion" standard.[95] In other words, incorrect voluntariness rulings (i.e., cases where a police practice *clearly* overcame the will of a suspect to resist interrogation) can be easily overturned because the appellate court does not have the constraint of deferring to the trial court's decision that exists under the "abuse of discretion" standard for evidentiary rulings. Essentially, if trial judges do not begin to aggressively use FRE 403 on their own, there is little chance of a reversal on appeal to prompt them to rethink their practices.

While the Ofshe and Leo test is an admirable suggestion for a tough situation, the limitations of evidence-based practices to reject unreliable confessions demonstrates that true reform rests within the due process test, not outside of it. While the current Supreme Court is unlikely to fundamentally change the voluntariness analysis, false confession litigants would be wise to nibble around the edges by attempting to distinguish *Connelly*.[96]

V. CONCLUSION

This Article has attempted to explain the causes of false confessions and illustrate how the current constitutional test for assessing the

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crime. *See* Garrett, *supra* note 14, at 1074 (indicating that twenty-seven of thirty-eight recent false confession-based DNA exonerations involved police denying any fact-leaking under oath).

94. *See* Garrett, *supra* note 14, at 1057.

95. *See* Peter Rutledge, *The Standard of Review for the Voluntariness of a Confession on Direct Appeal in Federal Court*, 63 U. CHI. L. REV. 1311, 1311-14 (1996) (finding that the Supreme Court's ruling in *Miller v. Fenton* established a de novo standard of review for due process voluntariness findings "in the context of a habeas corpus petition," but left open the question of what standard should be used in cases outside of the habeas context).

96. *See supra* Section IV.A.

voluntariness of a confession is inadequate to account for many of the reasons that an innocent person may confess to a crime he did not commit. The last forty years have been characterized by a shift in the due process voluntariness test to explicitly exclude indicia of unreliability when ruling on the admissibility of a confession at trial. As a result, confessions that appear untruthful, but were not procured through an impermissible level of coercion, will be admitted under the current standard.

Unfortunately, this test is based on the false premise that innocent suspects will falsely confess only if their will to resist an interrogation is overcome by overt coercion. Recent psychological research—especially regarding juveniles, the mentally ill, and other vulnerable groups—has demonstrated that this is an antiquated assumption that has little connection to real world empirical evidence. We now know that much more than overt coercion can cause an innocent person to confess—one need look no further than the dozens of recent DNA exonerations involving false confessions. A man with an extremely low IQ, for example, may falsely claim "I did it" out of a life-long pattern of looking to authority figures for behavioral cues. Such pitfalls are not limited to vulnerable groups either. A healthy, rational adult may falsely admit guilt out of a simple desire to go home and a faith in the ability of the criminal justice system to eventually screen out his misstep.

We no longer live in world where facts like those in *Perry's Case* are needed to demonstrate that false confessions do in fact happen. This Article has attempted to demonstrate that many false statements of guilt are not the result of overt coercion, but rather a more subtle form of coercion that is not recognized by the due process test, even though such coercion clearly contributes to the frequency of false confessions. While evidence-based reforms can be used to circumvent the limits of the voluntariness test and bring reliability considerations back into the admission equation, they are not a perfect solution. Excluding the maximum amount of false confessions—and preventing false admissions of guilt in the first place—requires recognizing that *Connelly* is no longer entitled to stare decisis because of a fundamental change in our understanding of the causes and frequency of false confessions.