GHOSTS OF CONFESSION LAW PAST, PRESENT, AND FUTURE

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Modern American confession law is a ghost of its former self. Under current Due Process doctrine, a confession is admissible at trial only if it is "voluntary"—a rule that the Supreme Court claims to derive from two centuries of Anglo-American common law. But this doctrinal origin story is little more than a fiction. Today's reductive voluntariness test bears scant resemblance to the common law's multifaceted and chimeric exclusionary rule—and offers none of its protections.

This Article demonstrates that, contrary to the Justices' own account, what the Court applies today is not a constitutionalization of the common law, but rather a misreading of it. Drawing upon primary sources from the eighteenth and nineteenth centuries, this Article establishes that the common law of confessions was animated by two distinct values: one concerned with the ***reliability*** *of confessions and the other with the use of* ***oppressive tactics*** *to obtain them. This Article examines the Court's persistent failure to recognize and disentangle those values, and it thus traces the collapse of early confession law into the ineffectual morass of modern voluntariness. This Article then demonstrates the ways in which the voluntariness doctrine gestures at both reliability and oppression but meaningfully responds to neither, and it illustrates the concrete harms that result. On these bases, this Article advocates for a return to confession law's roots, calling upon the Court to at last distinguish the common law's dual concerns and to erect them into a robust, double-layered shield against the admission of unacceptable confessions. In doing so, the Court can shape American confession law into the potent safeguard that it once promised to be.*

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INTRODUCTION

Despite mounting evidence of their dangers, the American criminal legal system continues to treat confessions as "the queen of proof."[1] Even when faithfully applying current Supreme Court precedent, trial courts overwhelmingly admit confessions on the nod. In theory, due process forbids the use of any "involuntary" confession.[2] But in practice, the due-process voluntariness test is "largely meaningless" except in the most extreme cases.[3] Under current voluntariness case law, the police may induce a confession through almost any conceivable means short of physical violence,[4] and the prosecution may introduce a confession made in almost any conceivable circumstances, so long as the confessor either was not formally in custody or had waived their *Miranda* rights.[5] As a result,

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1 John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 14 (1978) ("The maxim of the medieval Glossators . . . aptly describes American law: *confessio est regina probationum*, confession is the queen of proof.").

2 *See, e.g.*, Mincey v. Arizona, 437 U.S. 385, 398 (1978) ("[A]ny criminal[-] trial use against a defendant of his involuntary statement is a denial of due process of law . . . ." (emphasis omitted)).

3 RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 276 (2008).

4 *See* Paul Marcus, *A Return to the "Bright Line Rule" of* Miranda, 35 WM. & MARY L. REV. 93, 100 (1993) ("It is almost impossible to identify any precedential standard from the voluntariness cases other than that relating to physical violence.").

5 *See* California v. Beheler, 463 U.S. 1121, 1125 (1983) (per curiam) (explaining that for confession to qualify as "involuntary" within meaning of Due Process Clause, confessor must have been subject to police coercion rising to level of "'formal arrest or restraint on freedom of movement' of the degree associated with formal arrest" (quoting Oregon v. Mathiason, 429 U.S. 492, 495 (1977))); Dickerson v. United States, 530 U.S. 428, 444 (2000) ("[C]ases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare." (quoting Berkemer v. McCarty, 468 U.S. 420, 433 n.20 (1984))).

judges "almost never suppress confessions, even highly questionable ones."[6]

But the law has not always taken such a cavalier stance on confessions. Today, the Supreme Court's voluntariness jurisprudence allows judges to wave through confessions made by unaccompanied ten-year-olds with learning disabilities,[7] by suspects under the influence of drugs and alcohol,[8] or by actively hallucinating hospital patients.[9] Yet 130 years ago, the Supreme Court wrote that a confession must be excluded "if *any* degree of influence has been exerted,"[10] and the Justices seriously considered whether any confession made to a police officer might be *per se* inadmissible.[11]

This Article explains when and how American confession law went wrong. Drawing upon historical sources, it demonstrates that today's "amorphous"[12] and ineffectual voluntariness standard is the result of the Supreme Court misreading the common law. In other words, this Article argues that the current state of American confession law is not, as the Court claims, a faithful inheritance of Framing-era confession doctrine. Rather, modern confession law represents a constitutionalized oversimplification. This Article examines how the American courts made that oversimplification, collapsing the

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6 Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 922 (2004); *accord, e.g.*, Klara Stephens, *Misconduct and Bad Practices in False Confessions: Interrogations in the Context of Exonerations*, 11 Ne. U. L. Rev. 593, 623 (2019) (surveying proven false confessions and finding that "even when there was legally defined misconduct, . . . suppression[] . . . was only granted in 3% of cases.").

7 *See* W.M. v. State, 585 So. 2d 979, 983 (Fla. Dist. Ct. App. 1991) (per curiam).

8 *See, e.g.*, People v. Johnson, 674 N.E.2d 844, 851 (Ill. App. Ct. 1996).

9 *See* United States v. Parker, 116 F. Supp. 3d 159, 174–75 (W.D.N.Y. 2015).

10 Bram v. United States, 168 U.S. 532, 565 (1897) (emphasis added) (quoting 3 Wm. Oldnall Russell, A Treatise on Crimes and Misdemeanors 479 (Horace Smith & A. P. Perceval Keep eds., Lond., Stevens & Sons, Ltd. 6th ed. 1896) (1819)).

11 In *Bram*, 168 U.S. at 556–58, the Court surveyed the state of confession law in both Britain and the United States and noted that "there seems to be doubt in England whether . . . the mere fact of the interrogation of a prisoner by a police officer would *per se* render the confession inadmissible." Ultimately, the Court declined to adopt such a rule in the United States, but did note that "where a confession is elicited by the questions of a policeman, the fact of its having been so obtained, it is conceded, may be an important element in determining whether the answers of the prisoner were voluntary." *Cf., e.g.*, California v. Beheler, 463 U.S. 1121, 1125 (1983) (per curiam) (holding police custody to be necessary prerequisite to finding of involuntariness).

12 Eve Brensike Primus, *The Future of Confession Law: Toward Rules for the Voluntariness Test*, 114 Mich. L. Rev. 1, 3 (2015).

common law's rich "complex of values"[13] into the single, nebulous concept of "voluntariness"—and in doing so, rendering that concept essentially meaningless.

More specifically, this Article advances two primary arguments. First, this Article demonstrates that, until at least the early twentieth century, the common law of confessions broadly responded to two distinct concerns: the reliability of a confession and the use of oppressive tactics to obtain it. Second, this Article argues that, by failing to recognize and delineate those discrete concerns, the Supreme Court developed an internally inconsistent body of constitutional confession law that, today, gestures at both confession reliability and oppressive police tactics but meaningfully responds to neither. On these bases, this Article urges the Court to return its confession-law jurisprudence to first principles and bifurcate the modern voluntariness standard into distinct reliability and oppression tests, thereby erecting a double-layered shield against the admission of unacceptable confessions.

Much ink has been spilled on the failures of current American confession law,[14] and other writers have identified the dual values underlying modern due-process voluntariness.[15] But this is the first article to examine those issues through the lens of the Anglo-American common law and therefore the first to isolate and describe this causative link. By limiting their inquiries to this side of the nineteenth century, earlier confession-law scholars have removed modern American confession law from its original context and thereby impoverished our understanding of both of its underlying values.[16] This Article

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

14 *See infra* subpart III(A) and sources therein cited.

15 *See generally, e.g.*, Welsh S. White, *What Is an Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001, 2001 (1998) (identifying "two opposing lines of inquiry: whether the courts should determine if the methods used in interrogation are likely to produce an untrustworthy confession, or whether the courts should analyze the trustworthiness of each individual confession." (emphasis omitted)).

16 Eve Brensike Primus, for instance, convincingly argues that, in the past fifty years, the Supreme Court has collapsed a "deontological strand" of case law and a "consequentialist strand" of case law into a single concept of voluntariness. *See* Primus, *supra* note 12, at 1 (emphasis omitted). However, she begins her review of case law in the 1930s and mentions the English sources only indirectly and in passing. *Id.* at 11, 27. Steven Penney's *Theories of Confession Admissibility: A Historical View*, 25 AM. J. CRIM. L. 309 (1998), aspires to a historical analysis similar to that undertaken in the present Article. However, the aim of that article is different than the aim of the present Article: Penney seeks to identify and critique the rationale underlying *Miranda v. Arizona*, 384 U.S. 436 (1966), which this Article largely sets aside as arising independently from the common-law doctrines that eventually collapsed into voluntariness. Penney thus relies heavily on

reinstates that context, charting a diachronic account of confession doctrine. It draws upon this account to identify where and how American confession law went wrong, and it urges the courts of the United States to course-correct by revisiting their common-law roots.

This Article also breaks from much existing confession-law scholarship[17] in that this Article is not concerned with *Miranda*[18] and its progeny. This is not an oversight, and it is certainly not a reflection of *Miranda*'s relative importance in American confession law. To the contrary, although now on the wane,[19] *Miranda*'s warning-and-waiver requirements still in many respects eclipse voluntariness as the polestar of confession admissibility.[20] But the prominence of *Miranda*'s famously "prophylactic" rule[21] is in large part due to the failure of the voluntariness doctrine.[22] It is that doctrine with which this Article is concerned and which it traces from the eighteenth century to the present day. *Miranda*, although at times anticipated by courts applying the common law,[23] is not a product of that

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modern secondary sources and—perhaps for this reason—reaches a conclusion that the present Article actively contests, namely, that "[i]n the premodern period," which Penney identifies as spanning from the middle ages to 1850, "only reliability—in the form of the common[-]law voluntariness rule—had much of a systemic impact." *Id.* at 383; *cf. infra* Part I and sources therein cited.

17 *See, e.g.*, Lauren E. Clatch, *Interrogating* Miranda*'s Custody Requirement*, 103 N.C. L. Rev. 69, 70 (2024) ("For nearly six decades, *Miranda v. Arizona* has been a hallmark of American criminal justice and procedure. As such, *Miranda* and its progeny have inspired commentary from public figures, academics, and practitioners." (footnote omitted)); Janet C. Hoeffel, Miranda*'s First Principles*, 50 Tex. Tech L. Rev. 113, 114 (2017) (calling on the Supreme Court to "revisit the first principles of *Miranda*").

18 384 U.S. 436 (1966).

19 *See generally, e.g.*, Clatch, *supra* note 17; Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to* Miranda v. Arizona*)*, 99 Geo. L.J. 1 (2010).

20 Leo, *supra* note 3; *accord, e.g.*, Deborah Young, *Unnecessary Evil: Police Lying in Interrogations*, 28 Conn. L. Rev. 425, 449–50 (1996) ("With *Miranda*, the Court shifted away from the case-by-case evaluation of voluntariness . . . ."); Richard A. Leo, *Questioning the Relevance of* Miranda *in the Twenty-First Century*, 99 Mich. L. Rev. 1000, 1023–26 (2001) (describing how the *Miranda* analysis has come to dominate the issue of confession admissibility).

21 *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 437–38 (2000).

22 *See infra* note 295 and accompanying text.

23 *See, e.g.*, R v. Baldry (1852) 169 Eng. Rep. 568, 570; 2 Den. 430, 435 (Lord Campbell CJ) ("'You need not say anything to criminate yourself, but what you do say will be taken down and used as evidence against you.' Do these words import a promise or a threat [which would render a confession inadmissible]?").

same evolutionary line.[24] This distinction is increasingly crucial as the Supreme Court continues to deal *Miranda* a "death by many cuts,"[25] potentially[26] paving the way for a return to a meaningful voluntariness jurisprudence.

This Article aims to inform that jurisprudence by demonstrating how, in returning to its roots, the Supreme Court can reshape modern confession law into the potent safeguard that it was always meant to be. To that end, this Article proceeds in three principal parts:

Part I reconstructs the common law of confessions as it stood on the eve of its constitutionalization. It examines Anglo-American law's traditional ambivalence to self-incrimination, and it identifies two discrete concerns or values underlying that body of law. Borrowing vocabulary from modern English law, this Article refers to these as *reliability* and *oppression* concerns.[27] The first represents a wariness of potentially false confessions, while the second evinces a reluctance to condone morally objectionable investigation tactics. Part I demonstrates that, although intertwined and sometimes undistinguished, these concerns had independent existence and force at common law.

Part II examines the current state of American confession law and its reliance on the monolithic concept of "voluntariness." This Part details the collapse of the common law's two values and the rise of the modern due-process inquiry. It surveys Supreme Court case law from *Bram*,[28] to *Brown*[29] and

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24 *See* Miranda v. Arizona, 384 U.S. 436, 531 (1966) (White, J., dissenting) ("[T]he Court's holding today . . . is at odds with American and English legal history[] and involves a departure from a long line of precedent. . . . [T]he Court has not discovered or found the law in making today's decision[;] . . . what it has done is to make new law . . . .").

25 Friedman, *supra* note 19, at 36; *accord, e.g.*, Primus, *supra* note 12, at 3 ("[T]he Roberts Court has gutted criminal suspects' *Miranda* and *Massiah* protections. As a result, where there used to be three different constitutional doctrines to protect suspects during a police interrogation, there is now effectively one: voluntariness." (footnote omitted)).

26 Although perhaps optimistically. *See, e.g.*, Yale Kamisar, *The Rise, Decline, and Fall (?) of* Miranda, 87 WASH. L. REV. 965, 1026 (2012) ("It is hard to see why a Court that was sufficiently disenchanted with *Miranda* to overrule it would want to reshape the old 'voluntariness' test . . . .").

27 *See* Police and Criminal Evidence Act 1984, c. 60, § 76 (Eng.). "Oppression," in this sense, has been described by the English courts as the "[e]xercise of authority or power in a burdensome, harsh, or wrongful manner; unjust or cruel treatment of subjects, inferiors, etc.; the imposition of unreasonable or unjust burdens." R v. Fulling [1987] QB 426 (AC) at 432 (Eng.).

28 Bram v. United States, 168 U.S. 532 (1897).

29 Brown v. Mississippi, 297 U.S. 278 (1936).

Chambers,[30] through to *Malloy*[31] and *Connelly*,[32] and it demonstrates the Court's persistent failure in these cases to distinguish and advance either of the common law's values.

Part III of this Article demonstrates how the collapse of the common law has vitiated the protections that it might have offered and considers how the Court might reestablish those protections. This Part first illustrates the pressing need for a "confession law future" by surveying the harms caused by "confession law present."[33] It then calls upon the Court to—at long last—cleanly unknot the two discrete strands of voluntariness and weave them into independent admissibility requirements.[34] It examines the doctrinal paths by which the Court could perform this separation and, in doing so, pick up where the common law left off and reintegrate the values and promises of "confession law past."

Finally, this Article terminates with a brief conclusion.

I
Echoes of Confession Law Past

This Article's first aim, which this Part undertakes, is to paint a nuanced and comprehensive portrait of common-law confession doctrine. However, it is important to recognize that this is in some ways an impossible task.[35] In part, this is because common-law criminal procedure was not a monolithic

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

31 Malloy v. Hogan, 378 U.S. 1 (1964).

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

33 *See infra* subpart III(A).

34 *See infra* subpart III(B).

35 As Suzanna Sherry observed thirty years ago in a critique of law-office history, "professional historians" differ from lawyers in that "they recognize that history is indeterminate." Suzanna Sherry, *The Indeterminacy of Historical Evidence*, 19 Harv. J.L. & Pub. Pol'y 437, 441 (1995). In other words, lawyers have a tendency to "ask[] questions of the past that the past cannot answer." John Phillip Reid, *Law and History*, 27 Loy. L.A. L. Rev. 193, 202 (1993) (quoting Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 Sup. Ct. Rev. 119, 156). Wary of this very real danger, this Article disavows any attempt to identify "the" rule about confession admissibility at common law. No such rule exists. Even by imposing strict temporal and geographic limits on the phrase "at common law," it would be at least as impossible to paint a static portrait of the law of confessions in, say, 1850, as it would be to complete the same task with respect to the law in 2025. This Article's goal is not to sidestep these complexities by constructing the kind of "history-lite" that jurists sometimes rely on as "a necessary fiction" when seeking support for legal or policy arguments. *See* Gordon S. Wood & Scott D. Gerber, *The Supreme Court and the Uses of History*, 39 Ohio N.U. L. Rev. 435, 443 (2013). Rather, it attempts to distill a *broadly* accurate understanding of the most prominent strains of Anglo-American legal thought during the long nineteenth

phenomenon. In fact, even the term "common law" is imprecise. Other writers have identified at least half a dozen possible meanings,[36] and under several of those definitions, the American criminal legal system is still very much a "common law" one—as are the systems of England, Canada, Australia, and several other jurisdictions.[37] This Article does not attempt to examine every single confession case ever decided in any of these places. Rather, this Article uses the term "common law" in a slightly narrower sense, primarily to mean "the body of English legal doctrine comprising the foundation of American law and its later development."[38]

But even within this narrowed sense, it would still be possible to trace features of common-law criminal trial and procedure to at least as early as the thirteenth century.[39] Luckily, this Article need not go that far, as the common law of evidence—including confessions—arose much later.[40] Formal "exclusionary rules of evidence" probably did not emerge at common law before 1550,[41] and treatises dedicated specifically to evidence law began to appear only in the early eighteenth century.[42]

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century by relying on as wide a variety as possible of American and English cases and treatises covering a span of several centuries.

36 *See* J. Lyn Entrikin, *The Death of Common Law*, 42 HARV. J.L. & PUB. POL'Y 351, 361–64 (2019) (citing Morris L. Cohen, *The Common Law in the American Legal System: The Challenge of Conceptual Research*, 81 LAW LIBR. J. 13, 14–18 (1989)).

37 *See, e.g.*, Arizona v. Fulminante, 499 U.S. 279, 293 (1991) (White, J., dissenting) ("[A]n underlying principle in the enforcement of our criminal law [is that] ours is an accusatorial and not an inquisitorial system." (quoting Rogers v. Richmond, 365 U.S. 534, 540–41 (1961))); Carissa Byrne Hessick, *The Myth of Common Law Crimes*, 105 VA. L. REV. 965, 968 (2019) (arguing that "[t]he common law continues to play an important role in shaping the substance of criminal law.").

38 Entrikin, *supra* note 36, at 361–62.

39 *See generally* ROBERT BARTLETT, TRIAL BY FIRE AND WATER: THE MEDIEVAL JUDICIAL ORDEAL 127–52 (1986) (describing the end of trial by ordeal in England in 1219 and its replacement with trial by jury).

40 *See, e.g.*, R v. Baldry (1852) 169 Eng. Rep. 568, 570; 2 Den. 430, 434 (Mills, counsel for defendant) ("As to the practice in early times[,] the law is barren of authorities, and little is known of it except by tradition. Lord Coke says nothing upon the subject . . . .").

41 Frederick W. J. Koch, *The Hearsay Rule's True* Raison d'Être*: Its Implications for the New Principled Approach for Admitting Hearsay Evidence*, 37 OTT. L. REV. 249, 256 (2006) ("Almost all legal historians agree that it is highly unlikely that any exclusionary rules of evidence emerged at common law before 1550.").

42 *See generally, e.g.*, WILLIAM NELSON, THE LAW OF EVIDENCE (Lond., R. Gosling 1717) [hereinafter NELSON]; GEOFFREY GILBERT, THE LAW OF EVIDENCE (Dublin, Sarah Cotter 1754) [hereinafter GILBERT].

Accordingly, the present Part of this Article is concerned primarily with the period between 1700[43] and 1900.[44]

Of course, evidence law during this period was a far cry from modern evidence law—in part because it developed around and responded to a very different model of criminal procedure. The first professional police forces did not emerge until the mid-nineteenth century,[45] and in the United States, the public prosecutor was "clearly a minor actor in the court's structure" until after the Civil War.[46] Thus, when early courts and commentators were called upon to determine the admissibility of out-of-court confessions, those confessions had typically been obtained in one of two ways: either by private citizens pursuing their own investigations or by Justices of the Peace—local lay magistrates who were authorized to conduct examinations of suspects, accusers, and witnesses.[47]

Importantly, the body of law that governed these confessions was transatlantic well into the twentieth century. That is, barring specific authority to the contrary, English evidence law was frequently accepted as authoritative in the United States.[48] For instance, when Simon Greenleaf wrote his celebrated

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43 The earliest sources to which this Article cites are GILBERT, *supra* note 42, and NELSON, *supra* note 42. Nelson's treatise was first published in 1717, whereas Gilbert's treatise—authoritative well into the nineteenth century—was not published until 1754. However, Gilbert himself had died nearly thirty years prior, and "it is generally agreed that Gilbert's work reflects an understanding of evidence formed no later than the opening decade of the eighteenth century." Stephan Landsman, *The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England*, 75 CORNELL L. REV. 497, 592 (1990). Notably, some of the cases cited in this Article rely in turn on Sir Matthew Hale's *Historia Placitorum Coronae*. However, Hale's brief comments on confessions were specific to cases of treason, which were in some respects procedurally distinct from "ordinary" trials and from which it would therefore be unsafe to generalize. *See* 1 MATTHEW HALE, HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN 304 (W. A. Stokes & E. Ingersoll eds., Robert H. Small 1st Am. ed. 1847) (1736) (noting that a confession "made without torture" was sufficient to support a conviction for treason).

44 As discussed in further detail below, the United States Supreme Court decided a confession-admissibility case on constitutional grounds for the first time in 1897. Bram v. United States, 168 U.S. 532, 564 (1897); *see infra* notes 126–163 and accompanying text.

45 *See* Jonathan Barth, *Criminal Prosecution in American History: Private or Public?*, 67 S.D. L. REV. 119, 165–66 (2022).

46 Michael Edmund O'Neill, *Private Vengeance and the Public Good*, 12 U. PA. J. CONST. L. 659, 679 (2010) (quoting JOAN E. JACOBY, THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY 23 (1980)).

47 *See generally* JOHN H. LANGBEIN, PROSECUTING CRIME IN THE RENAISSANCE: ENGLAND, GERMANY, FRANCE 5–125 (1974).

48 *See generally, e.g.*, Ford W. Hall, *The Common Law: An Account of Its Reception in the United States*, 4 VAND. L. REV. 791 (1951).

A Treatise on the Law of Evidence in 1842, his explicit goal was to produce a U.S.-specific work.[49] Nevertheless, his chapter on confessions cited to several English cases and commentaries.[50] Likewise, when John Henry Wigmore published his own later-authoritative guide to evidence law in 1904, he titled it *A Treatise on the Anglo-American System of Evidence* and considered the subject sufficiently broad as to encompass Canada.[51] And at least as late as the 1920s, American courts were citing English confession cases not as remarks on foreign law,[52] but as support for their own rulings.[53]

As a general rule, this common law of confessions cast a skeptical eye on extrajudicial admissions of guilt. Historically, all felonies were potentially capital offenses,[54] and as a result, the stakes were extremely high when admitting evidence as damning as a confession.[55] Partly for this reason, eighteenth- and nineteenth-century judges frequently emphasized that

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49 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE, at IX (Simon Greenleaf Croswell ed., 15th ed. 1892) (1842) (from the Advertisement to the First Edition: "[M]any of the topics [earlier evidence treatises] contain were never applicable to this country; [and] some others are now obsolete[,] . . . rendering it indispensable that the work should be rewritten, with exclusive reference to our own jurisprudence.").

50 *See, e.g.*, *id.* at 291 n.2 (citing R v. Warickshall (1783) 168 Eng. Rep. 234; 1 Leach 263 and *The (London) Law Magazine*); *id.* at 295 n.2 (citing, e.g., The Queen's Case (1820) 129 Eng. Rep. 976, 981; 2 Br. & B. 284, 297–98; R v. Higgins (1829) 172 Eng. Rep. 565; 3 Car. & P. 603); *id.* at 297 n.4 (citing to R v. Garner (1848) 169 Eng. Rep. 267; 1 Den. 329).

51 *See generally* 1 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW (1904) [hereinafter 1 WIGMORE].

52 *Cf.* Malinski v. New York, 324 U.S. 401, 418–19 (1945) (discussing English practice but clearly distinguishing from American).

53 *See* Denmark v. State, 116 So. 757, 759 (Fla. 1928) ("A confession voluntarily made but procured by artifice, falsehood, or deception is admissible." (citing R v. Derrington (1826) 172 Eng. Rep. 189; 2 Car. & P. 418)); *see also, e.g.*, Commonwealth v. Burns, 187 A.2d 552, 558 (Pa. 1963) (citing infanticide confession cases from Ireland, New Zealand, and Australia). *But cf., e.g.*, State v. Doherty, 2 Tenn. (2 Overt.) 79, 87 (1806) (Overton, J.) (relying on English cases but also observing that "[m]any of the English decisions since the revolution, approach too near severity, to be consistent with the humane principles in the ancient books").

54 *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *98 ("The idea of felony is indeed so generally connected with that of capital punishment[] that we find it hard to separate them."); David J. Seipp, *The Distinction Between Crime and Tort in the Early Common Law*, 76 B.U. L. REV. 59, 61 (1996) ("The usual sentence for felons after 1200 was death by hanging.").

55 *See, e.g.*, State v. Fields, 7 Tenn. (Peck) 140, 141 (1823) ("[E]vidence of confession, tho' admissible, is yet received with great distrust, and under the superabundance of very solicitous apprehensions, for the wrong it may do."); Commonwealth v. Dillon, 4 U.S. (4 Dall.) 116, 118, 1 Ald. 368 (Pa. 1792) ("If there is ground even to suspect [that a defendant falsely confessed], God forbid, that his life should be the sacrifice!").

their rulings on confession admissibility were motivated by a concern for the confessions' probable truthfulness—i.e., their reliability. In the seminal English case of *R v. Warickshall*, for instance, the Court of King's Bench asserted that "[c]onfessions are received in evidence[] or rejected as inadmissible[] under a consideration whether they are or are not [e]ntitled to credit."[56] And in the early American case of *Commonwealth v. Dillon*, the Supreme Court of Pennsylvania similarly observed that "[t]he true point for consideration" was whether a confession appeared to be true or false.[57]

The primary mechanism for screening out such unreliable confessions was the rule that "a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape . . . that no credit ought to be given to it; and therefore it is rejected."[58] In other words, because "the mind, under the pressure of calamity, is prone to acknowledge, indiscriminately, a falsehood or a truth,"[59] a confession was inadmissible if induced—or even preceded—by threats or promises.[60] The concepts of "threats" and "promises" were often construed expansively,[61] on the ground that "the law cannot

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56 (1783) 168 Eng. Rep. 234, 234; 1 Leach 263, 263.

57 4 U.S. (4 Dall.) at 118, 1 Ald. 368.

58 *Warickshall*, 168 Eng. Rep. at 235, 1 Leach at 263–64. Although *Warickshall* was notable for its definitive articulation of the rule, the rule itself probably predated *Warickshall*. *See* Thomas Y. Davies, *Farther and Farther from the Original Fifth Amendment: The Recharacterization of the Right Against Self-Incrimination as a "Trial Right" in* Chavez v. Martinez, 70 TENN. L. REV. 987, 1021 (2003) (suggesting that *Warickshall* "articulated a rule that had emerged in earlier unreported English cases").

59 State v. Roberts, 12 N.C. (1 Dev.) 259, 260 (1827) (Taylor, C.J.).

60 *See, e.g.*, *Fields*, 7 Tenn. (Peck) at 142 ("[A]dmissibility is made to depend, on its being free from all suspicion of having been obtained by any threats of severity or promise of favor, and of every influence, even the minutest, having been exercised over the mind of the person.").

61 But not always. For instance, in *State v. Absolom*, 2 Del. Cas. 32, 33 (Ct. Quarter Sess. P. 1808), an unspecified "company . . . were endeavouring to extort a confession from [the defendant]" and apparently "told him that it 'would be better for him to confess.'" In many cases, identical or near-identical language rendered a resulting confession inadmissible. *See, e.g.*, R v. Baldry (1852) 169 Eng. Rep. 568, 569; 2 Den. 430, 433 (Mills, counsel for defendant) (citing cases excluding confessions made after the words "it will be better to speak the truth" and "[you] ought to tell whatever was the truth, but [you] must be very careful as [you are] sure to be committed"); State v. Bostick, 4 Del. (4 Harr.) 563, 564–65 (Ct. Oyer & Terminer 1845) ("[W]here the prisoner was told . . . that it would be better for him if he did [confess] . . . [it was] held sufficient to exclude the confession."); *id.* at 565 (excluding confession where servant child's mistress merely said that "if she confessed it, the suspicion would not be stronger; that she . . . did not expect to do any thing with her, but was going to send her home"). The *Absolom* court, however, without further explanation, held that the defendant's confession was

measure the force of the influence used, or decide upon its effect upon the mind of the prisoner."[62] Thus, as the U.S. Supreme Court observed when surveying cases in 1897, confessions were excluded following inducements as mild as "you had as well tell all about it."[63]

On this basis, modern commentators have sometimes asserted that "[a]t common law, confessions were excluded *only* when there was a concern as to their reliability."[64] But this is an oversimplification. Common-law courts certainly were concerned with excluding unreliable confessions[65]—sometimes to the exclusion of other considerations.[66] But in both English and

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"[not] made under circumstances similar to those mentioned in the authorities." *Absolom*, 2 Del. Cas. at 33. Notably, the defendant, Absolom, was "a free Negro" who, on conviction, the court ordered into slavery. *Id.* at 33–34.

62 Bram v. United States, 168 U.S. 532, 543 (1897) (quoting 3 WM. OLDNALL RUSSELL, A TREATISE ON CRIMES AND MISDEMEANORS 479 (Horace Smith & A. P. Perceval Keep eds., Lond., Stevens & Sons, Ltd. 6th ed. 1896) (1819)).

63 *Id.* at 561 (quoting Vaughan v. Commonwealth, 58 Va. (17 Gratt.) 576, 581 (1867)).

64 Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 111 (1997); *see also* Yale Kamisar, *What is an "Involuntary" Confession? Some Comments on Inbau and Reid's* Criminal Interrogation and Confessions, 17 RUTGERS L. REV. 728, 742–43 (1963) ("For *most* of the two hundred years within which [the voluntariness] formulation had constituted 'the ultimate test,' it had been no more than an *alternative statement* of the rule that a confession was admissible so long as it was free of influences which made it 'unreliable' or 'probably untrue.'") (quoting 3 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 822 (1940)).

65 *See, e.g.*, Commonwealth v. Dillon, 4 U.S. (4 Dall.) 116, 117, 1 Ald. 368 (Pa. 1792); *Fields*, 7 Tenn. (Peck) at 142 ("How uncertain must be the things which are uttered in such a storm of the passions? And this is not all; how easy is it for the hearer to take one word for another, or to take a word in a sense not affixed to it by the speaker."); State v. Roberts, 12 N.C. (1 Dev.) 259, 262 (1827) (Henderson, J.) ("[C]onfessions induced by hope or extorted by fear are, of all kinds of evidence, the least to be relied on, and are therefore entirely to be rejected."). *But cf., e.g.*, *id.* ("As to the confessions being corroborated by other testimony, that cannot affect the case. They were admissible or inadmissible, of themselves.").

66 *See, e.g.*, O'Brien v. People, 48 Barb. 274, 275 (N.Y. Gen. Term 1867) ("Confessions are excluded only when they are made under circumstances that tend to produce doubt as to their truth . . . ."); State v. Aaron, 4 N.J.L. 269, 279 (1818) ("If the confession . . . rested upon the ground of hope and fear alone . . . I should have been inclined to yield to its . . . competency . . . . But . . . it is a simple naked confession, disclosing no fact, pregnant with no circumstances to give it authority, or in any way to corroborate it. . . . I should incline to think it ought not to have been admitted as evidence . . . ." (emphasis omitted)); State v. Moore, 2 N.C. (1 Hayw.) 482, 483 (1797) (per curiam) ("[A] confession, whether extorted or not, that relates a number of circumstances which the prisoner could not well be acquainted with but as perpetrator . . . is such testimony as should be left to the consideration of a jury.").

American courts, confessions were also excluded on grounds entirely divorced from their reliability.[67]

The clearest example of this was the principle that confessions taken under oath were *per se* inadmissible. That rule likely began as a simple application of statutory interpretation—the sixteenth-century acts of Parliament that authorized justices of the peace to examine accused criminals did not specify that they should do so under oath.[68] By the early nineteenth century, however, it had evolved into a general exclusionary rule.[69]

It is difficult to convincingly frame this rule as aiming to exclude confessions that were unreliable.[70] The fact that a suspect had sworn to tell the truth seems unlikely to render their subsequent confession *less* reliable, and indeed, much common-law criminal procedure was premised on a belief in the "divine power of the oath to compel truthful testimony."[71] Nor did courts and commentators usually attempt to justify the rule in reliability terms. Rather, it was generally explained as arising from "the most obvious principles of justice, policy, and humanity"[72]—that is, from a refusal to place

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67 *See* John Fabian Witt, *Making the Fifth: The Constitutionalization of American Self-Incrimination Doctrine, 1791–1903*, 77 TEX. L. REV. 825, 834 (1999) ("[In the early Republic], courts ruled on and litigants fought over an array of doctrines that kept self-inculpatory testimony out of the courtroom.").

68 *See* 1 & 2 Phil. & M. c. 13 (1554) (Eng.) (repealed 1826); 2 & 3 Phil. & M. c. 10 (1555) (Eng.) (repealed 1826). John H. Langbein has written extensively on these laws, collectively referred to as the Marian Committal Statutes. *See generally* LANGBEIN, *supra* note 47.

69 *See, e.g.*, Witt, *supra* note 67 ("The confession rule excluded pretrial confessions from subsequent admission at trial when they had been extracted under oath . . . .").

70 Although some courts did at least suggest that this might be the rule's justifications. *See, e.g.*, *O'Brien*, 48 Barb. at 280 ("Confessions are excluded only when they are made under circumstances that may tend to produce doubt as to their truth . . . . When made under the effect of threats, or the sanction of an oath . . . the admissions are excluded, as matters of law."); State v. Gilman, 51 Me. 206, 217 (1862) ("The prisoner is not to be examined on oath, for this would be a species of duress . . . .").

71 George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 575, 580 (1997); *accord* Witt, *supra* note 67, at 851–53. Both Fisher and Witt suggest that, by the late eighteenth century, this "belief" was more of a legal fiction.

72 State v. Pierce, 2 Mart. (o.s.) 253, 253 (La. 1812) (Hennen, counsel for defendants) (mem.) (quoting LEONARD MACNALLY, THE RULES OF EVIDENCE ON PLEAS OF THE CROWN 47 (Lond., J. Butterworth & Dublin, J. Cooke 1802)); *accord, e.g.*, United States v. Bascadore, 24 F. Cas. 1028, 1028 (C.C.D.C. 1811) (No. 14,536) ("From the silence of [the Marian Committal Statutes] in that respect[,] the judges have drawn the inference that the confession is not to be upon oath; and it is said that policy forbids the using of such declarations against the prisoner."); Miller v. Commonwealth, 4 Ky. (1 Bibb) 404, 405 (1809) ("That the examination on oath

the suspect between the rock of perjury and the hard place of self-incrimination.[73]

Indeed—perhaps because some of the "inducements" censured by the case law were so patently unlikely to in fact cause the kind of "agitation of [the] mind" that would lead a person "to state things which are not true"[74]—the more general threats-or-promises exclusionary rule was also sometimes discussed as a policy-based refusal to endorse oppressive investigatory tactics. In an 1891 case from California, for instance, a federal judge forcefully rejected a reliability rationale for exclusion, writing:

> The rule does not stand upon the ground merely that the testimony is unreliable, and liable to mistake . . . . The slightest thing, say, "You had better confess;" [or] "Make a clean breast of it," — causes a confession to be rejected. Why? Not because it affords a reasonable ground that an innocent person at such invitation confesses himself guilty of a crime which he never committed, . . . but [because] the law will not allow a confession to be extracted from a person unless under the fullest guaranty that it is spontaneous and free, and without any influence brought to bear upon him; not that it raises a presumption that perhaps a person has confessed a crime of which he is innocent, but because the law won't allow it. . . . [I]t is rejected, as I say, not because the confession may not be true, but because the law will not allow what falls from a prisoner to be received in evidence, on the ground that he is not bound to betray himself.[75]

Similarly, although he personally endorsed a reliability rationale, Justice Selden of the New York Court of Appeals observed in a dissenting opinion in 1854 that there were two possible justifications for the rule excluding involuntary confessions: either that it "*mercifully* . . . exempt[ed] persons from all obligation to criminate themselves" or that, as a matter of

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before the magistrate . . . ought not, if objected to as incompetent, to have been received as evidence . . . the Court entertain[s] no doubt."). *But cf.* R v. Coote [1873] 4 LRPC 599, 607 (appeal taken from Que.) (UK) (asserting that "[t]he exception depends upon the principle '*nemo tenetur seipsum accusare*,' [no one shall be held to accuse himself]" but also holding that the exclusionary rule "does not apply to answers given without objection" while under oath).

73 *See, e.g.*, GILBERT, *supra* note 42, at 99 ("[O]ur [l]aw . . . will not force any [m]an to accuse himself; and in this we do certainly follow the [l]aw of [n]ature, which commands every [m]an to endeavour his own [p]reservation . . . .").

74 Commonwealth v. Knapp, 26 Mass. (9 Pick.) 496, 512 (1830) (Morton, J.); *accord* R v. Baldry (1852) 169 Eng. Rep. 568, 574; 2 Den. 430, 445 (Baron Parke) (collecting cases suggesting that "the rule has been extended quite too far").

75 United States v. Boese, 46 F. 917, 919 (N.D. Cal. 1891).

"*justice*, . . . it has its foundation in the uncertain and dangerous nature of [confessions]."[76] And in an 1882 case, the Alabama Supreme Court inveighed against all methods of "examining the accused,"[77] apparently holding that *any* questioning of a defendant was "such a censurable practice" as to mandate the exclusion of resulting confessions.[78]

In short, by the turn of the twentieth century, two concerns existed side by side in the common law of confessions.[79] On the one hand, courts wished to prevent juries from hearing confessions that were "unsafe"—i.e., *unreliable*.[80] On the other hand, judges were uneasy about condoning *oppressive* investigatory tactics that might constitute "a gross outrage upon the accused"[81] or else might bring the American legal system too closely in line with the "inquisitorial" processes of the civil law.[82]

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76 Hendrickson v. People, 10 N.Y. 13, 33 (1854) (Selden, J., dissenting). The existence of these distinct rationales was apparently a subject of some interest for Justice Selden in particular, as he considered it in multiple opinions. For instance, in another murder case in 1857, three years after he first discussed the mercy–justice distinction, Selden expended considerable ink arguing that reliability was the only proper grounds for excluding a confession. *See generally* People v. McMahon, 15 N.Y. 384 (1857). But in making this argument, he was explicitly attempting to refute the contrary position, that "[a confession's] rejection is based . . . upon a supposed violation of that principle of the common law which is embodied in the maxim, *nemo tenetur accusare se ipsum*." *Id.* at 387. He therefore acknowledged that courts in at least some cases had excluded confessions under a "mercy"-based (i.e., oppression) rationale. *See id.* at 388–90 (citing R v. Wheater (1838) 169 Eng. Rep. 18; 2 Mood. 45) (noting that "[t]he court . . . was embarrassed by the equivocal meaning of the term voluntary" and at least two judges were under the "impression[] that it was the compulsory nature of the oath which excluded [sworn confessions]"); *id.* at 391–92 (acknowledging "[a] few exceptions" from the reliability-based consensus and noting "an apparent conflict between several of the English cases on this point").

77 Kelly v. State, 72 Ala. 244, 246 (1882).

78 *Id.* at 248.

79 Or rather, *at least* two. *Cf.* Witt, *supra* note 67 (discussing, in the Fifth Amendment context, "four common-law rules [that] interacted to establish a common-law approach to silence and confessions").

80 *See, e.g.*, R v. Baldry (1852) 169 Eng. Rep. 568, 573; 2 Den. 430, 441–42 (Chief Baron Pollock) ("The ground for not receiving such evidence is, that it would not be safe to receive a statement made under any influence or fear. . . . [S]uch confessions are rejected because it is supposed that it would be dangerous to leave such evidence to the jury.").

81 Commonwealth v. Harman, 4 Pa. 269, 270 (1846) (referring to "[t]he administering of an oath by [a] magistrate").

82 *See, e.g.*, United States v. Boese, 46 F. 917, 919 (N.D. Cal. 1891) ("There are now no thumb-screws[] and those practices which prevailed on the continent . . . . [T]he law will not allow what falls from a prisoner to be received in evidence, on the ground that he is not bound to betray himself."); Williams v. Commonwealth, 29 Pa. 102, 105 (1857) ("If the defendant had been awakened out of sleep, charged with crime, and then . . . sworn to testify, I should have

Importantly, these two concerns were just that—concerns, or values, discernible in hindsight from a large body of case law. They should not be overstated: the courts of the eighteenth and nineteenth centuries were not applying a rigid two-pronged test for confession admissibility. Indeed, they often did not expressly ground their rulings in one theory or the other. But both courts and commentators articulated the two concerns and—to varying degrees—evinced an awareness of the distinction.

Evidence of this distinction extends beyond the case law proper. To begin with, legal practitioners themselves sometimes discussed the different values underlying confession law, at times championing one or the other as dispositive. In an 1830 murder case in Massachusetts, for example, counsel for the Commonwealth espoused an oppression-based argument, contending that "[t]he principle" underlying the exclusionary rule was "that a man confesses what he is entitled to withhold; he reveals a secret within his own breast, which he has a right to retain; and as he gives up something which the public is not entitled to, the gift is to be free and voluntary, like other donations."[83] Although not expressed in terms of "oppression," this conception of the exclusionary rule was unrelated to concerns about confession reliability. Rather, the rule, under this interpretation, would seem to be what Justice Selden would later refer to as one of "mercy"[84]—a policy judgment that, in Blackstonian terms, a suspect's "fault was not to be wrung out of himself."[85]

But in the same case, by contrast, defense counsel argued that "the principle in regard to confessions is, not that the party has a secret of his own which shall not be extorted from him, but that his statement, whether it discloses a secret or not, must be made voluntarily, *in order to be credible*."[86] Under this conception, then, the exclusionary rule was based in reliability—what Justice Selden would later refer to as a rule

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steadfastly resisted the subsequent introduction of the testimony against him. The common law . . . appears in beautiful contrast to the Continental systems, which permit the criminal to be racked by inquisitorial skill . . . .").

83 Commonwealth v. Knapp, 26 Mass. (9 Pick.) 496, 501 (1830) (Webster, counsel for the Commonwealth).

84 *See* Hendrickson v. People, 10 N.Y. 13, 33 (1854) (Selden, J., dissenting).

85 4 WILLIAM BLACKSTONE, COMMENTARIES *296 ("[A]t the common law, *nemo tenebatur prodere seipsum* [no one was bound to denounce himself]; and his fault was not to be wrung out of himself, but rather to be discovered by other means, and other men.").

86 *Knapp*, 26 Mass. (9 Pick.) at 502 (Dexter & Gardiner, counsel for defendant) (emphasis added).

of "justice."[87] Ultimately, this was the interpretation that the Massachusetts court endorsed in the case before it,[88] but even in doing so, the court recognized that "there may be cases" in which confessions would be excluded "because they are extorted illegally."[89]

In addition to practitioners, legal scholars at times articulated a distinction between confession law's two values. The author of one of the earliest evidence treatises, for instance, wrote that "[c]onfession must be voluntary and without [c]ompulsion; for our [l]aw . . . will not force any [m]an to accuse himself; and in this we do certainly follow the [l]aw of [n]ature, which commands every [m]an to endeavour his own [p]reservation."[90] This language would seem to reflect a moral judgment as to the propriety of compelling self-incrimination and to suggest that the exclusionary rule was grounded in those same ethical concerns about oppression. However, only a few lines later, the same writer added that "[p]ain and [f]orce may compel men to confess what is not the [t]ruth of [f]acts, and consequently such extorted [c]onfessions are not to be depended on."[91] This, by contrast, is a clear expression of reliability concerns entirely divorced from the earlier invocation of natural law.

Similarly, drawing the same distinction more explicitly a century and a half later, Wigmore wrote that "[t]he principle upon which a confession is treated as sometimes inadmissible is that under certain conditions it becomes untrustworthy as testimony."[92] He therefore repudiated the exclusion of confessions on grounds other than reliability, such as "breach of confidence or of good faith,"[93] or "illegality in the method of obtaining [them]."[94] However, he conceded that those theories were "possible and occasionally plausible"[95] and acknowledged that the rule was sometimes—although "not . . . accurate[ly]"—employed as a bright-line rule against specific oppressive

87 *Hendrickson*, 10 N.Y. at 33 (Selden, J., dissenting).

88 *Knapp*, 26 Mass. (9 Pick.) at 503 (Morton, J.).

89 *Id.*

90 GILBERT, *supra* note 42.

91 *Id.*

92 1 WIGMORE, *supra* note 51, § 822, at 931.

93 *Id.* § 823, at 934 (emphasis omitted).

94 *Id.*

95 *Id.* § 823.

tactics, "without referring back to the living principle on which it depends."[96]

Finally, two other pieces of evidence suggest—although less conclusively—that eighteenth- and nineteenth-century confession law comprised two distinct normative strands. The first is that a two-value exclusionary rule regarding confessions would correspond neatly with the exclusionary principles in play in other areas of law during the same time period. Roger Roots, for instance, has demonstrated that Framing-era case law exhibited exclusionary tendencies toward illegally obtained physical evidence,[97] rather than excluding only "evidence that was tainted by unreliability or suspect probative value."[98] And in his early nineteenth-century *A Practical Treatise of the Law of Evidence*, Thomas Starkie wrote in his chapter on general evidentiary principles that "the law interferes [to restrain the admission of evidence] for two purposes."[99] He then explained that "[t]he law . . . requires that the evidence should be of the purest and most satisfactory kind";[100] and that "[t]here are, also, some instances where the law excludes particular evidence, not because in its own nature it is suspicious or doubtful, but on grounds of public policy, and because greater

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96 *Id.* § 825, at 938–39. Wigmore's minimization of non-reliability rationales for the exclusionary rule may have been somewhat more aspirational than descriptive. Influenced in this area by Benthamite social critiques, Wigmore actively campaigned for a reduction in the scope of exclusionary privileges. *See, e.g.*, Edward J. Imwinkelried, *The Predominant or Primary Purpose Test for Determining Whether a Communication is Sufficiently Incident to a Protected Relationship to Be Privileged: The Danger of Relying on Vague Labels that Miss the Mark of the Underlying Instrumental Rationale for Privileges*, 101 N.D. L. REV. 1, 10–11 (2026). Various aspects of Wigmore's handling of the rule against compelled confessions have been described as "sleight-of-hand," Lawrence Herman, *The Unexplored Relationship Between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confession Rule (Part I)*, 53 OHIO ST. L.J. 101, 173 (1992), and "mystifyingly incomplete," *id.* at 174; *see also, e.g.*, Roger Roots, *The Framers' Fourth Amendment Exclusionary Rule: The Mounting Evidence*, 15 NEV. L.J. 42, 48 (2014) ("Wigmore . . . displayed a hostile attitude toward the exclusionary rule that belied his scholarly persona. He exaggerated and even misstated the holdings of many of the cases he cited." (footnote omitted)); *accord* George C. Thomas III & Marshall D. Bilder, *Aristotle's Paradox and the Self-Incrimination Puzzle*, 82 J. CRIM. L. & CRIMINOLOGY 243, 255 (1991) (noting the strong language with which Wigmore condemned non-reliability rationales generally and the *Bram* Court in particular).

97 *See generally* Roots, *supra* note 96.

98 *Id.* at 44 n.12 (quoting Patrick Tinsley, N. Stephan Kinsella & Walter Block, *In Defense of Evidence and Against the Exclusionary Rule: A Libertarian Approach*, 32 S.U. L. REV. 63, 64 (2004)).

99 THOMAS STARKIE, A PRACTICAL TREATISE OF THE LAW OF EVIDENCE 14 (George Morley Dowdeswell et al. eds., 8th Am. ed. 1860) (1824).

100 *Id.* at 17.

mischief and inconvenience would result from the reception than from the exclusion of such evidence."[101]

The second piece of circumstantial evidence supporting a historically two-valued confession law comes from abroad. As discussed above,[102] the English and American courts generally applied the same, shared body of confession case law until the first half of the twentieth century. But while the American courts came to collapse the common law's two values, the English courts did eventually distill distinct reliability and oppression strands from that shared case law.[103] Thus, by 1975, the English courts were explicitly distinguishing between "the reliability principle" and "the disciplinary principle" as grounds for excluding confessions.[104] And by 1993, the Law Lords were referring to "the long-standing duty of the judge . . . to rule on whether a confession by the accused has been, or may have been, obtained by oppression, or in consequence of anything said or done which was likely to render it unreliable."[105] In this way, with the passage of time, the same body of law that

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101 *Id.* at 36.

102 *See supra* notes 48–49 and accompanying text.

103 In 1893, for instance, the judges of the Court for Crown Cases Reserved invoked the old reliability language regarding the credit that ought to be given to "[a] confession forced from the mind by the flattery of hope or by the torture of fear . . . ." R v. Thompson [1893] 2 QB 12 at 16 (Eng.) (Cave, J.) (quoting R v. Warickshall (1783) 168 Eng. Rep. 234, 235; 1 Leach 263, 263–64). However, they also indicated oppression-based concerns, noting that the prosecution was "bound [to prove] that the confession . . . was *not* obtained from [the defendant] by improper means," and more generally lamented that "the principle which must guide the decision of magistrates in these cases should be loosely or confusedly interpreted." *Id.* at 15–16 (quoting R v. Warringham (1851) 169 Eng. Rep. 575, 576; 2 Den. 447, 449 (Baron Parke)). Subsequently, in a 1914 appeal from the Supreme Court of Hong Kong, Lord Sumner wrote that a confession was admissible only if "voluntary . . . in the sense that it has not been obtained from [the suspect] either by fear of prejudice or hope of advantage . . . ." Ibrahim v. R [1914] AC 599 at 609 (PC) (Lord Sumner) (appeal taken from H.K.). However, he also noted that "[m]any judges, in their discretion, exclude such evidence, for they fear that nothing less than the exclusion of all such statements can prevent improper questioning of prisoners." *Id.* at 614.

104 DPP v. Ping Lin [1975] AC 574 at 607 (HL) (Lord Salmon).

105 Daley v. R [1994] 1 AC 117 at 129 (PC) (appeal taken from Jam.) (Lord Mustill); *accord, e.g.*, Wong Kam-ming v. R [1980] AC 247 at 261 (PC) (appeal taken from H.K.) (Lord Hailsham of St. Marylebone, dissenting) ("[E]xcluding confessions . . . obtained by improper methods . . . is not only because of the potential unreliability of such statements, but also . . . because . . . it is vital that persons in custody or charged with offences should not be subjected to ill treatment or improper pressure in order to extract confessions."). That duty, as Lord Mustill noted, is "now embodied in section 76(2) of the Police and Criminal Evidence Act 1984." *Daley*, 1 AC at 129 (PC) (appeal taken from Jam.) (Lord Mustill) (citing Police and Criminal Evidence Act 1984, c. 60, § 76 (Eng.)).

collapsed into a single voluntariness inquiry in the United States ultimately produced, in the United Kingdom, a two-pronged test cleanly distinguishing reliability from concerns about oppressive investigatory tactics. And while not conclusive in itself, this development lends further credence to the idea that those distinct principles existed all along.

In sum, by the end of the nineteenth century, a coherent Anglo-American law of confessions had formed, and it broadly responded to two discrete values: one concerned with reliability—i.e., the danger that a confession might be false—and the other concerned with oppression—i.e., whether the confession had been obtained by unacceptable methods. The coexistence of these two values is evident not only in the case law itself, but also in the arguments of practitioners, the writings of contemporary commentators, and circumstantial evidence from other jurisdictions and other areas of law. Yet while these values existed independently, they also frequently went undistinguished. Courts might suppress a confession because the circumstances surrounding it indicated unreliability,[106] or they might do so because the interrogators who obtained the confession had done so by oppressing the confessor[107]—and they were not always clear which they were doing. Meanwhile, against the backdrop of this dual-principled doctrinal confusion, the American criminal legal system was undergoing a number of rapid changes. The following Part of this Article examines the cases that resulted from those changes and the ways in which they reshaped American confession law into its modern form.

II
The Rise of Confession Law Present

In the late nineteenth and early twentieth centuries, several factors coincided to fundamentally reshape the American criminal legal system. Perhaps most obviously, the Civil War, Reconstruction, and the resulting constitutional and sociocultural developments radically altered the relationship between

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106 *See, e.g.*, State v. Aaron, 4 N.J.L. 269, 279 (1818) ("If the confession . . . rested upon the ground of hope and fear alone . . . I should have been inclined to yield to its . . . competency . . . . But . . . it is a simple naked confession, disclosing no fact, pregnant with no circumstances to give it authority, or in any way to corroborate it. . . . I should incline to think it ought not to have been admitted as evidence. . . ." (emphasis omitted)).

107 *See, e.g.*, R v. Thompson [1893] 2 QB 12 at 13 (Eng.) (suppressing confession to embezzlement because chairmen of victim corporation told defendant's relative that "it will be the right thing for [the defendant] to make a clean breast of it").

the federal government and the states.[108] But this period also saw significant changes related only tangentially or not at all to the Civil War. Notably, rapid urbanization contributed to a perceived increase in crime,[109] and with the concomitant rise of professional police forces and public prosecutors, the modern criminal legal system in many ways "came into being between the Civil War and the turn of the twentieth century."[110]

Unsurprisingly, these developments had significant ramifications for American confession law. To begin with, jurisprudence that had formed around a system of community- or victim-driven private investigations was increasingly called upon to regulate the actions of professional police officers.[111] This was not necessarily an insurmountable development—in England, where professional police forces emerged in the first half of the nineteenth century,[112] the courts, for a time, largely continued to apply the established case law;[113] on both sides of the Atlantic, there were at least tentative suggestions that the

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108 *See, e.g.*, Joshua M. Divine, *Statutory Federalism and Criminal Law*, 106 VA. L. REV. 127, 166 (2020) (describing the postbellum "conceptual shift" that "would eventually become an enormous expansion of federal criminal law"); *see also, e.g.*, Alexander Tsesis, *Enforcement of the Reconstruction Amendments*, 78 WASH. & LEE L. REV. 849, 918–19 (2021) ("[Civil rights] enforcement statutes from the Second Founding showed a marked increase in Congress's authority to pass legislation of criminal law that had been reserved to the states under the original Constitution.").

109 *See, e.g.*, Barth, *supra* note 45, at 165; David Thacher, *Olmsted's Police*, 33 LAW & HIST. REV. 577, 577 (2015) ("The urbanization of nineteenth century America led to enormous changes in American criminal justice, as the rise of this dramatically more complex kind of human settlement posed new problems for legal regulation."); James J. Beha II, Note, *Redemption to Reform: The Intellectual Origins of the Prison Reform Movement*, 63 N.Y.U. ANN. SURV. AM. L. 773, 782–83 (2008); *see generally* Alice Ristroph, *An Intellectual History of Mass Incarceration*, 60 B.C. L. REV. 1949 (2019).

110 Emma Kaufman, *The Past and Persistence of Private Prosecution*, 173 U. PA. L. REV. 89, 117 (2024). For discussions of how "[a]fter the 1850s, . . . [t]he criminal justice model of the Framers' era grew less recognizable," see generally, for example, Roger Roots, *Are Cops Constitutional?*, 11 SETON HALL CONST. L.J. 685 (2001), and Elizabeth Dale, *Criminal Justice in the United States, 1790–1920: A Government of Laws or Men?*, *in* THE CAMBRIDGE HISTORY OF LAW IN AMERICA 140–48 (Michael Grossberg & Christopher Tomlins eds., 2008).

111 *See, e.g.*, 1 WIGMORE, *supra* note 51, § 830, at 943 (noting relaxation of traditional rules because "our system of public prosecution does not admit of such a sharp and easily handled distinction").

112 *See* Barth, *supra* note 45, at 166.

113 *See, e.g.*, Ibrahim v. R [1914] AC 599 at 611–13 (PC) (Lord Sumner) (appeal taken from H.K.) (summarizing development of case law regarding confessions obtained while in police custody); R v. Baldry (1852) 169 Eng. Rep. 568, 573–75; 2 Den. 430, 442–47 (relying on earlier threats-or-promises cases when considering confession obtained by police constable).

old *per se* rule against examination under oath might simply evolve to encompass interrogation by police officers.[114] But this kind of strict enforcement of the traditional exclusionary rules increasingly came into conflict with the efforts of centralized state police forces to combat perceived crises of public order.[115] Reflecting this tension, courts across the United States continued to apply the old exclusionary principles grounded in reliability and propriety, but they also began to express concern that the rules governing confession admissibility "ha[d] been extended quite too far, and that justice and common sense ha[d], too frequently, been sacrificed at the shrine of mercy."[116]

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114 *See, e.g.*, Bram v. United States, 168 U.S. 532, 556–58 (1897) (collecting conflicting English and American cases regarding whether a confession was rendered inadmissible by "the mere fact that the confession is made to a police officer, while the accused was under arrest in or out of prison, or was drawn out by his questions" (citing Hopt v. Utah, 110 U.S. 574 (1884); Sparf v. United States, 156 U.S. 51, 55 (1895))); Kelly v. State, 72 Ala. 244, 246 (1882) (excluding confession obtained by interrogation); *Baldry*, 169 Eng. Rep. at 573; 2 Den. at 441 (Lord Campbell, CJ) ("Prisoners are not to be interrogated. . . . [B]y the law of England, they cannot.").

115 *See generally* ELIZABETH DALE, *States and Nation, 1860–1900*, *in* CRIMINAL JUSTICE IN THE UNITED STATES, 1789–1939 65, 65–96 (2011) (discussing the ways in which, "[i]n the second half of the nineteenth century, state governments expanded their efforts to use the criminal law to discipline and control their populations"); Ristroph, *supra* note 109, at 1966–80 (noting that "at the end of [the long nineteenth century], experts and political leaders were especially critical of the state of criminal law").

116 This phrase, first used by Baron Parke in *Baldry*, 169 Eng. Rep. at 574; 2 Den. at 445 (quoting 1 JOHN PITT TAYLOR, A TREATISE ON THE LAW OF EVIDENCE, AS ADMINISTERED IN ENGLAND AND IRELAND § 639 (Lond., Maxwell & Son 1848)), was quickly adopted by American lawyers and judges and repeated countless times in the latter half of the twentieth century. *See, e.g.*, Biscoe v. State, 8 A. 571, 571 (Md. 1887) (also stating: "We have no disposition to extend the rule beyond the sound and well-established principles on which it is founded; and, tested by these principles, the confession in this case is, we think, clearly inadmissible."); State v. Squires, 48 N.H. 364, 369 (1869) (also reciting rule that a confession is inadmissible "unless it was made freely and voluntarily, and not under the influence of promises or threats; but to exclude the confession, the promises or threats must be such as to hold out a hope of some personal benefit, or a fear of some personal injury, of a temporal nature"); King v. State, 40 Ala. 314, 318 (1867) (also noting that "[t]he books abound in adjudications upon the question, as to what degree of influence will exclude the evidence of confessions in criminal prosecutions; and upon this question there has been much contrariety of decision"); State v. Kitty, 12 La. Ann. 805, 806 (1857) (argument of Moise, Attorney General, counsel for the State); Smith v. Commonwealth, 51 Va. (10 Gratt.) 734, 739, 742 (1853) (also citing the rule that "a confession may be given in evidence unless it appear that it was obtained from the party by some inducement of a worldly or temporal character in the nature of a threat, or promise of benefit, held out to him . . . by a person in authority," and expressing concern that a more expansive rule "would cut off a most important, and in many instances, the only source of evidence by which the conviction and punishment of guilt can be secured").

In addition to generating this doctrinal disquiet in the lower courts, the postbellum shifts in American law increased the federal judiciary's involvement in criminal matters.[117] Partly as a result, the fin de siècle saw the rise of the United States Supreme Court as a major player in criminal law and procedure.[118] It was thus during this period that the Court first waded into the murky waters of confession law, deciding four confession-admissibility cases between 1884 and 1896.[119] However, these early cases—all decided on non-constitutional grounds—contributed little in the way of doctrinal innovation. Indeed, in the earliest case, *Hopt v. Utah*, the Court explicitly declined to "lay down any general rule on the subject," instead relying largely on uncritical quotations from evidence treatises and English cases.[120] Likewise, the three subsequent cases relied primarily on *Hopt*, reproducing its exact language to varying extents.[121]

The Court's earliest confession cases are thus notable not because they introduced any change to the common-law principles, but rather because they reveal the Court's understanding of American confession law on the eve of its constitutionalization. And while, of course, that understanding might not be accurately reflective of the law's actual state, the picture that emerges from these early confession cases is, in fact, identical in most respects to the picture sketched above. That is, the early cases depict a still transatlantic[122] body of law that is openly but not unrelentingly skeptical of out-of-court confessions[123] and that is ostensibly grounded in concerns about confession reliability[124] but that also recognizes that certain

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117 *See, e.g.*, Divine, *supra* note 108; Tsesis, *supra* note 108.

118 *See, e.g.*, Jonathan Bressler, *Reconstruction and the Transformation of Jury Nullification*, 78 U. CHI. L. REV. 1133, 1146 (2011) (discussing the constitutionalization of criminal procedure during Reconstruction).

119 Hopt v. Utah, 110 U.S. 574 (1884); Sparf v. United States, 156 U.S. 51 (1895); Pierce v. United States, 160 U.S. 355 (1896); Wilson v. United States, 162 U.S. 613 (1896).

120 110 U.S. at 583–85.

121 *See Sparf*, 156 U.S. at 55–56; *Pierce*, 160 U.S. at 357; *Wilson*, 162 U.S. at 622–23.

122 *See Hopt*, 110 U.S. at 584–85 (citing to English cases); *Sparf*, 156 U.S. at 55–56 (same).

123 *See Hopt*, 110 U.S. at 584–85 ("[W]hile from the very nature of such evidence it must be subjected to careful scrutiny and received with great caution, a deliberate, voluntary confession of guilt is among the most effectual proofs in the law . . . .").

124 *See id.* at 585 ("[T]he presumption upon which weight is given to such evidence, namely, that one who is innocent will not imperil his safety or prejudice

investigatory tactics may render a resulting confession *per se* inadmissible.[125]

This snapshot of the common law was to become outdated only a year later, however, when the Court did undertake its first foray into the realm of constitutional confession law. In *Bram v. United States*,[126] the defendant was a Boston-based sailor bound for South America when the ship's captain, the captain's wife, and the second mate were murdered.[127] Following the murders, another crew member accused Bram, who was "arrested by [the crew] and placed in irons."[128] The ship detoured to Halifax, Nova Scotia, where a Canadian detective took Bram into his private office and stripped him.[129] The detective later testified that, either during or immediately after the strip search, he said to Bram, "Bram, we are trying to unravel this horrible mystery . . . . Your position is rather an awkward one. I have had [the other sailor] in this office, and he made a statement that he saw you do the murder."[130] Bram responded, "He could not have seen me. Where was he?" to which the detective replied, "He states he was at the wheel." Finally, Bram said, "Well, . . . he could not see me from there."[131]

Bram was subsequently returned to Boston, where he was tried for the triple homicide.[132] Over Bram's objection, the Halifax detective testified to this conversation, and the jury returned a conviction.[133] On appeal, Bram contended that the

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his interests by an untrue statement, ceases when the confession appears to have been made [in response to threats or promises]."); *Wilson*, 162 U.S. at 622 (same).

125 The most obvious example of this recognition is the *Wilson* Court's discussion of the traditional rule excluding confessions made under oath. *See* 162 U.S. at 623. However, dicta in *Sparf*, 156 U.S. at 55–56, suggests that, at the very least, the Court was receptive to arguments that other interrogation tactics might similarly result in automatic exclusion. The *Sparf* defendant argued that "there cannot be a voluntary statement, a free open confession, while a defendant is confined and in irons under an accusation of having committed a capital offence." *Id.* at 55. And while the Court rejected that argument, counsel had apparently considered it non-frivolous, and indeed, although the Court claimed not to find "any authority in support of that position," *id.*, only two years later, in *Bram*, it would survey English cases that had reached just such a conclusion. *See* Bram v. United States, 168 U.S. 532, 556–57 (1897).

126 168 U.S. 532 (1897).

127 *Id.* at 534–36.

128 *Id.* at 561.

129 *Id.*

130 *Id.* at 562.

131 *Id.*

132 *Id.* at 537.

133 *Id.* at 537–38.

trial court should have excluded his statement that the alleged witness could not have seen him from the wheel.[134]

Accepting that Bram's rather weakly self-inculpatory statement in fact amounted to a confession,[135] the Supreme Court turned to the question of its admissibility. Had the Court applied the established common-law exclusionary principles, that question would seem to be easily resolved in favor of the prosecution.[136] The detective had not used any of the "inducements"—threats, promises, or admonitions that it would be better to tell the truth—that the common law recognized as sufficient to render a confession unreliable,[137] nor did there seem to be any independent reason to think that the confession was too "dangerous to leave . . . to the jury."[138] Likewise, the detective had not resorted to any forbidden tactics such as physical torture or the administration of an oath.[139] In fact, he had not even asked Bram a direct question.

The importance of *Bram*, however, lies in the fact that the Court did *not* meaningfully apply the established common-law principles—although it claimed to. Rather, the Court announced for the first time that "[the] question . . . whether a confession is incompetent because not voluntary . . . is controlled by that portion of the Fifth Amendment . . . commanding that no person 'shall be compelled in any criminal case to be a witness against himself.'"[140] In doing so, the Court began the collapse of several previously distinct concepts.

First, the Court equated the privilege against self-incrimination with the body of common law excluding confessions. This was almost certainly an ahistorical reading of the

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134 *Id.* at 540.

135 *Id.* at 540–41.

136 *See* Penney, *supra* note 16, at 326 ("*Bram* would seem to be an easy case for the government.").

137 *See supra* notes 58–63 and accompanying text; *Bram*, 168 U.S. at 570 (Brewer, J., dissenting) ("In [the conversation with the detective] there is nothing which by any possibility can be tortured into a suggestion of threat or a temptation of hope.").

138 R v. Baldry (1852) 169 Eng. Rep. 568, 573; 2 Den. 430, 441–42 (Chief Baron Pollock). Bram *was* in police custody, which might have given some courts pause. *See supra* note 114 and accompanying text. However, only the year before, the Court had affirmed a rule that "[c]onfessions are not rendered inadmissible by the fact that the parties are in custody." Pierce v. United States, 160 U.S. 355, 357 (1896) (citing Hopt v. Utah, 110 U.S. 574, 583 (1884); Sparf v. United States, 156 U.S. 51, 55 (1895)).

139 *See supra* notes 70–73 and accompanying text.

140 *Bram*, 168 U.S. at 542.

constitutional text,[141] but it was also, as Wigmore later phrased it, "a not unnatural error."[142] If this were *Bram*'s only doctrinal contribution, the case would represent little more than an early example of the Court's proclivity for getting history wrong.[143]

Second, the Court explicitly held that the common-law rules of confession admissibility were incorporated into the United States Constitution. Writing for the *Bram* majority, Justice White asserted that "[t]he well[-]settled nature of the [exclusionary] rule in England at the time of the adoption . . . of the Fifth Amendment, and the intimate knowledge had by the framers of the principles of civil liberty which had become a part of the common law, aptly explain the conciseness of the language of that Amendment."[144] On this basis, he concluded that "the doctrine as to confessions as now formulated embodies the rule existing at common law *and embedded in the Fifth Amendment*."[145]

Historically accurate or not,[146] this was a significant development, and it continues to shape the Supreme Court's

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141 *See generally* Witt, *supra* note 67, at 832–33 ("Scholars have had considerable difficulty explaining the original meaning of the American constitutional self-incrimination provisions. . . . The striking feature of the debate, no matter which view one adopts, is just how little evidence exists . . . .").

142 1 WIGMORE, *supra* note 51, § 823, at 935 n.8.

143 *Cf., e.g.*, Jonathan Schneider, *Dobbs v. History, Part One: English Common Law*, GEO. WASH. L.: C.R. & C.L. BRIEF 3 (June 24, 2024), https://bpb-us-w2.wpmucdn.com/studentbriefs.law.gwu.edu/dist/3/23/files/2024/06/2024-2025_Published-2024_06_24_Jonathan-Schneider_Dobbs-v.-History-Part-One_-English-Common-Law-.pdf [https://perma.cc/BXM6-B2RB] (critiquing the Court's historical analysis of English common law perspectives on abortion); Saul Cornell, *Learning to Read Like an Eighteenth-Century Lawyer: The Historical Critique of Originalism Revisited*, 33 WM. & MARY BILL RTS. J. 439, 439 (2024) ("[O]riginalists have not recovered the past but invented it."); Jacob D. Charles, *The Dead Hand of a Silent Past:* Bruen*, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67, 70–71 (2023) ("*Bruen* sweeps aside longstanding concerns about 'law-office history' with little more than a footnote . . . [and] may practically guarantee Ctrl+F history—cursory keyword searching to wring easy answers from complex historical sources." (footnote omitted)).

144 *Bram*, 168 U.S. at 548.

145 *Id.* (emphasis added).

146 Justice White's assertion that "a maxim [*nemo tenetur seipsum accusare*], which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment," *Bram*, 168 U.S. at 545 (quoting Brown v. Walker, 161 U.S. 591, 597 (1896)), might find some evidence in the historical record. *See generally* Witt, *supra* note 67. However, his conflation of *nemo tenetur* with the common-law rules governing confessions was probably erroneous. *See generally id.*; *see also* Mark A. Godsey, *Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination*, 93 CALIF. L. REV. 465, 485–88 (2005) (discussing the "*Bram* Court's Conflation of the Voluntariness Doctrine with the Self-Incrimination Clause" (emphasis

understanding of its own confession jurisprudence to the present day.[147] But the underexamined aspect of *Bram* is that, contrary to the Court's own claims, it did not, in fact, incorporate the common law into the Constitution wholesale, with its discrete but undistinguished oppression and reliability concerns. Rather, the Court attempted to derive a single principle—"*the* rule"—from the totality of the common-law confession cases.[148] This rule, the Court deduced, was that the single criterion for confession admissibility was whether it was "voluntary," which the Court glossed as meaning "not that . . . the particular communications contained in a statement were voluntarily made, but . . . [that] the accused was not involuntarily impelled to make a statement."[149]

In other words, the single rule that the Court purported from the common law and incorporated into the federal Constitution was that a confession was admissible only if the decision to speak—not the decision to say anything *in particular*, but the decision to speak at all—was "the result of a purely voluntary mental action."[150] Applying this test, the Court found that, on "a consideration of the circumstances surrounding, and the facts established to exist, in reference to [it]," Bram's confession had not been voluntary and was therefore admitted in violation of the Fifth Amendment.[151]

The problem with this ruling was not that the Court adopted the term "voluntary." Other courts had frequently used the same language when discussing the admissibility of confessions.[152] But those prior courts had generally explained that

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omitted)). *But cf.* Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2652 n.96 (1996) (arguing that "the reading of the Fifth Amendment offered by *Bram v. United States* seems at least plausible both textually and historically").

147 *See infra* notes 231, 313 and accompanying text.

148 *Bram*, 168 U.S. at 548–49 (emphasis added) ("[T]he embarrassment which comes from the varying state of fact . . . has given rise to the statement that there was no general rule of law by which the admissibility of a confession could be determined . . . . Much of the confusion . . . has arisen from a misconception of the subject to which the proof [of admissibility] must address itself. The rule is . . . .").

149 *Id.* at 549.

150 *Id.* at 562; *accord* 1 WIGMORE, *supra* note 51, § 843, at 958 ("The notion is a broad one, and is in effect: Was the situation such that the person *had* to speak, felt obliged to speak, or was it a matter of pure choice with him to speak or not?").

151 *Bram*, 168 U.S. at 561–65.

152 *See, e.g.*, Holland v. State, 22 So. 298, 300 (Fla. 1897) ("In considering whether the confessions are admissible, the court determines whether they were free and voluntary[] and uninfluenced by fear, duress, promises, or other illegal considerations . . . ."); State v. Drake, 82 N.C. 592, 594–95 (1880)

"voluntarily" meant "made without the appliances of hope or fear, without extraneous pressure in either direction from other persons."[153] Indeed, only thirteen years earlier, in *Hopt*, the Court had been clear that "voluntary within the meaning of the law" was distinct from voluntary in fact and specifically that it denoted a lack of "any . . . inducements, threats[,] or promises."[154] The orthodox rule was thus that "[t]hough it is necessary

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("The confessions of a prisoner, to be competent evidence . . . must be voluntary . . . . [I]t is a settled rule [that] no confession of one charged with crime shall be admitted in evidence against him, when it appears that the confession was made by reason of hope or fear." (citation omitted) (quoting State v. Whitfield, 70 N.C. 356, 357 (1874))); Miller v. State, 25 Wis. 384, 387 (1870) ("It does not . . . appear that there was any inducement in the nature of a promise, or of a threat held out by any one, to influence the defendant's mind in making these confessions; but they were perfectly voluntary." (internal quotation marks omitted)); Brister v. State, 26 Ala. 107, 128 (1855) ("Before any confession can be received in evidence, in a criminal case, it must be shown that it was voluntary—that is, that it was made without the appliances of hope or fear, by any other person."); R v. Baldry (1852) 169 Eng. Rep. 568, 569; 2 Den. 430, 431 (Mills, counsel for defendant) ("[A] confession, in order to be admissible, must be 'free and voluntary'; that is, it must not be extracted by any sort of threat or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence." (quoting 2 Wm. Oldnall Russell, A Treatise on Crimes and Misdemeanors 826 (Charles Sprengel Greaves ed., Lond., Saunders & Benning 3d ed. 1843) (1819))); R v. Warickshall (1783) 168 Eng. Rep. 234, 235; 1 Leach 263, 263 ("A free and voluntary confession is deserving of the highest credit . . . .").

153 Young v. State, 68 Ala. 569, 575 (1881); *accord, e.g.*, Travers v. United States, 6 App. D.C. 450, 455 (D.C. Cir. 1895) (Hart & Wolf, counsel for appellant) (arguing that "voluntary" meant "not . . . extracted by any sort of threats or violence nor obtained by any direct or implied promises however slight, nor the exertion of any improper influence or coercion of any sort"); Eberhart v. State, 47 Ga. 598, 608 (1873) ("Without doubt, confessions must be voluntary—that is, if they are made under the hope of reward or fear of hurt, they are not competent . . . ."); Thompson v. Commonwealth, 61 Va. (20 Gratt.) 724, 730–31 (1870) ("[A] confession of the accused is admissible evidence against him, only when it is voluntary; that is, when made without being induced by motives of hope or fear of temporal advantage or injury, excited by a person in authority, or with the apparent sanction of such a person." (citing Smith v. Commonwealth, 51 Va. (10 Gratt.) 734, 739 (1853))); State v. Knight, 19 Iowa 94, 101–02 (1865) ("The law is well settled, that a confession, to be admissible against a prisoner, must be *voluntary*, that is, neither obtained by the application of hope, on the one hand, or fear on the other."); Couley v. State, 12 Mo. 462, 469 (1849) ("[T]he confession must be made voluntarily; that is, not extorted from the party by force nor induced from him by promises from a person authorized to hold such inducements.").

154 Hopt v. Utah, 110 U.S. 574, 585 (1884). For other cases recognizing the distinction between legal and factual voluntariness, see, for example, State v. Leuth, 3 Ohio Cir. Dec. 48, 51 (1890) ("The word 'voluntary,' as applied to life and its affairs, is used with wide latitude. . . . But in law, the word, as applied to confession . . . must receive that construction given to it by decision . . . ."); State v. Graham, 41 N.J.L. 15, 17 (1879) (mentioning as an aside that "[i]t may be that such a confession . . . would not be considered voluntary in the legal sense, so as to legalize its introduction against the criminal on his trial."); Hendrickson v. People, 10 N.Y. 13, 32 (1854) (Selden, J., dissenting) ("Now it is obvious that

to the admissibility of a confession that it should have been voluntarily made, . . . yet it is not necessary that it should have been the prisoner's own spontaneous act."[155] Spontaneity of speech, however, seemed to be exactly what the *Bram* Court was now demanding.[156]

To the extent that the Court was attempting to derive a single, all-encompassing principle from the common-law cases, this ruling was not entirely indefensible. The common-law reliability cases had been concerned with whether a defendant was subject to compulsion sufficient to make him *falsely* confess; the common-law oppression cases had been concerned with whether the *kind* of compulsion applied to make a defendant confess was morally unacceptable. The harmonizing principle that the Court plausibly identified was thus that a confession was inadmissible if the defendant had been subject to compulsion, whether or not morally acceptable, sufficient to make him confess, whether truly or falsely. In this way, the *Bram* concept of voluntariness was sufficiently broad to account for both of the common-law exclusionary rationales.

The problem, however, was that the *Bram* Court had been overambitious. As described above, the common law of confessions simply *was not* grounded in a single, all-encompassing rule—and in attempting to devise such a homogenous rule, the Court was selling the common law short even while purporting to constitutionalize it. Under the *Bram* conception of voluntariness, reliability was apparently no longer a consideration. The Court had said nothing about whether Bram's confession was "[e]ntitled to credit"[157] or "pregnant with . . . circumstances to

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[voluntariness] is not a strictly accurate test, notwithstanding the universality of its use for the purpose. A confession or statement made upon the heel of promises of favor may be perfectly voluntary, yet it is rejected.").

155 Austin v. State, 14 Ark. 555, 562 (1854) (quoting 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 229 (Bos., Little & Brown 5th ed. 1850) (1842)); *accord, e.g.*, Levison v. State, 54 Ala. 520, 524–25 (1875) (same); Rutherford v. Commonwealth, 59 Ky. (2 Met.) 387, 391 (1859) (same); State v. Hopkirk, 84 Mo. 278, 284 (1884) ("It is by no means necessary that the confession be spontaneous, otherwise no confession ever made would be receivable."). *But cf., e.g.*, State v. Clifford, 53 N.W. 299, 300 (Iowa 1892) ("A confession or statement, to have been voluntarily made, must proceed 'from the spontaneous suggestion of the party's own mind, free from the influence of any extraneous disturbing cause.'" (quoting People v. McMahon, 15 N.Y. 384, 386 (1857))); People v. Chapleau, 121 N.Y. 266, 273 (1890) (same).

156 *See Bram*, 168 U.S. at 562 ("purely voluntary mental action").

157 R v. Warickshall (1783) 168 Eng. Rep. 234, 234; 1 Leach 263, 263.

give it authority,"[158] and the justices tacitly rejected any reliability assessment by emphasizing that the inquiry was whether the circumstances had impelled the defendant to speak *at all*, rather than whether "the pressure of calamity" had rendered the defendant's mind "prone to acknowledge, indiscriminately, a falsehood."[159] But nor, it seemed, was the use of specific tactics dispositive post-*Bram*. As discussed above, Bram had not been put under oath, tortured, threatened, made promises, or even asked any direct questions.[160] Yet his confession was involuntary "when all the surrounding circumstances [were] considered in their true relations."[161]

In short, *Bram* began the collapse of the common law of confessions. Although the Court cited extensively to earlier cases, it failed to untangle or even to identify the distinct reliability and oppression values that had informed those decisions. Rather, the Court purported to deduce the more fundamental principle that underlay all of those earlier cases—namely, that "[a] confession is voluntary in law if, and only if, it was, in fact, voluntarily made."[162] In espousing this principle, the *Bram* Court not only oversimplified the common-law cases, but, moreover, began to deprive the lower courts of the easily applied rules of both the reliability and oppression cases.[163]

Of course, in 1897, the Fifth Amendment privilege against self-incrimination had not yet been incorporated against the states, and therefore *Bram* had little immediate impact in state courts, where the majority of criminal cases were and are litigated.[164] Partly for this reason, *Bram* has been described as

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158 State v. Aaron, 4 N.J.L. 269, 279 (1818); *accord, e.g.*, GILBERT, *supra* note 42.

159 State v. Roberts, 12 N.C. (1 Dev.) 259, 260 (1827) (Taylor, C.J.).

160 *See supra* notes 128–131 and accompanying text.

161 *Bram*, 168 U.S. at 562.

162 Ziang Sung Wan v. United States, 266 U.S. 1, 14 (1924) (applying *Bram* to find Court of Appeals committed reversible error by applying the common-law threats-or-promises test).

163 *See, e.g.*, Davis v. United States, 18 App. D.C. 468, 492 (D.C. Cir. 1901) (noting with evident frustration that *Bram* was "directly in conflict" with the same court's earlier ruling in *Hardy v. United States*, 3 App. D.C. 35 (1893), which it had felt "was in accord with what we conceived to be the doctrine of the majority of well-considered English and American cases").

164 More than one state court explicitly rejected the *Bram* ruling as unsound. *See, e.g.*, State v. Doyle, 84 So. 315, 333 (La. 1920) ("[I]t may be well to mention that the Bram [c]ase . . . upon which so much reliance is placed by the defense, has been considered both by text-writers and courts to be highly exceptional—in fact, an unsafe guide."); Wade v. State, 15 Ohio Cir. Dec. 279, 289 (1903) ("Nor do we think that the law as stated in the majority opinion in *Bram v. U.S.* is the law of this state."); State v. Storms, 85 N.W. 610, 613 (Iowa 1901) ("We do not regard

"perhaps the most irrelevant Supreme Court case in the history of American criminal justice."[165] But this is an overstatement. Both the Supreme Court and lower courts continue to cite *Bram* to the present day,[166] and indeed, in federal courts, the *Bram* voluntariness standard was the final word on confession admissibility for nearly seventy years.[167] It is perhaps unsurprising, then, that Wigmore, writing in the decades immediately following *Bram*, decried "the present application[] [of] taking the phrase 'voluntary', considering it without any reference to promises or threats, and erecting it into an absolute and final test."[168]

Yet despite criticism,[169] the "absolute and final test" of voluntariness remained the only gauge of confession admissibility under the federal Constitution until the Court's landmark decision in *Brown v. Mississippi*.[170] In *Brown*, the defendants were rounded up by Mississippi sheriff's deputies and, over the course of two days, were whipped, strapped, partially hanged, and otherwise brutally tortured until they confessed to the recent murder of a local man.[171] Although the facts of this torture were uncontested, the trial court allowed the sheriff's deputies

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the majority opinion [in *Bram*] as sound, and in this we are not alone." (collecting sources)).

165 Wesley M. Oliver, *Prohibition, Stare Decisis, and the Lagging Ability of Science to Influence Criminal Procedure*, 105 J. CRIM. L. & CRIMINOLOGY 993, 1012 (2015).

166 *See, e.g.*, Vega v. Tekoh, 142 S. Ct. 2095, 2101 (2022) (citing *Bram*, 168 U.S. at 565, for the proposition that the Fifth Amendment "bars the introduction against a criminal defendant of out-of-court statements obtained by compulsion"); Missouri v. Seibert, 542 U.S. 600, 607 (2004) (directly quoting *Bram*'s claim that the admissibility of confessions "is controlled by . . . the Fifth Amendment"); Johnson v. Warren, No. 20-1071, 2020 U.S. App. LEXIS 27852, at *8 (6th Cir. Sep. 1, 2020) (directly quoting voluntariness standard); Lundberg v. Sec'y, Fla. Dep't of Corr., 808 F. App'x 725, 732 (11th Cir. 2020) (same); United States v. Beasley, No. 8:23-cr-140-KKM-AAS, 2023 U.S. Dist. LEXIS 192965, at *6 (M.D. Fla. Oct. 27, 2023) (same); Bruni v. Shinn, No. CV 19-08041-PCT-DLR (MHB), 2020 U.S. Dist. LEXIS 67579, at *12 (D. Ariz. Apr. 16, 2020) (same, and also noting that "[t]he Supreme Court subsequently incorporated the 5th Amendment's protections into the 14th Amendment's Due Process guarantee, making *Bram*'s voluntariness requirement directly applicable to the States"), *aff'd*, No. 20-17414, 2022 U.S. App. LEXIS 30137 (9th Cir. Oct. 31, 2022).

167 *See Seibert*, 542 U.S. at 607–08 (describing "parallel" strands of constitutional confession law developed under the Fifth and Fourteenth Amendments).

168 1 WIGMORE, *supra* note 51, § 843, at 958. Wigmore did not cite to any specific case as evidence of this modern trend. However, he was a vehement critic of *Bram* generally and elsewhere wrote that *Bram* "must be specially repudiated." *Id.* § 823, at 935 n.8.

169 *See supra* note 164 and cases therein cited.

170 297 U.S. 278 (1936).

171 *See id.* at 281–85.

to testify to the confessions, and, on this evidence alone, the jury convicted the defendants.[172] The state supreme court affirmed the conviction on essentially procedural grounds,[173] suggesting in dicta that it considered the confessions to have been "freely and voluntarily given"[174] but endorsing no specific theory.

On certiorari, the United States Supreme Court reversed, holding that the federal Constitution mandated the exclusion of confessions "extorted by officers of the State by brutality and violence."[175] Acknowledging that it had not yet incorporated the Fifth Amendment Self-Incrimination Clause against the states,[176] the Court instead grounded its ruling in the Fourteenth Amendment and therefore did not cite to *Bram* and made no reference to the common law or voluntariness. Rather, writing for the unanimous Court, Chief Justice Hughes declared that "[t]he due process clause requires 'that state action . . . shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'"[177]

Brown has been described as representing "the Court's dramatic creation of a[n] . . . exclusionary rule,"[178] but in fact, the common-law rule excluding confessions obtained by violence was well-established by the twentieth century.[179] The

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172 *See id.* at 279–80.

173 To simplify somewhat, the majority held that, in order to preserve the error, the defendants needed to both request a hearing on the confessions' admissibility *and*, afterward, following the trial court's unfavorable ruling on that point, to object to them at trial. *See* Brown v. State, 158 So. 339, 342 (Miss. 1935).

174 *Id.*

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

176 *Id.* at 285.

177 *Id.* at 286 (quoting Hebert v. Louisiana, 272 U.S. 312, 316 (1926)).

178 Catherine Hancock, *Due Process Before* Miranda, 70 TUL. L. REV. 2195, 2203 (1996).

179 *See* 1 WIGMORE, *supra* note 51, § 833, at 948 ("That a confession obtained by the *rack*, or a threat of the rack, is inadmissible was apparently never judicially decided; that it would be inadmissible is of course unquestioned to-day." (footnote omitted)); Hector v. State, 2 Mo. 166, 168 (1829) (ordering exclusion of confession "made under the influence of pain" without articulating precise rule). In 1856, the Supreme Court of Mississippi wrote that the state was "powerless" to "procur[e] testimony" by force and "c[ould] give no countenance or sanction to a similar mode[] when employed by individuals." Jordan v. State, 32 Miss. 382, 387 (1856). And in R v. Thompson [1893] 2 QB 12 at 17, Justice Cave cited the rule in R v. Fennell that "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*." (1881) 7 QBD 147 (CCR) at 151 (Lord Coleridge CJ) (emphasis added). *But cf.* Oliver, *supra* note 165, at 1013 (arguing that, in the late eighteenth and early nineteenth centuries, "[t]orture . . . went from being the most forbidden interrogation technique to the most permitted" (citing People v. Trybus, 113 N.E. 538, 540 (1916) ("The question is not . . . whether the detective struck defendant . . . . The question is whether

importance of *Brown* was thus not that it created a new rule against using confessions procured through torture—the states already recognized such a rule.[180] Rather, the practical significance of *Brown* was that it signaled that the federal courts would now be intervening to make sure that state courts had not admitted confessions that they should have excluded.

But *Brown* provided state courts with little indication of how to distinguish good confessions from bad. The Court seemed to have declared the *Brown* defendants' confessions inadmissible largely on the basis of righteous anger. In the words of one modern commentator, "[t]he unanimous *Brown* opinion was long on facts, but short on theory."[181] To the extent that *Brown* articulated a rule at all, that rule appeared to be simply that confessions were inadmissible if procured by "methods . . . revolting to the sense of justice."[182] On the one hand, this emphasis on "methods" would seem to be a revival of the common-law oppression cases that had viewed certain interrogation tactics as fundamentally unacceptable. But on the other hand, the *Brown* Court cited with approval to the dissenting lower-court opinion that had emphasized that the defendants were tortured "until they . . . not only confessed, but confessed in every matter of detail as demanded by those present."[183] Was the physical torture employed by the Mississippi deputies "[in]consistent with the fundamental principles of liberty and justice"[184] because the use of violence was *always* so incompatible? Or was it, as courts had sometimes held when applying the common law, because confessions obtained in such a way were "of all kinds of evidence, the least to be relied on,

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defendant, voluntarily, not under the influence of fear induced by threats[] or under a stipulation . . . not to prosecute, made the statements."))); State v. Moore, 2 N.C. (1 Hayw.) 482, 483 (1797) (per curiam) (where neighbors beat defendant until he confessed to murder, court upheld confession and conviction because "extorted or not," the confession "relate[d] a number of circumstances which the prisoner could not well be acquainted with but as perpetrator of the crime").

180 Including, as the Court noted, Mississippi. *Brown*, 297 U.S. at 287 (citing Fisher v. State, 110 So. 361, 365 (Miss. 1926)).

181 Hancock, *supra* note 178.

182 *Brown*, 297 U.S. at 286. The Court used several similarly expansive phrases, such as "[t]he State is free to regulate the procedure of its courts . . . unless in so doing it 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Id.* at 285 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

183 *Id.* at 282 (quoting Brown v. State, 161 So. 465, 470 (Miss. 1935) (Griffith, J., dissenting)).

184 *Brown*, 297 U.S. at 286 (quoting Hebert v. Louisiana, 272 U.S. 312, 316 (1926)).

and are therefore entirely to be rejected"?[185] The Court did not say and therefore gave the lower courts little clue as to what other "methods" rendered a confession inadmissible as a matter of due process.

In the years immediately following *Brown*, the Supreme Court of Tennessee suggested that sleep deprivation was one such method,[186] and the Supreme Court of Massachusetts found that delay in bringing a defendant before a magistrate was not.[187] And four years later, *Chambers v. Florida* clarified that the exclusion ordered in *Brown* "was based upon the fact that the confessions were the result of compulsion" and that such compulsion could be mental as well as physical.[188] But mostly, when forced to determine a test for constitutional admissibility, courts post-*Brown* were forced to fall back on the last standard that the Justices had meaningfully articulated: the voluntariness test announced in *Bram*.

In *People v. Speaks*, for instance, the California Court of Appeal cited to *Brown* for the proposition that "[t]he vital question is whether the requirements of due process under the Fourteenth Amendment . . . were satisfied [by] the admission in evidence of the defendant's alleged confession."[189] Yet the court then asserted that "[b]efore a confession is admissible it must be shown by the prosecution that it was voluntary"[190] and relied upon the definition of voluntariness announced in *Bram*.[191] And in *People v. Price*, the defendant alleged that his confession was inadmissible under *Brown* because it had been extracted by beatings.[192] But the Illinois Supreme Court summarily dismissed that argument on the grounds that "*Brown* . . . is not applicable, for the evidence here shows that the confession . . . [was the defendant's] free and voluntary act."[193]

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185 State v. Roberts, 12 N.C. (1 Dev.) 259, 262 (1827) (Henderson, J.).

186 *See* Rounds v. State, 106 S.W.2d 212, 213–14 (Tenn. 1937).

187 *See* Commonwealth v. Di Stasio, 1 N.E.2d 189, 196 (Mass. 1936).

188 309 U.S. 227, 239 (1940). Notably, the *Brown* Court had not made this claim. *Brown* mentioned "compulsion" exactly two times, each in reference to the non-incorporated status of the Fifth Amendment. *See Brown*, 297 U.S. at 285.

189 319 P.2d 709, 716 (Cal. Ct. App. 1957).

190 *Id.* at 717.

191 *Id.*

192 20 N.E.2d 61, 67 (Ill. 1939).

193 *Id.* For further post-*Brown* state cases relying on *Bram*, *see, e.g.*, Caingetti v. State, 2 So. 2d 368, 370 (Fla. 1941) (relying on voluntariness and citing *Bram* but not *Brown*); Bryant v. State, 13 S.E.2d 820, 838 (Ga. 1941) (same); Gross v. State, 2 So. 2d 818, 820 (Miss. 1941) (relying on voluntariness and citing neither *Bram* nor *Brown*); Coleman v. State, 104 P.2d 1004, 1006–07 (Okla. Crim. App. 1940)

Thus, while *Brown* established that the federal Constitution regulated the admissibility of confessions in state courts, it had little impact on the theory or standards for such admissibility. Indeed, by 1940, only four years after *Brown*, the Supreme Court itself had fallen back into the old voluntariness language in due-process cases.[194] And in 1944, in *Ashcraft v. Tennessee*,[195] the Court—citing to *Bram* but not to *Brown*[196]—held that the admission of a confession in state court had violated due process because the confession had not been "voluntary."[197] By the time it decided *Malloy v. Hogan* in 1964,[198] even the Court itself had to acknowledge that any one-time distinction between the *Bram* and *Brown* lines of case law had been "soon abandoned"[199] and that it was not, in fact, announcing a novel rule when it declared that "the admissibility of a confession in a state criminal prosecution is tested by the same standard applied in federal prosecutions since . . . *Bram*."[200]

Importantly, *Malloy* itself was not, in fact, a confession case but rather a classic compelled-testimony case. This distinction may explain the way in which the *Malloy* Court framed its discussion of confessions. In that case, Malloy, the petitioner, had refused to answer potentially incriminating questions when called as a witness in a state-court proceeding.[201] The court held him in contempt on the ground that the Fifth Amendment privilege against self-incrimination had not been incorporated against the states, and, on the same basis, the Supreme Court of Connecticut rejected his habeas petition.[202] On certiorari, the Supreme Court reversed, announcing that "the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the States."[203]

(relying on voluntariness and citing *Bram* but not *Brown*); State v. Henry, 198 So. 910, 917 (La. 1940) (same); Chambers v. State, 187 So. 156, 157 (Fla. 1939) (same), *rev'd*, 309 U.S. 227 (1940); Williams v. State, 86 P.2d 1015, 1018 (Okla. Crim. App. 1939) (same).

194 *See* Ward v. Texas, 316 U.S. 547, 555 (1942) ("[W]e must conclude that this confession was not free and voluntary . . . .").

195 322 U.S. 143 (1944).

196 *Id.* at 152 n.8, 154 n.9.

197 *Id.* at 154.

198 378 U.S. 1 (1964).

199 *Id.* at 6–7.

200 *Id.* at 7.

201 *Id.* at 3.

202 *Id.*

203 *Id.* at 6.

This bare statement of incorporation would have been, in itself, sufficient to dispose of Malloy's case. Judicial compulsion to testify against oneself is the quintessential example of a Fifth Amendment violation,[204] and thus, so long as the Fifth Amendment was incorporated against the states, Malloy was clearly entitled to habeas relief. But the Court was again overambitious, and it went further. The fact that the Fourteenth Amendment englobed the protections of the Fifth, the *Malloy* Court declared, explained why Due Process had forbidden the use of the tortured confessions in *Brown*: those confessions had constituted compelled self-incrimination within the meaning of the Fifth Amendment.[205]

Malloy thus returned to and reiterated *Bram*'s old fallacy that the Fifth Amendment was concerned with confessions and that, therefore, the admissibility of a confession turned not on its reliability nor on the oppressiveness of the methods used to obtain it, but only on whether it had been "the accused's 'free choice to admit, to deny, or to refuse to answer.'"[206] Indeed, the *Malloy* Court essentially re-endorsed *Bram*'s conception of voluntariness without modification. Under *Bram*, the Court had glossed voluntariness as meaning "not that . . . the particular communications contained in a statement were voluntarily made, but . . . [that] the accused was not involuntarily impelled to make a statement."[207] In other words, a confession was voluntary if the decision to speak—again, not the decision to say anything *in particular*, but the decision to speak at all—was "the result of a purely voluntary mental action."[208] And in *Malloy*, the Court explained that the exclusion of involuntary confessions protected "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence."[209]

But despite the *Bram* Court's claim to have derived this test from the common law, the voluntariness standard failed to

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204 *See, e.g.*, Kate E. Bloch, *Fifth Amendment Compelled Statements: Modeling the Contours of Their Protected Scope*, 72 WASH. U. L.Q. 1603, 1656 (1994) (discussing "the quintessential self-incrimination trilemma—self-accusation, perjury, or contempt").

205 *Malloy*, 378 U.S. at 6–7.

206 *Id.* at 7 (quoting Lisenba v. California, 314 U.S. 219, 241 (1941)).

207 Bram v. United States, 168 U.S. 532, 549 (1897).

208 *Id.* at 562.

209 *Malloy*, 378 U.S. at 8. Although this Article is not primarily concerned with *Miranda*, it is also noteworthy that the Court in that case also explicitly adopted *Bram*'s definition of voluntariness verbatim. Miranda v. Arizona, 384 U.S. 436, 461–62 (1966).

adequately respond to either of that body's concerns. At common law, a confession might be excluded because the interrogators had engaged in oppression, without an inquiry into the defendant's state of mind;[210] or they might be excluded "not because of any breach of good faith in admitting them, nor because they [were] extorted illegally,"[211] but rather because they were too "dangerous . . . to leave to a jury."[212] Of course, these tests were not applied uniformly or by every court[213]—the common law was in a state of development. But both lines of inquiry were in existence and were potentially dispositive.

By contrast, the Supreme Court's conception of voluntariness—announced in *Bram* and affirmed in *Malloy*—cut both lines short. No longer were specific tactics *per se* sufficient to exclude a confession (except, under *Brown*, perhaps physical torture); rather, the doctrine "encompasse[d] all interrogation practices," and the question was the degree of pressure they were "likely to exert" on the interrogee.[214] And no longer was there concern for the likelihood that the suspect's confession was false; instead, the question was whether his choice to make that confession—whether true or false—was "a free and rational choice."[215] The former inquiry required the trial court to engage in a holistic assessment of each individual's mental fortitude—something that the common law had rejected as impossible.[216] The latter inquiry required the trial court to admit a confession that is clearly "not [e]ntitled to credit,"[217] so long as the defendant freely chose to make it.

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210 *See, e.g.*, State v. Pierce, 2 Mart. (o.s.) 253, 253 (La. 1812) (Hennen, counsel for defendants) (mem.) ("It cannot be read. The examination of the person accused ought not to be upon oath. The confession of a person taken upon oath, cannot be read, in evidence against him." (citation omitted)).

211 Commonwealth v. Knapp, 26 Mass. (9 Pick.) 496, 512 (1830) (Morton, J.).

212 R v. Baldry (1852) 169 Eng. Rep. 568, 573; 2 Den. 430, 441–42 (Chief Baron Pollock).

213 *See, e.g.*, State v. Absolom, 2 Del. Cas. 32, 33 (Ct. Quarter Sess. P. 1808) (in case against "free Negro," court held, without citation to authority, that admonition that it "would be better for [defendant] to confess" did not render confession inadmissible).

214 Miranda v. Arizona, 384 U.S. 436, 464 (1966) (citing *Malloy*, 378 U.S. 1).

215 *Id.* at 465.

216 *See* Bram v. United States, 168 U.S. 532, 543 (1897) ("[T]he law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner . . . ." (quoting 3 Wm. Oldnall Russell, A Treatise on Crimes and Misdemeanors 478 (Horace Smith & A. P. Perceval Keep eds., Lond., Stevens & Sons, Ltd. 6th ed. 1896) (1819))).

217 R v. Warickshall (1783) 168 Eng. Rep. 234, 234; 1 Leach 263, 263.

But the final and perhaps most significant departure from the common law of confessions came more than twenty years after *Malloy*, in *Colorado v. Connelly*.[218] As discussed above, courts applying the common-law rules had at times found that official oppression was sufficient to warrant the exclusion of confessions. The *Connelly* Court, however, turned this principle on its head, declaring that "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment."[219] It is difficult to frame this ruling, unlike those in *Bram* and *Malloy*, as a misunderstanding or oversimplification of the common law rather than a simple departure from it. At common law, state action—let alone police coercion—was certainly not a necessary predicate to the exclusion of a confession. Indeed, the state had very little to do with law enforcement at all until at least the mid-nineteenth century,[220] and "[t]he Founders could not have envisioned 'police' officers as we know them today."[221] Thus, in the eighteenth and nineteenth centuries, the courts in both the United States and England routinely excluded confessions obtained by private individuals.[222] By abandoning this tradition, the *Connelly* Court hammered the last nail into the coffin of common-law reliability concerns, essentially completing the transformation of American confession law into its current form.

Of course, the Supreme Court has decided other confession cases since *Connelly*. Overwhelmingly, however, those cases have, in fact, been *Miranda* cases.[223] In its most recent

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218 479 U.S. 157 (1986).

219 *Id.* at 167.

220 *See, e.g.*, Kaufman, *supra* note 110 (discussing ubiquity of private prosecution prior to the twentieth century).

221 Roots, *supra* note 110, at 693.

222 *See, e.g.*, Commonwealth v. Dillon, 4 U.S. (4 Dall.) 116, 116–17, 1 Ald. 368 (Pa. 1792) (confession rendered inadmissible by the "objectionable" behavior of "several respectable citizens"); Commonwealth v. Chabbock, 1 Mass. (1 Will.) 144, 144 (1804) (confession inadmissible where "drawn from [defendant] under a promise of favor to be shown him by the [private] prosecutor"); R v. Thompson [1893] 2 QB 12 at 13 (Eng.) (suppressing confession to embezzlement because chairmen of victim corporation told defendant's relative that "[i]t will be the right thing for [the defendant] to make a clean breast of it").

223 *See, e.g.*, Vega v. Tekoh, 142 S. Ct. 2095, 2101 (2022) (holding that *Miranda* violations are not *per se* violation of Fifth Amendment and therefore do not give rise to liability under 42 U.S.C. § 1983); Missouri v. Seibert, 542 U.S. 600, 617 (2004) (finding "question-first" tactic designed to work around *Miranda* constitutionally deficient); Dickerson v. United States, 530 U.S. 428, 437–38 (2000) (holding congressional attempt to supplant *Miranda* warnings unconstitutional);

meaningful discussion of constitutional voluntariness, the Court did not cite to a single post-*Connelly* case and, indeed, relied exclusively on *Bram*, *Brown*, *Malloy*, and *Miranda*.[224] The constitutional test for confession admissibility is thus essentially the same today as it was forty years ago: was "the defendant's will . . . overborne"[225] by "coercive police activity"[226] such that he did not "choose[] to speak in the unfettered exercise of his own will"?[227] If so, then the confession is involuntary and inadmissible. In all other circumstances, however, the confession can be used at trial.

The Court has emphasized that this is an individualized test that "logically can depend on 'the characteristics of the accused,'" including their "age, education, . . . intelligence, . . . [and] prior experience with law enforcement."[228] What the test *cannot* depend on, however—indeed, is "forbidden" to depend on—is the reliability of the confession[229] and the use of any specific oppression short of physical torture to obtain it.[230] In this way, the Court has crafted a modern test of confession admissibility with little relation either to the rules or values of the common law. Thus, while the Court has, for over one hundred years, claimed that the constitutional voluntariness standard "ha[s] 'roots' going back centuries,"[231] today this

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Illinois v. Perkins, 496 U.S. 292, 300 (1990) (holding that undercover police officers need not give *Miranda* warnings).

224 *Seibert*, 542 U.S. at 607–08.

225 Yarborough v. Alvarado, 541 U.S. 652, 667–68 (2004) (quoting Lynumn v. Illinois, 372 U.S. 528, 534 (1963)).

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

227 *Seibert*, 542 U.S. at 607 (quoting Malloy v. Hogan, 378 U.S. 1, 8 (1964)).

228 *Yarborough*, 541 U.S. at 667–68 (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973)).

229 *See* Lego v. Twomey, 404 U.S. 477, 484–85 n.12 (1972) ("[T]he exclusion of unreliable confessions is not the purpose that a voluntariness hearing is designed to serve. The sole issue in such a hearing is whether a confession was coerced. Whether it be true or false is irrelevant; indeed, such an inquiry is forbidden." (citing Rogers v. Richmond, 365 U.S. 534 (1961))).

230 *See Bustamonte*, 412 U.S. at 226 ("[N]one of [the Court's confession-admissibility decisions] turned on the presence or absence of a single controlling criterion . . . ."); Sharp v. Rohling, 793 F.3d 1216, 1233 (10th Cir. 2015) ("[T]he importance of any given factor can vary in each situation." (citations omitted)); *accord, e.g.*, United States v. Rodebaugh, 798 F.3d 1281, 1292 (10th Cir. 2015) ("The existence of a threat is not dispositive . . . ."); Johnson v. Pollard, 559 F.3d 746, 754 (7th Cir. 2009) ("An interrogating officer's misrepresentations are neither dispositive of nor irrelevant to the question of whether a defendant's statement was voluntary.").

231 Dist. Att'y's Off. v. Osborne, 557 U.S. 52, 73 n.4 (2009) (quoting Dickerson v. United States, 530 U.S. 428, 433 (2000)).

claim is all but untenable. The courts of the eighteenth and nineteenth centuries may not always have clearly articulated a single, unifying rationale for their exclusionary decisions, but they would nevertheless have been uniformly astonished to hear the United States Supreme Court both assert that "the exclusion of unreliable confessions is not the purpose that a voluntariness hearing is designed to serve"[232] and simultaneously refuse to find that any interrogation tactic short of physical torture will necessarily render a confession inadmissible.[233]

The Court's persistent protestations of doctrinal continuity are thus misplaced. The confession-law jurisprudence that the Court espouses today is not the complex, dual-valued body of law that the *Bram* Court purported to first constitutionalize in 1897 and the *Malloy* Court claimed to re-endorse. Rather, by collapsing both reliability and oppression concerns behind the "'convenient shorthand' of asking whether [a] confession was 'involuntary,'"[234] the Court has created a new standard that occasionally gestures at both confession reliability and police oppression[235] but responds to neither. The remainder of this Article details the harms that have resulted from that collapse and demonstrates that we can remedy those harms by returning to the common law's first principles.

III
A Vision of Confession Law Future

This Article began by demonstrating that discrete reliability and oppression concerns underlay the common law of confessions as it existed in the eighteenth and nineteenth centuries.[236] It then traced the collapse of those values into modern voluntariness doctrine over the course of the last 130 years of

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232 *Lego*, 404 U.S. at 484–85 n.12.

233 *See, e.g.*, Marcus, *supra* note 4; *infra* notes 251–253 and accompanying text.

234 Miller v. Fenton, 474 U.S. 104, 109 (1985) (quoting Blackburn v. Alabama, 361 U.S. 199, 207 (1960)).

235 *See, e.g.*, *id.* at 110 ("[T]actics for eliciting inculpatory statements must fall within the broad constitutional boundaries imposed by the Fourteenth Amendment's guarantee of fundamental fairness."); *Lego*, 404 U.S. at 484–85 ("We noted in [*Jackson v. Denno*, 378 U.S. 368 (1964)] that there may be a relationship between the involuntariness of a confession and its unreliability. But our decision was not based in the slightest on the fear that juries might misjudge the accuracy of confessions and arrive at erroneous determinations of guilt or innocence." (footnote omitted)); *see also id.* at 485 n.13 (tracing Court's inconsistent invocations of reliability concerns).

236 *See supra* Part I.

Supreme Court case law.[237] In this way, this Article has identified where American confession law began, where it is now, and how it got here. Now, this Article looks forward. The following Part describes the ways in which current confession law cries out for change (III(A)) and then details paths by which the Court could effect that change (III(B)).

A. A Need for Change

"No subject of the law is in more inextricable confusion than that relating to the admission in evidence of confessions made by one accused of crime."[238] The quote is from 1907, but the sentiment is timeless.[239] The values underlying "[t]he abhorrence of society to the use of involuntary confessions"[240] are no more clearly defined today than they were a century ago—and perhaps somewhat *less* clearly defined than they were a century before that. In the present day, "[t]he notion of 'voluntariness'" remains "an amphibian"[241]—neither one thing nor the other—because the Court has consistently failed to untangle reliability from oppression and, indeed, has worked to knot the two ever more tightly together.[242] The result is a confession jurisprudence that is both internally and externally inconsistent. That is, the discrete rules of modern confession law are inconsistent with each other, and the larger body of confession

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237 *See supra* Part II.

238 State v. Sherman, 90 P. 981, 982 (Mont. 1907); *accord, e.g.*, *id.* at 983 ("[T]he confusion has arisen from an apparent effort on the part of courts to establish a hard and fast rule for defining the test by which the admissibility of confessions is to be governed. Manifestly this could not be done . . . .").

239 *See, e.g.*, Territory v. Wong Pui, 29 Haw. 441, 446 (1926) ("'[T]here is no branch of the law of evidence in such inextricable confusion as that relative to confessions.' The confusion seems to extend to all of the different aspects of the subject . . . ." (quoting 2 CHARLES FREDERIC CHAMBERLAYNE, A TREATISE ON THE MODERN LAW OF EVIDENCE § 1472, at 1863 (Howard C. Joyce ed., 1911) (quoting State v. Patterson, 73 Mo. 695, 705 (1881)))); Fredric I. Lederer, *The Law of Confessions—The Voluntariness Doctrine*, 74 MIL. L. REV. 67, 67 (1976) ("Few areas of criminal procedure have proven as complex as the law of confessions."); Primus, *supra* note 12, at 1 ("Confession law is in a state of collapse." (emphasis omitted)).

240 Spano v. New York, 360 U.S. 315, 320 (1959).

241 Culombe v. Connecticut, 367 U.S. 568, 604–05 (1961).

242 *See generally* White, *supra* note 15, at 2006 (considering "whether the Due Process voluntariness test applies to exclude false or untrustworthy confessions is a vitally important question"); Primus, *supra* note 12, at 1 (arguing that "there are two different strands within voluntariness doctrine—one deontological strand that focuses on the offensiveness of the police methods used and one consequentialist strand that is concerned with the problem of false confessions" (emphasis omitted)).

law is inconsistent with other areas of what might be called "constitutional evidence law."[243]

To begin with, the inconstancy of the Court's confession case law has left a number of pieces of dicta in apparent tension.[244] But even setting these aside, it is clear that the lines of modern confession law are not clearly drawn. The Court has, for instance, established that "certain interrogation techniques . . . are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment."[245] This would seem to endorse the strand of the common law that forbade oppressive tactics on "principles of justice, policy, and humanity."[246] Yet while the common law at various times recognized threats and promises,[247] the administration of oaths,[248] and physical pain[249] all as *per se* disqualifying a confession, under current due-process case law only the last of these necessarily renders a confession "involuntary."[250] In the years since *Brown*, the Court has refused to

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243 *Cf.* Alex Stein, *Constitutional Evidence Law*, 61 VAND. L. REV. 65, 66 (2008) (arguing that evidence law has, in fact, *not* been constitutionalized—or, at least, not sufficiently).

244 *Compare, e.g.*, *Spano*, 360 U.S. at 320 ("The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law . . . ."), *with* Lisenba v. California, 314 U.S. 219, 236 (1941) ("The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false."); *compare id.* at 236 ("The aim of the rule that a confession is inadmissible unless it was voluntarily made is to exclude false evidence."), *with* Lego v. Twomey, 404 U.S. 477, 484–85 n.12 (1972) ("[T]he exclusion of unreliable confessions is not the purpose that a voluntariness hearing is designed to serve." (citing Rogers v. Richmond, 365 U.S. 534 (1961))).

245 Miller v. Fenton, 474 U.S. 104, 109 (1985) (citing Brown v. Mississippi, 297 U.S. 278, 287 (1936)).

246 State v. Pierce, 2 Mart. (o.s.) 253, 253 (La. 1812) (Hennen, counsel for defendants) (mem.) (citing LEONARD MACNALLY, THE RULES OF EVIDENCE ON PLEAS OF THE CROWN 47 (Lond., J. Butterworth & Dublin, J. Cooke 1802)).

247 *See, e.g.*, State v. York, 37 N.H. 175, 183–84 (1858) ("[A]ny threat, promise, or encouragement of any hope of favor, held out as an inducement to confess, is sufficient to exclude it. . . . [T]he amount of influence exerted is not to be nicely weighed. . . . Public policy forbids that confessions should be used in evidence against the prisoner which are drawn from him by appliances of this nature . . . ." (citing State v. Phelps, 11 Vt. 116 (1839))).

248 *See Pierce*, 2 Mart. (o.s.) 253, 253; United States v. Bascadore, 24 F. Cas. 1028, 1028 (C.C.D.C. 1811) (No. 14,536).

249 *See, e.g.*, State v. Houston, 76 N.C. 256, 257 (1877) ("If there be . . . inflictions of pain or demonstrations of violence, then the confession is attributed to such influences . . . .").

250 *See, e.g.*, United States v. Mehling, No. CR 24-131-BLG-SPW, 2025 U.S. Dist. LEXIS 121764, at *11–12 (D. Mont. June 26, 2025) ("'A confession accompanied

categorically condemn any oppression short of physical torture, even those tactics that, having been strongly demonstrated to produce false confessions, also implicate reliability concerns.[251] Indeed, because the ultimate inquiry is whether the individual defendant's "will has been overborne and his capacity for self-determination critically impaired," the Court has suggested that even such oppressive tactics as "deprivation of food or sleep"[252] are not so "revolting to the sense of justice"[253] as to automatically render a confession inadmissible.

The difficulty posed by this refusal to condemn specific tactics is not simply that—contrary to the Court's claims[254]—it is inconsistent with the common law. Indeed, a blind adoption of some of the common law's more rigid prohibitions would be obviously incompatible with the modern American criminal legal system.[255] But by failing to identify, extract, and enforce the anti-oppression logic underlying those prohibitions, the Court has created a body of law that *aspires* not to "give[] [the police] carte blanche to extract what they can from a suspect,"[256] but that in practice does exactly that.[257] Moreover, while the object

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by physical violence is *per se* involuntary, while one accompanied by psychological coercion is not.' . . . Thus, in alleged psychological coercion cases, . . . the Court looks to the totality of the circumstances . . . ." (quoting United States v. Haswood, 350 F.3d 1024, 1027 (9th Cir. 2003)) (citing United States v. Miller, 984 F.2d 1028, 1030–31 (9th Cir. 1993))).

251 *See, e.g.*, Frazier v. Cupp, 394 U.S. 731, 739 (1969) (police lies insufficient to "make . . . otherwise voluntary confession inadmissible"); Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 12 (2010) (finding that police deception "has been implicated in the vast majority of documented police-induced false confessions" (citing Saul M. Kassin, *On the Psychology of Confessions:* Does *Innocence* Put *Innocents* at Risk?, 60 AM. PSYCH. 215 (2005))).

252 Schneckloth v. Bustamonte, 412 U.S. 218, 225–26 (1973) (quoting Culombe v. Connecticut, 367 U.S. 568, 602 (1961)).

253 Miller v. Fenton, 474 U.S. 104, 109 (1985) (quoting Brown v. Mississippi, 297 U.S. 278, 286 (1936)).

254 *See, e.g.*, *Schneckloth*, 412 U.S. at 225 ("The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness." (quoting *Culombe*, 367 U.S. at 602)).

255 *Compare, e.g.*, Mark A. Godsey, *Shining the Bright Light on Police Interrogation in America*, 6 OHIO ST. J. CRIM. L. 711, 714 (2009) ("[T]he interrogation process [used by the police in the United States] is aimed not simply to obtain an 'I did it' confession, but to manipulate from the suspect a police-orchestrated narrative designed to ensure a conviction . . . .") (reviewing LEO, *supra* note 3), *with, e.g.*, R v. Baldry (1852) 169 Eng. Rep. 568, 573; 2 Den. 430, 441 (Lord Campbell CJ) ("Prisoners are not to be interrogated.").

256 *Schneckloth*, 412 U.S. at 225.

257 *See, e.g.*, Marcus, *supra* note 4; Primus, *supra* note 12, at 3 ("The amorphous nature of the current voluntariness standard permits the admission of most confessions while still being flexible enough to allow courts to step in when

of the rule excluding involuntary confessions is supposedly "to substantially deter future violations of the Constitution,"[258] it is difficult to imagine how that goal can be achieved when the law does not recognize any specific police actions beyond outright torture as constituting such violations.

Indeed, this is perhaps the most significant way in which the due-process voluntariness test is inconsistent with other areas of constitutional evidence law: because it does not designate specific police conduct as unacceptably oppressive, it does not meaningfully deter *future* oppression. The exclusionary rule that suppresses evidence obtained in violation of the Fourth Amendment, for instance, is explicitly designed to provide such deterrence.[259] Therefore, in the Fourth Amendment sphere, the Court "prefer[s] to provide clear guidance to law enforcement through categorical rules," recognizing that "the balanc[e] of the competing interests . . . 'must in large part be done on a categorical basis—not in an ad hoc, case-by-case fashion by individual police officers.'"[260] But in the voluntariness context, by contrast, the Court disavows the same bright-line rules, instead requiring that police officers conduct just such an ad hoc, case-by-case determination as to whether their conduct overbears the will of a particular suspect. Thus, to the extent that the exclusionary rule in fact deters police misconduct in any case,[261] it certainly does not do so in the context of confessions, where "the laws meant to guide police

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particularly egregious problems arise."); Welsh S. White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581, 598 (1979) ("[T]he 'totality of the circumstances' test's fatal flaw is its failure to generate precedents that can serve as guidelines for the police and the lower courts.").

258 Colorado v. Connelly, 479 U.S. 157, 166 (1986) (citing United States v. Leon, 468 U.S. 897, 906–13 (1984)).

259 *See, e.g.*, Davis v. United States, 564 U.S. 229, 236–37 (2011) ("The rule's sole purpose . . . is to deter future Fourth Amendment violations. . . . Where suppression fails to yield 'appreciable deterrence,' exclusion is 'clearly . . . unwarranted.'" (citations omitted) (quoting United States v. Janis, 428 U.S. 433, 454 (1976))).

260 Riley v. California, 573 U.S. 373, 398 (2014) (quoting Michigan v. Summers, 452 U.S. 692, 705 n.19 (1981)).

261 *Cf., e.g.*, Andrew M. Carter, *Good Cops, Bad Cops, and the Exclusionary Rule*, 23 U. PA. J. CONST. L. 239, 247–48 (2021) (arguing that, although the Fourth Amendment exclusionary rule does not in fact deter "bad cops" from engaging in wrongdoing, it nevertheless provides "good cops" with clear rules to follow); Kit Kinports, *Culpability, Deterrence, and the Exclusionary Rule*, 21 WM. & MARY BILL RTS. J. 821, 832 (2013) ("[C]ommentators across the political spectrum representing a variety of jurisprudential disciplines have acknowledged that deterrence is not susceptible to empirical proof and thus at some level is largely a matter of conjecture." (collecting sources)).

conduct . . . are ambiguous" and "fail[] to provide the guidance law enforcement needs."[262]

But nor, moreover, does the current voluntariness test serve the accuracy or truth-seeking interest by which the Court has sometimes justified exclusionary rules in the Sixth Amendment context. The Court first articulated this principle in a series of cases beginning with *United States v. Wade* and companion cases,[263] in which it held that the Sixth Amendment mandated exclusion of eyewitness identification procedures conducted in the absence of counsel. Emphasizing that the aim was to "avoid[] unfairness at the trial," the Court justified the exclusionary rule as "enhanc[ing] the reliability of the fact-finding process."[264]

Subsequently, over a decade later and on the very eve of *Connelly*'s assertion that a confession's reliability was "a matter to be governed by the evidentiary laws of the forum . . . and not by the Due Process Clause,"[265] the Court explicitly re-endorsed the reliability foundations of the Sixth Amendment, extending it to the hearsay context in *Ohio v. Roberts*.[266] There, the Court affirmed that the Confrontation Clause had as its "underlying purpose to augment accuracy in the factfinding process."[267] Applying this rationale, the Court held that hearsay statements must be suppressed at trial unless they bore "adequate indicia of reliability."[268]

Of course, the Court has, in more recent cases, "steadily . . . de-emphasized" reliability as a constitutional value.[269] Nevertheless, reliability concerns of this kind might provide a conceptual justification for the exclusion of confessions, just as they did at common law.[270] But today, the Court explicitly rejects that rationale, emphasizing that "the exclusion of unreliable confessions is not the purpose that a voluntariness

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262 George Cronin & Marissa Boyers Bluestine, *Police, False Confessions, and a Framework for Change in the US*, CHAMPION, June 2020, at 45.

263 United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967); Stovall v. Denno, 388 U.S. 293 (1967).

264 *Stovall*, 388 U.S. at 298 (quoting Johnson v. New Jersey, 384 U.S. 719, 729 (1966)).

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

266 448 U.S. 56 (1980).

267 *Id.* at 65.

268 *Id.* at 66 (internal quotation marks omitted).

269 Michael J. Zydney Mannheimer, *Coerced Confessions and the Fourth Amendment*, 30 HASTINGS CONST. L.Q. 57, 92 (2002).

270 *See supra* notes 53–66 and accompanying text.

hearing is designed to serve"[271] and, indeed, that lower courts are "forbidden" from engaging in such an assessment.[272]

In short, by collapsing the common law's dual "oppression" and "reliability" concerns into the single question of whether a defendant's will was overborne, the Court has created a body of confession law that responds to neither. Modern voluntariness doctrine fails to deter improper tactics—because it refuses to define them; and it fails to exclude confessions that are unreliable—because it forbids judges to consider whether they might be. But the doctrinal inconsistencies resulting from this persistent oversimplification of the common law are not merely theoretical or abstract. That is, they don't just make it harder for law professors to teach evidence—they also cost freedom and lives.

To this point, consider the role of modern confession law in the ongoing epidemic of wrongful convictions. With the rise of the innocence movement in recent decades, that role has become increasingly apparent. It is now essentially beyond dispute that, of the more than 400,000 individuals sent to prison each year[273] and the further two dozen sentenced to death,[274] some unknowable but significant number are innocent.[275] And while there is no single reason that innocent people are found guilty of crimes, any review of documented wrongful convictions

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271 Lego v. Twomey, 404 U.S. 477, 484 n.12 (1972) (citing Rogers v. Richmond, 365 U.S. 534 (1961)).

272 *Id.*; *accord, e.g.*, *Rogers*, 365 U.S. at 545 ("Any consideration of this 'reliability' element was constitutionally precluded.").

273 E. ANN CARSON & RICHARD KLUCKOW, DEPT. OF J.: BUREAU OF J. STAT., NCJ 307149, PRISONERS IN 2022—STATISTICAL TABLES, at 17 (Aug. 29, 2025) https://bjs.ojp.gov/document/p22st.pdf#:~:text=Prison%20admissions%20%C2%83%20Admissions%20to,table%208 [https://perma.cc/TLL3-X45C].

274 *Facts About the Death Penalty*, DEATH PENALTY INFO. CTR. (July 14, 2026), https://files.deathpenaltyinfo.org/documents/pdf/FactSheet.pdf [https://perma.cc/2DZ3-38AV].

275 *See, e.g.*, Jon B. Gould & Richard A. Leo, *One Hundred Years Later: Wrongful Convictions After a Century of Research*, 100 J. CRIM. L. & CRIMINOLOGY 825, 827 (2010) ("[W]rongful convictions are far from rare in the criminal justice system."); Stephanie Roberts Hartung, *The Confluence of Factors Doctrine: A Holistic Approach to Wrongful Convictions*, 51 SUFFOLK U. L. REV. 369, 395–96 (2018) ("The empirical data stemming from recent exonerations and innocence research suggests that wrongful convictions of the innocent are not as rare as was historically believed."); Edward J. Imwinkelried, *The Best Insurance Against Miscarriages of Justice Caused by Junk Science: An Admissibility Test That Is Scientifically and Legally Sound*, 81 ALB. L. REV. 851, 851 (2018) ("In the past few decades, the American criminal justice system has had to come to terms with the reality that wrongful convictions are not exceedingly rare occurrences.").

quickly reveals "[a] recurring theme"[276]: one of the leading causes of wrongful convictions is false confession.[277]

Once "unthinkable,"[278] these false confessions have in recent years become just another feature of the American criminal legal system.[279] They account for close to a quarter of all wrongful convictions,[280] including nearly fifteen percent of wrongful capital convictions.[281] They are disproportionately made by the most vulnerable and disadvantaged communities.[282] And once made, they "set[] in motion a virtually irrefutable presumption

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276 Richard A. Leo & Brian L. Cutler, *False Confessions in the 21st Century*, CHAMPION, May 2016, at 46–47 (collecting sources).

277 *See, e.g.*, Richard A. Leo, *The Problem of False Confession in America*, CHAMPION, Dec. 2007, at 30; 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, 191 (1997).

278 Richard A. Leo et al., *Bringing Reliability Back in: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 485.

279 *See, e.g.*, Paul G. Cassell, *Protecting the Innocent from False Confessions and Lost Confessions—and from* Miranda, 88 J. CRIM. L. & CRIMINOLOGY 497, 507 (1998) (acknowledging that false confessions occur and lead to wrongful convictions but arguing against systemic reforms on the grounds that "[a]ny number of tragedies can be said to 'occur regularly' in this country, but responsive action to them must be guided by the dimensions of the problem" (footnote omitted)). Cassell is "the number one skeptic" of false confessions, Boaz Sangero, Miranda *Is Not Enough: A New Justification for Demanding "Strong Corroboration" to a Confession*, 28 CARDOZO L. REV. 101, 106 (2007), and the leader of a "virtually single-handed assault on . . . *Miranda v. Arizona*." Richard A. Leo & Richard J. Ofshe, *Using the Innocent to Scapegoat* Miranda*: Another Reply to Paul Cassell*, 88 J. CRIM. L. & CRIMINOLOGY 557, 557–58 (1998) (footnote omitted). Responses to his false-confession scholarship—including his estimations of the (in)frequency of false confessions and wrongful convictions—range from excoriation to lambastment. *See, e.g.*, *id.*; Elizabeth Fajans & Mary R. Falk, *Shooting from the Lip:* United States v. Dickerson*, Role [Im]morality, and the Ethics of Legal Rhetoric*, 23 U. HAW. L. REV. 1, 52–57 (2000) (condemning the "rhetorical excess" of both Cassell and those who respond to him).

280 *See* Emily West & Vanessa Meterko, *Innocence Project: DNA Exonerations, 1989-2014: Review of Data and Findings from the First 25 Years*, 79 ALB. L. REV. 717, 732 (2016) (false confessions in twenty-seven percent of cases); Drizin & Leo, *supra* note 6, at 920 ("[F]alse confession [is] the primary cause of wrongful conviction in 14–25% of the documented cases.").

281 ROB WARDEN, NW. UNIV. SCH. OF L.: CTR. ON WRONGFUL CONVICTIONS, THE SNITCH SYSTEM: HOW SNITCH TESTIMONY SENT RANDY STEIDL AND OTHER INNOCENT AMERICANS TO DEATH ROW 3 (2004), https://www.innocenceproject.org/wp-content/uploads/2016/02/SnitchSystemBooklet.pdf [https://perma.cc/5VE4-ARF8].

282 *See generally* Nicole Weis, Note, *The "Fool's Gold" Standard of Confession Evidence: How Intersecting, Disadvantaged Identities Heighten the Risk of False Confession*, 22 NEV. L.J. 1179 (2022); Drizin & Leo, *supra* note 6 (disproportionate number of false confessions made by juveniles, the mentally ill, and the developmentally disabled); *see also* Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 295 (1996) (discussing special vulnerability of "suspects who are below middle class and suspects with prior felony records").

of guilt" that ensures a defendant will be treated more harshly at every stage of the criminal process, from charging through postconviction relief.[283]

The constitutionalized conflation of reliability and oppression facilitates the use of false confessions—and therefore wrongful convictions—at essentially every stage of the criminal legal process. To begin with, "[p]olice are most likely to view as legitimate effective interrogation tactics that have not been expressly prohibited."[284] The Court's refusal to declare any tactic other than outright violence impermissible thus signals to the police that they have free rein to induce confessions by any means short of torture.[285] Indeed, because the permissibility of interrogation tactics varies as a function of the mental fortitude of the individual suspect, the police are perversely incentivized to limit their behavior not by reference to whether what they do is "revolting to the sense of justice,"[286] but rather by what they calculate a particular suspect can "take."[287] Moreover, because reliability is a non-issue in the admissibility analysis, and because *Connelly* established that a confession is always voluntary absent police coercion, the police are free to take advantage of external circumstances that independently render suspects unable to rationally decide whether to confess.[288]

Moreover, once the police have obtained a confession, the voluntariness standard gives trial courts little to no guidance

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283 Drizin & Leo, *supra* note 6, at 922.

284 White, *supra* note 257.

285 *See* Cronin & Bluestine, *supra* note 262, at 45 ("Police officers who are considered good investigators . . . know the law and are competent in navigating these ambiguities so as to remain within the law during an investigation and when seeking a confession.").

286 Miller v. Fenton, 474 U.S. 104, 109 (1985) (quoting Brown v. Mississippi, 297 U.S. 278, 286 (1936)).

287 *See, e.g.*, Cronin & Bluestine, *supra* note 262, at 45 (discussing tendency of police to devise workarounds to "ambiguous" and "reactionary" court rulings); Brinegar v. United States, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting) (noting in Fourth Amendment context that "the extent of any privilege . . . which we sustain, the officers interpret and apply themselves and will push to the limit").

288 *See, e.g.*, United States v. Guerro, 983 F.2d 1001, 1003 (10th Cir. 1993) (because police officer "did not utilize improper interrogation tactics," confession was voluntary where defendant with "reading skills . . . at the fifth or sixth grade level" and "minimal" ability to understand English was interrogated in the immediate aftermath of her sister's stabbing while "[d]efendant's mother had fainted and was apparently clutching her heart and a large group of distraught family and friends had gathered").

in determining the admissibility of a confession.[289] The dispositive question on a motion to suppress is not whether the police engaged in specific prohibited tactics, nor is it whether the circumstances surrounding the confession render it "[e]ntitled to credit."[290] Rather, the question is whether "the defendant's decision to speak with law enforcement was 'the product of an essentially free and unconstrained choice.'"[291] This is "essentially a psychological assessment . . . for which there is inadequate knowledge"[292] and to which "the factfinding mechanisms presently employed are not well equipped."[293]

Recognizing this indeterminacy, courts overwhelmingly shy away from the actual voluntariness inquiry, which is one reason that the administration of *Miranda* warnings has become essentially dispositive of confession admissibility.[294] But even when courts do meaningfully attempt to determine voluntariness, they only very rarely suppress confessions. A 2019 survey of proven wrongful convictions, for instance, found that "even when there was legally defined misconduct, . . . suppression[] was only granted in 3% of cases."[295] Where the police *merely* engaged in "bad practices," such as lying to suspects, courts suppressed only two of 115 confessions, "both only in part, and only because of *Miranda* violations."[296]

Finally, once a confession is admitted, the damage is for the most part done. The Supreme Court has recognized that "[a] confession is like no other evidence,"[297] and indeed, probably nothing is as damning to a criminal defendant as the admission of a confession at trial. "Juries tend to discount the possibility of false confessions as unthinkable"[298] and therefore

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289 *See, e.g.*, Marcus, *supra* note 4; Leo, *supra* note 3, at 277 ("Perhaps the central problem is the insoluble ambiguity, if not indeterminacy, of the concept of voluntariness.").

290 R v. Warickshall (1783) 168 Eng. Rep. 234, 234; 1 Leach 263, 263.

291 United States v. Ordonez-Zometa, 141 F.4th 531, 552 (4th Cir. 2025) (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 225 (1973)).

292 Young, *supra* note 20, at 452.

293 White, *supra* note 64, at 141.

294 *See* Dickerson v. United States, 530 U.S. 428, 444 (2000) ("[C]ases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare." (quoting Berkemer v. McCarty, 468 U.S. 420, 433 n.20 (1984))).

295 Stephens, *supra* note 6, at 623.

296 *Id.* at 623–24.

297 Arizona v. Fulminante, 499 U.S. 279, 296 (1991).

298 Leo et al., *supra* note 278, at 485.

overwhelmingly convict in cases featuring confession evidence.[299] Defense attorneys are well aware of this phenomenon and are therefore more likely to press clients who have confessed to enter a plea bargain.[300] And once a defendant is convicted—whether through plea or trial—postconviction relief is particularly difficult to obtain in confession cases, because "[i]t's very hard to convince people that a defendant who confessed is innocent."[301]

In short, it is clear that the current voluntariness standard for confession admissibility is a failure—it fails to ensure that convictions are based on reliable evidence, fails to prevent all but the most flagrant police abuse, and fails to provide clear rules or even justifying rationale. In large part, this is because—as the Court itself has recognized—"voluntariness" is only "convenient shorthand" for "a complex of values."[302] But by reducing those values to a "shorthand" when they were just beginning to crystallize at common law, the Court has essentially stripped them of meaning. The time has come for the Court to recognize that fact, return to confession law's roots, and pick up where the common law left off.

B. The Paths Forward

This Article has thus far emphasized that many of the failures of "confession law present" stem from the Supreme Court's oversimplification of the common law's dual concerns. But this Article has also stressed that the common-law courts themselves often failed to distinguish those same concerns[303] or else distinguished them in conflicting ways.[304] The common

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299 *See* Drizin & Leo, *supra* note 6, at 960 (finding convictions in eighty-one percent of false confession cases).

300 *See, e.g.*, *id.* at 922.

301 Samuel Gross & Maurice Possley, *For 50 Years, You've Had "The Right to Remain Silent": So Why Do So Many Suspects Confess to Crimes They Didn't Commit?*, MARSHALL PROJECT (June 12, 2016), https://www.themarshallproject.org/2016/06/12/for-50-years-you-ve-had-the-right-to-remain-silent [https://perma.cc/59PD-MFE7] (noting that confession cases are much more likely to require DNA evidence of innocence to obtain postconviction relief).

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

303 *See supra* notes 79–83 and accompanying text.

304 *Compare, e.g.*, United States v. Boese, 46 F. 917, 919 (N.D. Cal. 1891) (disclaiming a reliability rationale for the common-law rule "because a rational person can see that no innocent person would be induced to say that he was guilty of a crime of which he was innocent"), *with, e.g.*, Commonwealth v. Knapp, 26 Mass. (9 Pick.) 496, 503 (1830) (Morton, J.) ("[T]he reason on which [coerced] confessions . . . are excluded . . . is not because of any breach of good faith in admitting them, . . . [because] that in the agitation of mind in which the party

law may "work[] itself pure,"[305] but this Article does not contend that, in the area of confessions, it had done so perfectly by the end of the nineteenth century.

The Court's failure in constitutionalizing the current voluntariness standard is thus not that the Justices have declined to adopt the common law wholesale, with all of its intricate and at times contradictory rules. Indeed, many of those rules would clearly be unworkable in a modern system of criminal law.[306] Nor is the problem with modern confession law simply that it is different from the common law—many modern legal doctrines are far superior to their counterparts at common law,[307] and the fact that we *used* to do something is a poor reason to do it now.[308] The Court might well have constructed a robust and meaningful confession-law jurisprudence entirely from scratch, without reference to the common law.[309] The fundamental problem with modern confession law, however, is that the Court *tried* to adopt the common law of confessions—*and got it wrong*.

As it stood at the end of the nineteenth century, that body of law responded to—but did not always articulate—two distinct concerns: oppression and reliability. By contrast, "the test of voluntariness" that the Court applies today—and that

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charged is supposed to be, he is liable to be influenced, by the hope of advantage or fear of injury, to state things which are not true.").

305 Lon L. Fuller, The Law in Quest of Itself 140 (1940) (paraphrasing Omychund v. Barker (1744) 26 Eng. Rep. 15, 23; 1 Atk. 22, 34 ("[T]he common law, that works itself pure by rules drawn from the fountain of justice, is for this reason superior to an act of parliament." (Murray, Solicitor General, later Lord Mansfield) (emphasis omitted))).

306 *See generally, e.g.*, Bram v. United States, 168 U.S. 532, 552–53 (1897) (collecting cases censuring "inducements" as mild as "you are under suspicion of this, and you had better tell all you know" (quoting R v. Kingston (1830) 172 Eng. Rep. 752, 752; 4 Car. & P. 387, 387)); R v. Baldry (1852) 169 Eng. Rep. 568, 569; 2 Den. 430, 432 (Mills, counsel for defendant) (collecting similar cases).

307 *Compare, e.g.*, Gideon v. Wainwright, 372 U.S. 335, 343–45 (1963) (interpreting Sixth Amendment to require provision of counsel to indigent criminal defendants), *with* John H. Langbein, The Origins of Adversary Criminal Trial 26–40 (2003) (describing common-law rule forbidding defense counsel).

308 *Cf., e.g.*, Jonathan Gienapp, *History, Law, and Constitutional Rupture*, 104 B.U. L. Rev. 1349, 1365 (2024) (arguing that "contrary to what . . . originalists assume, rupture is arguably the defining feature of U.S. constitutional history").

309 Indeed, there is some indication that this is what the Court intended to do and understood itself to be doing in *Miranda*. *See, e.g.*, Penney, *supra* note 16, at 367–72 (considering "what the *Miranda* majority thought it was doing in devising this system").

it erroneously describes as "the only clearly established test in Anglo-American courts for two hundred years"[310]—responds to neither. If the Constitution is to provide meaningful limits on the uses of confession at trial, then the Court must re-recognize and reintegrate those animating values that it has abandoned. Indeed, it must go further: it must strengthen each of those values—reliability and lack of oppression—into two independent tests for admissibility, establishing that a confession is inadmissible at trial unless it was obtained without oppression *and* in circumstances that cast no doubt on its reliability. This is what this Article champions when calling upon the Court to "pick up where the common law left off"—not blindly returning to nineteenth-century practice, but building from it.

The evolution and current state of confession law in England is instructive in this respect—not as a blueprint or a potential transplant, but as an illustration of the value of separating the common law's reliability and oppression concerns. As discussed above, British and American confession law diverged from shared origins only in the early 1900s.[311] Thus, in the first quarter of the twentieth century, English and American courts voiced shared consternation that the law of confessions was "still unsettled"[312] and "in . . . confusion."[313] Yet by 1964, the same year that the *Malloy* Court described the exclusionary rule as turning on "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will,"[314] the English Court of Queen's Bench was announcing a two-pronged "fundamental principle of law" that required the prosecution to show both that a confession was "not . . . obtained in an oppressive manner" *and* was "voluntary in the sense that it [was not] obtained by threats or inducement."[315]

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310 Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973) (quoting Culombe v. Connecticut, 367 U.S. 568, 602 (1961)).

311 *See supra* notes 48–53, 122 and accompanying text.

312 Ibrahim v. R [1914] AC 599 at 614 (PC) (Lord Sumner) (appeal taken from H.K.).

313 *E.g.*, State v. Sherman, 90 P. 981, 982 (Mont. 1907); Territory v. Wong Pui, 29 Haw. 441, 446 (1926).

314 Malloy v. Hogan, 378 U.S. 1, 8 (1964).

315 A. Vahit Bicak, *Police and Criminal Evidence Act 1984, s. 76(2): Re-emergence of the Involuntariness Test*, 65 J. CRIM. L. 85, 85 (2001) (quoting Callis v. Gunn [1964] 1 QB 495 at 501 (Eng.) (Lord Parker CJ)) (emphasis omitted). Bicak observes that "[t]he important point to be noted in this case is that oppression was considered separately from voluntariness." *Id.* He suggests that, initially, oppression, threats/promises, and reliability were *three* distinct considerations, with reliability being the most recent innovation. *See id.* at 85–87. However, this reading is in conflict with the *Warickshall* dicta of two centuries prior that "[c]onfessions

Today in the United Kingdom, that same two-pronged test has been preserved in statute.[316] Yet, when excluding confessions that were "obtained[] . . . by oppression" or that are "likely, in the circumstances [to be] unreliable,"[317] the English courts rightly understand themselves to be executing "the long-standing duty of the judge" at common law.[318] As a result of that duty, English confession law forms a far more robust screen than its American cousin: a 1999 study of serious cases found that the use by the English police of "oppressive or coercive interviewing tactics" strongly correlated with the ultimate judicial exclusion of confessions;[319] and one British criminologist has gone so far as to claim that the UK has had "no significant coerced false confession miscarriages for 20 years."[320] By drawing upon the same common-law roots, the United States Supreme Court can perform the same task of disentangling the two strands of confession doctrine and reinforcing them into independent admissibility requirements.

Notably, the Supreme Court could achieve this disentanglement with minimal disturbance to its existing case law. To begin with, the Court could simply recognize—as it has done

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are received in evidence[] or rejected as inadmissible[] under a consideration whether they are or are not [e]ntitled to credit." R v. Warickshall (1783) 168 Eng. Rep. 234, 234; 1 Leach 263, 263. Moreover, the pre-*Gunn* English courts had expressly framed the threats-or-promises rule as one intended to ensure confession reliability. *See* R v. Baldry (1852) 169 Eng. Rep. 568, 573; 2 Den. 430, 441–42 (Chief Baron Pollock) ("The ground for not receiving such evidence is, that it would not be safe to receive a statement made under any influence or fear. . . . [S]uch confessions are rejected because it is supposed that it would be dangerous to leave such evidence to the jury.").

316 Police and Criminal Evidence Act 1984, c. 60, § 76 (Eng.).

317 *Id.*

318 Daley v. R [1994] 1 AC 117 at 129 (PC) (appeal taken from Jam.) (Lord Mustill); *accord* A v. Sec'y of State for the Home Dep't [2005] UKHL 71 [14], [2006] 2 AC 221 at 248 (Eng.) (Lord Bingham of Cornhill) ("This rule is now found in s 76 of PACE, but enacts a rule established at common law . . . ."); *see also, e.g.*, Wong Kam-ming v. R [1980] AC 247 at 261 (PC) (appeal taken from H.K.) (Lord Hailsham of St. Marylebone, dissenting) (recognizing both a reliability and an oppression rationale for the exclusion of involuntary confessions); DPP v. Ping Lin [1975] AC 574 at 607 (HL) (Lord Salmon) (distinguishing between "the reliability principle" and "the disciplinary principle").

319 John Pearse & Gisli H. Gudjonsson, *Measuring Influential Police Interviewing Tactics: A Factor Analytic Approach*, 4 LEGAL & CRIMINOLOGICAL PSYCH. 221, 232 (1999).

320 Andy Griffiths & Eric Shepherd, *How Interrogation Became Interviewing in the UK: Can It Happen in the US?*, CHAMPION, June 2020, at 42 (noting that the UK's ninety-three percent conviction rate for homicide compares favorably to the American rate of sixty-one percent). *But cf.* Hamilton v. Post Office [2021] EWCA (Crim) 577, [2021] 1 Crim. App. 17 (overturning post-PACE criminal convictions based largely on false confessions).

in the past—that it "has not charted an entirely clear course in this area."[321] The Court could reiterate that the admissibility of confessions is a question of due process and confirm its old dictum that the exclusion of involuntary confessions "does not turn alone on their inherent untrustworthiness" but also "on the deep-rooted feeling that the police must obey the law while enforcing the law."[322] It might candidly acknowledge that, by failing to explicitly note which of these values was at play in each of its confession cases, it failed to provide lower courts with workable guidelines. It could then intervene with the express intention of clarifying its own prior case law, as it has not infrequently done in the past.[323]

In such a case, the Court could perform a historical analysis of the kind undertaken by the present Article, identify the two discrete values reflected in the common-law cases, and then trace those values through its own case law, sorting prior decisions into "coercion" and "reliability" piles. In this way, the Justices could harmonize such seemingly irreconcilable cases as *Colorado v. Connelly*,[324] which held that "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause,"[325] and *Blackburn v. Alabama*,[326] which held that a confession was inadmissible because the uncoerced defendant "was insane and incompetent" when he made it.[327] Both strands of case law remain good law—and have independent force—the Court could explain, because cases like *Connelly* were applying the well-settled rule that a confession is voluntary only if obtained without "coercion" or oppression, while cases like *Blackburn* were applying the distinct but equally well-settled rule that confessions are voluntary only if they are "the product of a rational intellect and a free will"[328]—i.e., reliable. In this way, the Court could plausibly reshape the existing case law into

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321 Miller v. Fenton, 474 U.S. 104, 113 (1985).

322 Spano v. New York, 360 U.S. 315, 320 (1959).

323 *See, e.g.*, Bartenwerfer v. Buckley, 143 S. Ct. 665, 671 (2023) ("We granted certiorari to resolve confusion in the lower courts on the meaning of § 523(a)(2)(A)."); Foremost Ins. v. Richardson, 457 U.S. 668, 669 (1982) ("We granted certiorari to resolve the confusion in the lower courts respecting the impact of *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972), on traditional rules for determining federal admiralty jurisdiction.").

324 479 U.S. 157 (1986).

325 *Id.* at 167.

326 361 U.S. 199 (1960).

327 *Id.* at 207.

328 *Id.* at 206, 208.

distinct requirements that a confession be excluded if *either* unreliable *or* obtained by oppression.

Alternatively, the Court could stage a partial return to its Fifth Amendment analysis in *Bram*. That case has never been formally overruled,[329] and although the application of the Self-Incrimination Clause to confession admissibility is likely ahistorical, the plain language would provide the Court with a textual toehold. Under this approach, the Court could announce that the privilege against *compelled* self-incrimination mandates the exclusion of confessions obtained through *compulsion*—i.e., oppressive tactics. The Court could then distinguish reliability concerns as falling under the Due Process Clauses, adopting the theory that, when facing potential deprivations of life or liberty, a criminal defendant is *due* a trial *process* that excludes prejudicial but unreliable evidence. This latter holding would harmonize the law regarding confessions and lineup evidence by recognizing that due process imposes a uniform rule against unreliable evidence regardless of its nature.[330]

Of course, this approach would necessitate a greater shakeup in the Court's current case law.[331] However, the current Court has shown little reluctance to overrule precedent, particularly where—as is clearly the case with respect to modern voluntariness doctrine—there is reason to doubt "the quality of the precedent's reasoning [and] the workability of the rule it established."[332] And by grounding reliability and oppression concerns in separate constitutional provisions, the Justices would have a stronger textual cover for accusations of activism. Moreover, such a distinction would provide a clearer framework

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329 *See* United States v. Allen, 864 F.3d 63, 82 n.84 (2d Cir. 2017) ("[T]he Court has never overruled *Bram*'s use of a voluntariness test grounded in the Self-Incrimination Clause."). *But cf.* Arizona v. Fulminante, 499 U.S. 279, 285 (1991) ("*Bram* . . . under current precedent does not state the standard for determining the voluntariness of a confession . . . .").

330 *See* Manson v. Brathwaite, 432 U.S. 98, 114 (1977) ("[R]eliability is the linchpin in determining the admissibility of identification testimony . . . .").

331 Perhaps most notably, it would seem to require a complete inversion of the Court's dictum in *Lisenba* that "[t]he aim of the rule that a confession is inadmissible unless it was voluntarily made is to exclude false evidence," whereas "[t]he aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false." Lisenba v. California, 314 U.S. 219, 236 (1941).

332 Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2270 (2024) (quoting Knick v. Twp. of Scott, 139 S. Ct. 2162, 2178 (2019) (internal brackets omitted)); *see also, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2265–71 (2022).

for lower courts by emphasizing that reliability and lack of oppression are entirely separate and equally dispositive inquiries.

Of course, the Roberts Court has evinced a consistent "disdain for criminal defendants,"[333] and it beggars belief that the current Court would deliberately reform its confession law in favor of tighter exclusionary rules. However, the sitting Justices have also espoused a strong dedication to originalism and have at least claimed to desire a return to the status quo of the eighteenth-century common law.[334] If the Court is taken at its word in this respect, then confession law is certainly ripe to be revisited—as this Article has demonstrated, the rules governing the admissibility of confessions have drifted far from their common-law origins, in both theory and effect.

Nor, moreover, are the ideological leanings of the current Justices reason to leave current doctrine unchallenged. As one reform-minded criminal proceduralist has explained in a call for "criminal procedure futurism," although the Court as currently constituted is unlikely to immediately adopt the doctrinal course-correction outlined here, this does not obviate the duty of legal scholars to "do our part toward transformative changes based on where we are."[335] And a key component of this effort is the challenging of existing precedents "based on the illegitimacy of their doctrinal foundation."[336] This Article has striven to delegitimate the Court's current confession-law jurisprudence by demonstrating that, despite its claims to a centuries-old common-law pedigree, the modern concept of voluntariness represents only the most insubstantial ghost of confession law past. Only once the Court—present or future—recognizes this fact can it begin to reshape confession law into a meaningful protection against injustice.

CONCLUSION

A century and a half ago, the common law of confessions was in a state of uncertainty. Doctrine that had developed

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333 Daniel S. Harawa, *Between a Rock and a Gun*, 134 YALE L.J.F. 100, 103 (2024) https://yalelawjournal.org/pdf/HarawaYLJForumEssay_91jk5coe.pdf [https://perma.cc/9LXG-KKJK].

334 *See, e.g.*, *Dobbs*, 142 S. Ct. at 2248–56 (purporting to survey doctrinal history); McDonald v. City of Chicago, 561 U.S. 742, 767–78 (2010) (same).

335 Frank Rudy Cooper, *Dicta Mines, Pretext, and Excessive Force: Toward Criminal Procedure Futurism*, 112 CALIF. L. REV. 1007, 1015–16, 1040 (2024) (arguing that "creat[ing] the doctrinal architecture for a 'second criminal procedure revolution'" would require "giving up on the present Court").

336 *Id.* at 1016.

piecemeal in response to private conversations and judicial examinations was increasingly called upon to regulate the actions of professional police interrogators. In both England and the United States, it was agreed that a confession could not be introduced at trial unless it was voluntary. But less clear was what it meant for a confession to be voluntary—and why it mattered. Sometimes, the rule seemed to be one of "mercy," aiming "to exempt persons from all obligation to criminate themselves."[337] Yet sometimes it seemed to be a rule of "justice," stemming from a recognition and wariness of "the uncertain and dangerous nature of all evidence of guilt[] drawn from the statement of a party conscious of being suspected of crime."[338]

In the United States, the Supreme Court attempted to cut the Gordian knot by simply doubling down: the Constitution requires that confessions be "voluntary."[339] Whether any given confession satisfies that requirement would be a matter for the lower courts to determine individually in each case that came before them. The result is a body of case law from which "[i]t is almost impossible to identify any precedential standard."[340] Oppression does not, by itself, render a confession inadmissible[341]—except when it does.[342] Unreliability is not, itself, a basis to exclude a confession[343]—except when it is.[344]

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337 Hendrickson v. People, 10 N.Y. 13, 33 (1854) (Selden, J., dissenting) (emphasis omitted).

338 *Id.* (emphasis omitted).

339 *See* Ziang Sung Wan v. United States, 266 U.S. 1, 14 (1924).

340 Marcus, *supra* note 4.

341 *See, e.g.*, United States v. Johnson, No. CR-24-05610-001-TUC-JCH (BGM), 2025 U.S. Dist. LEXIS 24976, at *7–8 (D. Ariz. Jan. 6, 2025) ("[T]he Court lacks the authority to adopt a bright line rule [regarding the duration of interrogations] when . . . the voluntariness of a confession is based on the totality of the circumstances."); State v. Griffin, 262 A.3d 44, 72 (Conn. 2021) ("We decline . . . to categorically condemn the use of [deceptive police tactics] or to adopt any bright-line rules as to their likely impact on the voluntariness of a confession. The impact of false evidence ploys, if any, must instead be assessed in light of the totality of the circumstances . . . .").

342 *See, e.g.*, United States v. Cragg, 807 F. App'x 640, 643 (9th Cir. 2020) ("[A] confession accompanied by physical violence is *per se* involuntary." (quoting United States v. Miller, 984 F.2d 1028, 1030 (9th Cir. 1993))).

343 *See* Lego v. Twomey, 404 U.S. 477, 484 n.12 (1972) ("[T]he exclusion of unreliable confessions is not the purpose that a voluntariness hearing is designed to serve. . . . The sole issue in such a hearing is whether a confession was coerced. Whether it be true or false is irrelevant; indeed, such an inquiry is forbidden." (citation omitted)).

344 *See, e.g.*, Aleman v. Vill. of Hanover Park, 662 F.3d 897, 907 (7th Cir. 2011) ("[A] trick that is as likely to induce a false as a true confession renders a

The demonstrated shortcomings of this approach—both theoretical and practical—should lead the Court to revisit the foundations of its current confession case law. Cutting the Gordian knot failed; the time has come to untangle it. By doing so, the American Supreme Court can begin to tease apart the discrete values that underlie and inform our wariness of confession evidence[345]—and therefore to ensure that each is fully realized in modern American law.

confession inadmissible because of its unreliability[,] even if its voluntariness is conceded.").

345 *See* Spano v. New York, 360 U.S. 315, 320 (1959) ("The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law . . . .").